TORTS READINGS:

INTRODUCTION TO THE LAW OF TORTS:

• Torts are common law causes of action. The word tort means wrongful or legal.

THE NATURE OF INTENTIONAL TORTS:

• Intentional torts exist to protect an individual's person or property rights from unwanted interference by others. They include trespass torts.

• Intentional conduct encompasses deliberate, reckless or negligent actions. It is sufficient that the defendant intends to perform the act, which caused the offensive contact.

It is the act not the injury which must be intentional.

• Damages: substantial or compensatory, exemplary, aggravated, punitive

•Onus of proof: on the plaintiff to prove the elements of the trespass. Once this is established, the onus then switches to the defendant who must then establish that the trespass was not intentional.

TRESPASS TO THE PERSON:

Three intentional torts (trespass torts) rotect distinct aspects of an individual;s person:

- the tort of **battery** – protects the body
- the tort of **assault** – protects the mental well being
- the tort of **false imprisonment** – protects liberty

1. Battery: the violation of being touched without consent is sufficient to bring this action.

Elements:

- An intentional positive *voluntary act* (not injury) by the person (***Rickson v Star City*** – hostile attitude is necessary for battery)
- Which directly causes – not consequential ***(Scott v Shepherd)***
- Physical bodily contact/interference with the plaintiff ***(Cole v Turner)***

Must take place without the consent of the plaintiff. ***(Marion's case)***

Contact can be contact using an object or another means, not restricted to touching by body part.
An omission to act can be come a positive act so as to constitute a battery. Ex. Not getting off the police mans foot.

CASES:

McHale v Watson (1964):

Defendant (a 12 yr. old boy) threw a sharpened piece of steel at a wooden post that bounced off and struck P in the eye.

D found not negligent as a boy of his age could not be expected to foresee that the dart would not stick into the post but would go off at a tangent and hit someone.

Williams v Milotin (1957):

A child riding a bicycle was hit in the street by a truck driven negligently by the defendant. There was no suggestion that the defendant intended to strike him.

Held: This case established that trespass includes **negligent conduct**. Negligent battery.

Scott v Shepherd (1773):

D held to be **liable in trespass (battery) to P bcos injury** was **held to occur because of a 'direct' act of the D**

The acts of W and R were not regarded as breaking chain of directness, as W/R not regarded as free agents, but acting under **compulsive necessity** for own **safety/preservation** --> their action was inevitable consequence of D's unlawful act

Hutchins v Maughan:

The defendant laid poisonous baits on unfenced land where the defendant grazed his horses. The plaintiff's dogs ate the baits and died as a result.

Held: There was no trespass as the act of laying the baits by itself did not interfere with the plaintiff's property. Herring CJ- 'Before (the plaintiff) could suffer an injury, he had himself to intervene by coming to the land and bringing his dogs thereon'.

2. Assault:

Elements of assault:

- An intentional voluntary act or threat by the defendant
- directly creates in another person (the plaintiff)
- A reasonable apprehension of
- imminent contact with that person's body

• Words or actions: No clear authority as to whether words alone can be assault. If over telephone: can be assault if imminent body contact (Barton v Armstrong).

CASE - ***Barton v Armstrong (1969):***

- HELD: telephone threats could constitute an assault
- FACTS: high profile politician threatened plaintiff with violence unless he signed a commercial agreement.
- 'it is a matter of circumstances...'
- Telephone person in early hours of morning, many occasions. Threatened not in a conventional tone but in an atmosphere of drama and suspense'
- Calculated to not only instil fear into his mind but to constitute threatening acts, as distinct from mere words

CASE – Rixon v Star City:
Proof of the assault does not require proof of an intention to follow up or carry through a threat.

• Can be deliberate or negligent.

• Conditional threats are counted. The test is to see if it was reasonable for the plaintiff to anticipate imminent force if they disobey the condition.
CASE ***– Rozsa v Samuels***

3. **False imprisonment:** provides a remedy to an individual whose personal liberty has been *unlawfully* restrained.

Elements:
- A positive voluntary act of the defendant ***(Herd v Weardale)***
- Directly causing
- The total deprivation of the liberty of the plaintiff. ***(Symes v Mahone)***

• False imprisonment need not any force or contact, just an intentional or megligent act causing confinement.
• Whether there is total restraint depends upon whether there is a reasonable means of escape.
• A reasonable means of escape is not one that does not involve danger to the plaintiff.
• R v Macquarie and Budge, guy was stuck on ship didn't know how to steer it so was stuck and couldn't get off
• Reasonable means of escape may also be dependant *on the amount of knowledge* available to the plaintiff. ***Balmain New Ferry Co Ltd v Robertson –*** knew he was not allowed to leave without paying for his fare.
If a plaintiff completely surrenders their own liberty, they cannot complain of FI.

• It does not matter if the plaintiff did not know of the false imprisonment when it took place ***(Murray v Ministry of Defence)*** -> P held in house while inspected by RARA, had no idea what was going on until afterwards

- ***Nasr v NSW*** [2007] NSWCA 101

- initially lawful detention may become unlawful if for "unreasonably long time".

ACTIONS ON THE CASE OF PHSICAL INJURIES OR NERVOUS SHOCK:

For actions on the case, actual damage needs to be proven.

Action on the case differs from trespass in the following respects:

- the act of the defendant may indirectly or consequentially cause the damage to the plaintiff
- actual damage to the plaintiff must be shown to have occurred as a result of the defendant's act
- the plaintiff bears the onus of proof of all elements of the tort, including fault of the defendant, on the balance of probabilities

ex. For instance, where a defendant intentionally hides the key to the plaintiff's medicine chest and the plaintiff consequentially suffers severe physical distress as a result of a lack medication

Nervous shock caused indirectly by intentional statements calculated to inflict harm:

New tort establishing an action on the case for nervous shock is in ***CASE – WILKINSON v DOWNTON 1897.***

There are 3 elements to this tort:

1) a wilfull calculated act of the defendant
2) calculated to cause harm, and
3) in fact causing harm – actual damage to the plaintiff:
   could be psychological/psychiatric harm

Calculated means that it is 'foreseeably likely' that it would produce harm. It doesn't necessarily mean to have calculated the damage that was done, but to be able to foresee some sort of damage – he meant to cause some sort of harm.

The case:

The defendant came to plaintiff's home and falsely presented to the plaintiff that her husband had been involved in a serious car accident and had lost both of his legs, this was supposed to be a practical joke. As a result of this statement, the plaintiff suffered nervous shock and became seriously ill.

Because she was shocked she couldn't go to get her husband, so she sent her son to the pub her husband was at, with pillows and all, on the train.

The jury awarded her damages for the shock and reimbursement of her travel costs. The judge found that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff, and has in fact caused physical harm to her.

Physical injury caused indirectly by intentional acts intended to inflict harm:

While an action on the case for physical injuries, it has been viewed as a tort independent from the above.

Elements:

- ***A deliberate act***

- ***Intended to do injury***
- ***The P suffered physical injury***

Established by decision of the court in ***CASE – BIRD v HOLBROOK 1828 –***

The defendant placed a spring gun in his enclosed garden following the theft of valuable plants. The spring gun had wires attached to it, which if stepped on, would set off the gun. There was no warning or notice given as to the existence of the gun.
The plaintiff had no case in trespass to person, because the contact with his person was not the direct consequence of the defendant's act.

Best CJ found that the defendant was liable, as he had not given notice of the existence of the gun. It was not just the setting of the spring gun, it was the intention to cause the injury that established the action.

TRESPASS TO LAND: *when trespass to land – think nuisance also

Definition of trespass to land:

Trespass to land is a

- voluntary, intentional (or negligent) act of D
- direct causing
- physical interference with the plaintiff's exclusive possession (use and enjoyment) of land

The act must be direct and not consequential, meaning the interference must be immediate upon the D's act.

The nature of land:

The right of a person in possession of land extend only as far up into the air or as far down into the subsoil as is reasonably necessary for the use and enjoyment of the land.

• It is a trespass to tunnel under land. CASE – STONEMAN v LYONS (1975) – was a trespass to excavate trench beneath the footings of an adjoining landowner's garage, causing it to collapse.

• It is a trespass if it interferes at a height of ordinary use of airspace of property. ***CASE – Davies v Bennison 1927*** – trespass to land where defendant fired a bullet from his own property across the plaintiff's property, killing cat on plaintiff's roof.

(Taking an aerial photo of land for example will not impede on ordinary use of land, too high to be an interference)

Title to sue:

• Actual exclusive physical possession - In order to maintain an action in trespass, the plaintiff need not have legal title but must have exclusive possession of land.

Because trespass to land includes the right to enjoy and use property, the plaintiff doesn't have to necessarily be the person in possession of the land at the time the ort occurred

CASE – NEWINGTON v WINDEYER 1985 – Plaintiff using The Grove, even though it was unregistered to anyone. Defendant trespassed, and this action was successful because the plaintiff was the exclusive possessor of the land.

A mere licensee to use property will not have title to sue because a license does not confer a right to possession. Ex. Dinner guest is not in exclusive possession of land.

Actionable per se:

• Like other forms of trespass, it is actionable per se, meaning doesn't require proof of damage.
Ex. CASE - Dumont v Miller – Entry on P's land by hunters with their beagles. No need to prove damage by beagles, still a trespass.

A Voluntary Intentional Act:

• D's act must be voluntary
• NO trespass without Fault – ***League Against Cruel Sports Ltd v Scott [1986]***
• Mistake is no defence, unless the case is of a medical condition where the action isn't voluntary.

Nature of physical Interference:

The act must constitue a physical interference with the land which could mean actual entry, directly causing an object to be placed in land etc.

Trespass by a licensee:

• In some circumstances, entry to a property will be by the consent or the licence of the occupier.
• The occupier may revoke a licence at any time. Once revoked, entrant must leave within a reasonable time or their presence will amount to a trespass.

CASE – Cowell v Rosehill Racecourse 1937 – Plaintiff brought an action for trespass to the person when he was physically removed from the defendant's property. Court held that the plaintiff had become a trespasser on the defendant's property when he refused to leave within a reasonable time after being informed that the licence had been revoked.

• Further, a person who lawfully enters a property, having been granted a licence, may commit a trespass whilst upon the property where the person commits a wrongful act.
CASE – Singh v Smithenbecker 1923 – defendant lawfully entered property to take deliveries of sheep, committed a trespass when he removed the plaintiff's gate, rounded up certain sheep and drove them away without the plaintiff's permission.
This is sometimes referred to *trespass pro tanto.*

• While on premises, if a person does something unlawful or exceeds or abuses that lawful authority, then at common law that person is liable as a trespasser form the moment of original entry. This is the ancient doctrine of ***trespass ab initio.***

Implied licences to enter premises:
CASE – Haliday v Nevill 1984 – court held that officers entry was not a trespass as there was an implied licence to enter the open and unobstructed driveway, which had no gate, lock or notice prohibiting entry.

Held: High court held that there is an implied licence for the public to access a private dwelling through entry into gardens and yards which lead to dwellings for legitimate purposes in trying to contact the possessor.

An implied licence at common law will not operate where it has been revoked, even for some purposes of law enforcement.

CASE – TCN Channel Nine Pty Ltd v Henry Alfred Anning [2002] NSWCA 82:
The implied licence was limited to a particular purpose, namely, to enter the land to request permission to film.

The Appellant did not enter the land for that purpose, or for purposes which included that purpose. It entered the land for the purposes of filming the raid, recording the Respondent's use of the land, conducting such interviews as it could with a view to broadcasting a programme. It was wholly outside any implied licence. Per Spigelman CJ at [78].

Exceeded license = trespass to land.

Trespass and entry authorised by law:
In some circumstances, entry to premises without the consent of the occupier will be authorised by law.

Police powers and trespass to land:

- Unless authorized by law, police officers have no special right of entry into any premises without consent of the person in possession of the land.
  - ***Halliday v Neville.***

- Unless authorised by law to remain, Police officers must leave premises within a reasonable time when requested to do so. They have no power to enter for "investigating whether there has been a breach of the peace."
  - ***Kuru v NSW (2008) 246 ALR 260*:**
  - 6 police officers had entered through an open door of the plaintiff's apartment in response to domestic violence reports. Plaintiff asked them after a while to leave the premises several times, by the police continued to search despite the protests. Majority in Kuru's case considered the specific section of the NSW legislation giving police officers power to enter and remain on premises but that in the particular circumstances of the case, the police were not authorised by statute to remain on Mr Kuru's premises after he had withdrawn his permission for them to stay.

- A police officer serving a summons (as opposed to making an arrest by warrant or for felony) must obtain the consent of the party in possession of the land before entry
    - ***Plenty v. Dillon (1991)* 171 CLR 635**

Plenty v. Dillon
Power of entry onto premises w/o warrant

- By a P.O. or citizen to prevent murder
- By a P.O. or citizen if an arrestable offence has in fact been committed & person who committed it has been followed into a house
- By a P.O. or citizen if an arrestable offence is about to be committed & would be committed unless prevented
- By a P.O. following an offender running away from an affray

Continuing trespass:
Once a defendant remains on the property of the plaintiff after an unauthorised entry or refusal to leave, continuing trespass may occur.

CASE – Konskier v B Goodman – failure by builder to remove building debris from the roof of a terrace house adjoining the house where the building work had been taking place. This was not withstanding that the original occupier of the adjoining house had agreed to certain building work. There was no trespass at that time, but when the builders had failed to remove the debris within a reasonable time of completion of the work, they became trespassers and that trespass continued.

Trespass and privacy:
Trespass cannot be used for most practical invasions of privacy, as the tort is limited to physical entry upon land in the possession of the plaintiff. Such entry does not occur where photographs are taken of the premises.

CASE – BATHURST CC v SABAN 1985 – the council had taken photos and videos of the defendant's property. Court held that photographs and video tapes were shot from a public street or a right of way, thus no trespass was committed.

CASE - ABC v Lenah Game Meats (2001) 208 CLR 199:
ABC obtained footage of Meats skinning and tinning poems, however it was captured by another source, and was passed onto ABC. Meats said that was a breach of privacy, however we do not have a tort of privacy in Australia.
Some people trespassed into Meats slaughterhouse when placing hidden camera's in it.

Meats sought an injunction. Injunction could be awarded if the material was seen as unconscionable.
In this case the injunction wasn't awarded. Court decided that because the possums weren't being sold or consumed in Australia, the exposure of this video

would not impinge on her business interests in Australia, so the injunction wasn't awarded.

- Lack of precision in concept of privacy

Remedies for trespass to land:

• Routinely granted to restrain trespasses to property upon proof that trespass is likely to be committed, continued or repeated. Injunctions, or court orders requiring D to act 'mandatory' or refrain from acting 'prohibitory' in a particular way are equity where CL remedy inadequate.

Remedies:
Nominal damages, compensatory damages, aggravated damages, exemplary damages, injunctions, self help remedies such as ejectments may also apply.
Equitable remedies – mandatory injunctions force someone to do something, prohibitive injunction stop someone from doing something.

DON'T FORGET IN EXAM:
IF IT'S A CASE OF TRESPASS TO LAND - ITS OFTEN ALSO A NUISANCE.
Nuisances can be public or private. Nuisance is interfering with the enjoyment of a plaintiff's life – unreasonable interference.

NUISANCE:

• Nuisance refers to 2 different causes of action: private nuisance – which is a tort- and public nuisance, which affects the public at large.

Private Nuisance: What constitutes a nuisance?

• Nuisance is **not actionable per se and requires proof of damage**, but that damage includes not only actual damage to property but also intangible damage, being the unreasonable interference with the enjoyment of land.

• actual damages encompasses not only logistical damage also annoyance, inconvenience, discomfort, or interference with property rights.

Title to sue:

• A plaintiff will have to prove possession of land pursuant to some legal or equitable interest in the land in order to have a standing to sue.

• CASE – ***Oldham v Lawson (no1) [1976***] – held that a mere licensee, that is an occupant without any proprietary interest n the property, could not maintain an action in nuisance.
When a licensee has exclusive occupation and an equitable right to remain in possession, then he or she will have standing to sue.

• The House of Lord, however, overrule this decision ***in CASE – Hunter v Canary Wharf*** – in which it was held that there could be no standing to sue in nuisance unless the plaintiff could establish a 'right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with an excusive possession.' This also applies in Australia today.

Which rights are protected?
The tort of nuisance **protects the use and enjoyment of land.**

• It must be an unreasonable interference with the plaintiff's use and enjoyment of land. If it is not unreasonable in the eyes of the law or it does not interfere with the use of the land, it is not a nuisance.
CASE – Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937).

• Nuisance will not give a right to a view from a property and in ***CASE – Bathurst CC v Saban (1986),*** it was held that an unsightly property which could be seen from the plaintiff's property did not constitute a nuisance.

What constitutes nuisance?
Three kinds of interference are recognised by the law as constituting a nuisance:

1) causing encroachment in the neighbour's land, short of trespass:
2) causing physical damage to the neighbour's land or any building, works or vegetation on it; and
3) unduly interfering with a neighbour in the comfortable and convenient enjoyment of his or her land

Some examples of nuisance include noise, offensive smells and flies, air pollution, the presence of a brothel near residences, excavation causing subsidence of land, over flow of water etc.

Reasonableness:
• In order to determine whether the interference is unreasonable the courts will consider certain factors: including in ***Robson v Leischke (2008)***

<u>Is the interference Substantial?</u>

• Plaintiff must establish that interference with use and enjoyment od property is substantial and not merely a trivial matter before the courts will hold that a defendant's use of property amounts to a nuisance.
• More than fanciful, more than one of mere delicacy…

<u>Give and take:</u>
• The courts have long taken the view that it is necessary to expect some 'give and take' between neighbours.
• So the ordinary and reasonable use of residential premises by the occupiers does not constitute an actionable nuisance. The law is not concerned with balancing the conflicting interest of adjoining owners.

• It is not enough for a land owner to act reasonably in his own interest. He must also be considerate of the interest of his neighbour. The governing principle is good neighbourliness, and this involves reciprocity.

Locality:
Locality in which an alleged nuisance will be relevant to the issue of reasonableness where there is an intangible interference with the plaintiff's enjoyment of property.
• What might be nuisance in one place, for example a quiet residential neighbourhood, will not necessarily be a nuisance elsewhere, for example in an industrial complex.
• Proper local government planning and zoning laws can do much to avoid argument of this nature.

Time and duration:

o Courts prepared to draw distinction between loud noise at night and in early morning as compared with during the day: Halsey v Esso. In these circumstances, a court maybe prepared to find that noise of all night parties is unreasonable while similar activities during the day are not: *Seidler v Luna Park Reserve Trust* compare Wherry v K B Hutcherson 1987 (restricted hours of rollercoaster can operate). Duration Must be a 'state of affairs' Bolton v Stone – cricket pitch not designed to cause constant danger, one-off event

o Allday:Seidler

Nature of the activity:

o both activities of the p and the D are legitimate in themselves thus difficulty lies in balancing H's right to operate the conference centre against Rachel's right to peaceful enjoyment of her home unit.

o If crane swining overhead, it will interfere with her enjoyment of the land. Scared cause severe dmg.

Alternatives:

arguably, possible for H to modify his operations so as to reduce or minimise the disruption to Rachel. In *Halsey v Esso* eg. Ds were required to change their hours of operation and modify their equipment to minimise pollution. Alternatives reasonably practicable and open to the D, may render unreasonable

Also: o Sensitivity of P. objective test. If P is unsually sensitive then they will usually not succeed in their action.

If P unusually sensitive and it is reasonable. Unusual sensitivity: Robinson v Kilvert. But nowadays many ppl work from home.

o If there is malice: where a defendant acts maliciously, he is liable in nuisance even where the plaintiff was unusually sensitive.

CASE - Hollywood Silver Fox Farm v Emmett:

The defends argued that it was reasonable for him to shoot on his land but the court held that where the defendant's actions were done maliciously to annoy or damage his neighbor, that was unreasonable and constituted a nuisance notwithstanding the sensitive nature of the plaintiff's business.

• Balancing these factors, and absence of defence, court likely to find Rachel should partially succeed in her action in private nuisance for the substantial inconvenience caused by the operation of Herbert's conference centre.

Who is liable?

• The creator of the nuisance will obviously be liable thought the creator need not have any property interest in the property from which the nuisance emanates.

• A person who authorises the creation of a nuisance will be liable on ordinary principle of tort law.

• However, where a nuisance is created by a tenant and it is not the inevitable result of the purpose for which the premises were leased, then the tenant will be liable, not the land lord.

• Vicarious liability applies to nuisance as it does to other torts. So, where a nuisance is committed be employees in the course of their employment, the employer will be liable.

Injunctions

3. Advised to seek prohibitory injunction to prevent H from allowing rooftop area to be used for all night parties: Halsey v Esso

4. She may also be able to obtain mandatory injunction to have nets around miniature golf course repaired so that golf balls can no longer be hit off the roof: *Miller v Jackson*

5. Public Nuisance

- public nuisance – plaintiff must establish special damage (ie above that suffered by public generally)

- blocking road/footpath is a public nuisance (*Walsh v Ervin*)
-
- presumably interference with NSWPWS (eg inability to carry out statutory functions) greater than public at large
- Sophie -> arguable (interference with use of public place) and Sophie's particular damage goes beyond that of the public generally (eg *Walsh v Ervin*)
-
- Public nuisance
-

- If she can show that **there has been an interference with a public right (*Ball v Consolidated Rutile Ltd*) and that this caused her substantial and particular damage over and above that suffered by the general public**: *Walsh v Ervin*
-
- Picket line interfering with public right of passage, able to satisfy 1. 2nd is that substantial and particular dmg will be satisfied by the financial loss she has incurred due to the loss of trade. **Finally D will only be able to escape liability if they can show that the interference caused by eh picket line is reasonable on the basis of the normal give and take of public life**. Q becomes whether a strike for 10% pay increase will be held to be reasonable activity justifying causing this level of inconvenience to the general public including Daphne
-
- A public nuisance is a nuisance so widespread in its range that it would be unreasonable to expect one individual to take action against it alone. Rather the action should be taken by the community as a whole. Typical examples are interference with a public space, such as onstruction of a highway, onstructing a waterway or polluting a river so as to make the water unfit for drinking. A private individual does not have standing to sue in respect of a public nuisance unless it can be shown that he/she has suffered particular damage which is different from or greater than that suffered by the public at large.

INTENTIONAL TORTS RELATING TO GOODS:

There are 3 main intentional torts which protect the interest of persons in relation to goods. These are:

- **trespass to goods** – which protects goods in the possession of the plaintiff from physical interference by another
- **conversion** – converting someone's property into your own
- **detinue** – detaining/refusing to give back someone's property

The Torts of Detinue and Conversion are NOT causes of action in Trespass but are separate and distinct causes of action.

TRESPASS TO GOODS:

Elements of Trespass to Goods:

- A positive intentional and voluntary act by the defendant that
- directly interferes
- with goods in the possession of the plaintiff.

Interfering with goods includes handling and moving chattel, unauthorized user, destruction and damage.

Title to Sue:

• The plaintiff must have *actual possession of the goods*, at the time of the trespassory act.

• Except where there is a *Gratiutious Bailment at Will*.

- ☐ Bailor has immediate right to possession
- ☐ Bailee has actual possession

Both can sue in Trespass

CASE - ***Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204*** –

PLAintiff sought an injunction to restrain the defendant, Elliot, from continued conversion of, and trespass to, wine bottles which were its property. Each of the plaintiff's bottles were embossed with a statement that the bottle was the property of the plaintiff. Property in the bottles did not pass to purchasers of the plaintiff's wine and the bottles were to be returned to the plaintiff when empty.

Elliot, defendant, sold bulk wine to his customers in whatever bottles they brought to him, including bottles from the plaintiff. A price was paid to Elliot for the wine alone.

High Court held that even if the defedant's conduct did amount to conversion, an injunction could not be ordered as there was no evidence that this conduct would continue. Dixon J stated that a right to immediate possession does give the plaintiff title to sue for trespass to goods in the actual possession of another person where that other person holds the goods as an employee, agent or gratuitous bailor at the will of the plaintiff.

• Common law also recognizes a type of possession called constructive possession where a person does not have physical possession of the goods however has not transferred the possession to another person and retains an intention to control the goods.

3 exception to the requirement of actual possession to ground a suit in trespass to goods:

- a trustee may sue in respect of a trespass to trust goods in the possession of a beneficiary
- the executor or admistrator in respect of goods of the deceased estate may sue in respect of goods of the deceased which have not yet come into his/her possession
- the owner of the franchise in wrecks may sue for trespass without having had possession of the relevant chattel

Directness:

• Must be a direct link between the conduct of the defendant and the interference with the plaintiff.

Intention:

• A deliberate act.

RIGHTS TO POSSESSION WHERE THERE IS A BAILMENT:

- Gratuitous Bailment at Will
  - ☐ Bailor has immediate right to possession
  - ☐ Bailee has actual possession
  - ☐ Both can sue in Trespass (*Penfolds* Case)
- Bailment for Term or For a Purpose (contract)
  - ☐ Bailor will have immediate right to possession only at conclusion of term or purpose or on termination of the contract (cannot sue in trespass – no actual possession)
  - ☐ Bailee has actual possession (can sue in trespass)

DETINUE:

• Refusal by the defendant to hand over possession of a chattel to the plaintiff who demands its return.

Detinue comes from the word detain. It is a tort unrelated to trespass torts.

1. Title to Sue

Title to sue is that the plaintiff must at least establish the right to immediate possession to goods detained at the time of the defendant's refusal to return them. This right needs to be proprietary.

CASE - (Jarvis v Williams [1955] 1 All ER 108) – plaintiff had sold and delivered goods to a purchaser. As a result of a contractual agreement between the plaintiff and the purchaser, the plaintiff was entitled to possession of the goods which were currently in possession of the defendant who did want to hand them over.

The court held that the plaintiff had no right to sue in detinue or conversion because the plaintiff had no propriety right to the goods, but rather a contractual entitlement.

2. Detention

To succeed in an action of detinue, the plaintiff must prove that the defendant wrongfully refused or neglected to return goods to the plaintiff where the plaintiff was properly entitled to possession.

3. Demand

The demand must be unequivocal and specific to time, place and manner. Also demand may not require the defendant to do more than he is required by law or by any contractual arrangement with the plaintiff, to do.

In the case of a contract between the plaintiff and the defendant, the plaintiff's rights to require return of the chattel will be governed by the contract. A good example is a leasing arrangement in respect of a chattel. Where the leasee is in default of the lease, then the contract will usually give the lessor a right to repossess the chattel. But such repossession must be in accordance with the terms of the contract.

CASE - ***(Lloyd v Osborne (1899) 20 LR (NSW) 190*** – the plaintiff's solicitor sent a letter of demand to the defendant requiring him to 'at once deliver to the plaintiff or to her agent all the sheep branded X'. The demand was seen by the Supreme Court as being insufficient as it was not specific as to place for delivery nor did it identify the plaintiff's agent. The defendant's failure to comply with the demand did not amount to a refusal to ground an action in detinue.

Capital Finance v Bray [1964] 1 WLR 323) – the plaintiff who alleged that the defendant had defaulted on the repayments for a vehicle, claimed that the defendant should immediately deliver it to one of three specified locations. The hire-purchase contract between the parties did not contain any provision requiring the defendant to deliver the vehicle to the hirer.

Hence, the demand was held insufficient in the tort of detinue.

4. Forms of Order

In an action for Detinue the Court may make one of 3 possible orders:

a. The payment of the value of the chattel and damages for its retention
b. The return of the chattel OR payment of its value plus damages for its retention OR
c. The return of the chattel plus damages for its retention.

CASE - General Finance and Facilities v Cooks Cars [1963] 1 WLR 644 - the plaintiff had leased a mobile crane, subject to a hire purchase agreement. In breach of this agreement, the crane was twice sold, ending up in the possession of Romford Scrap and Salvage, the defendants. On finding the cranes, the plaintiff issues a writing for its return or a sum of money representing its value, or in the alternative, damages for conversion. The court held that the plaintiffs had an action in detinue.

Difference between conversion and detinue is that conversion is done deliberately, whilst detinue is done negligently.

CONVERSION:

When a finder of one's goods wrongfully converts them into his or her own use, or wrongfully deprived the owner of the use and possession of the goods.

Elements:

- intentional or deliberate dealing with chattleh
- constitutes
- serious interference with the possessory rights of the plaintiff, converting

• Distinguished it from trespass, though some trespasses may also amount to conversion.

Conversion protects a plaintiff's rights to dominion (sovereignty or control) over goods. The issue of title to goods will often be central to a case of conversion which may involve the court in finding which party has the better title to a chattel in order to determine who has the right to possession and whether a conversion has been committed.

1. Goods the Subject Matter of Conversion

Any object may be the subject of a claim in conversion so long as it is capable of being personal property.

CASE - Doodeward v Spence (1908) 6 CLR 406) - the plaintiff had in his possession a two-headed still born fetus, which he was exhibiting in public as a 'well preserved specimen of nature's freaks'. The fetus was taken from him by the defendant, a police man. The plaintiff claimed that he had property rights in the fetus and it was unlawfully taken from him. The court held that the plaintiff could bring an action as the fetus in this case was capable of possession as 'its preservation may afford valuable or interesting information on instruction', thus could be differentiated from a corpse, which was not property.

• Any tangible movable object capable of actual possession, including money as object not currency can be the subject of a claim in conversion. (Orton v Butler (1822) 5 Barn & Ald 652)

Negotiable Instruments (cheques) can be the subject of a claim in conversion. (Wilton v Commonwealth Trading Bank [1973] 2 NSWLR 644)

2. Title to Sue - The Plaintiff's Interest in the Goods

In general what is required is either actual possession at the time of the interference (dealing) or the right to the immediate possession of the goods.

Consider the following legal entitlements a person may have to possess goods:

(i) Bailment (delivery of goods to a bailee for a particular purpose, without transfer of ownership) - A bailment gives the bailee actual possession of a chattel so that a bailee may sue in conversion. Where a bailment is subsisting the bailee may even sue the bailor in conversion. The bailor has no entitlement to possession until the bailment has come to an end.

* Bailment at will

Bailee can sue on actual possession or Bailor can sue on right to immediate possession

CASE - Perpetual Trustees & National Executors of Tasmania Ltd v Perkins (1989) – The plaintiffs were the executors of the state of a woman and her sister, both of whom had inherited some valuable portraits from their parents. The sisters had loaned the pictures to their brother, who had passed them onto another brother whose family, after his death, had purported to sell the pictures to the Art Gallery of South Australia.

The sisters or their legal representatives had title to sue in conversion as they had an immediate right to possession of the portraits. The brother's family had no title to sell the art gallery and their action in purporting to sell the pictures and the art gallery's action in purchasing the portraits was a conversion.

* Bailment for a term

Bailee can sue during term.

Bailor cannot sue during term and cannot dispossess bailee

City Motors (1933) Pty Ltd v Southern Aerial (1961) 106 CLR 477 – a bailee succeeded in conversion against the bailor who wrongfully repossessed a vehicle on the ground that the bailor had no immediate right to possession until the bailment was determined.

* Bailment for limited purpose and bailee's inconsistent dealing

Where the bailee breaches terms of bailment commits an act wholly inconsistent with the terms of the bailment the immediate right to possession revests in the bailor who can then sue the bailee and or a third party for conversion.

The great difficulty is in determining when an act inconsistent with the bailment is so serious as to cause the entire bailment to fall rather than simply being regarded as a breach of bailment which only entitled the Bailor to seek damages for breach of bailment (or contract).

CASE - (Penfolds Wines v Elliot (1946) 74 CLR 204

CASE- Milk Bottles Recovery v Camillo [1948] VR 344) – the defendant who collected and used the plaintiff's milk bottles to sell her own milk to her customers was held in conversion on the basis that the defendant's conduct involved a risk of breakage of the bottles and was therefore a serious interference with the plaintiff's rights.

(ii) Lien: At common law a lien is a limited right to retain possession of goods until a debt is paid. The holder of lien does not have proprietary rights but does have a right to possession. Lien holders can even sue for conversion if the owner of the goods removes the goods from the lien holder's possession.

A lien is a defence, not a right of action, however a person with a valid lien has sufficient interest to sue third parties and owners of the title to goods in conversion

CASE - Standard Electronics v Stenner [1960] NSWR 447

(iii) Finders:

A person who finds an object has a possessory title for the good against the whole world except the true owner of the good. So a finder has sufficient possession to sue anyone, other than the true owner, in conversion.

CASE - Amory v Delarmarie 93 ER 664 – a chimney sweepsboy who found a jewel and took it to be valued, was successful in claims of conversioon against the valuer who refused to return the jewel. The court found that the boy's possessory title as the finder was better than any claim of the valuer, and indeed, that the finder had possessory title against all but the true owner.

Where chattel is found on property of third party, who can claim it depends on whether the property occupier "manifested an intention to exercise control over the building and the things which may be upon it or in it"

CASE - Parker v British Airways [1982] 2 WLR 503 – the plaintiff was a finder of a valuable bracelet in first class passenger lounge of the defendant at Heathrow airport. The plaintiff handed the bracelet to the defendant's staff on the proviso that if its true owner did not come forward, the bracelet would be returned to the plaintiff. The defendant sold the bracelet and the plaintiff succeeded in an action in conversion.

3. Intentional Conduct in Conversion:

The tort requires intentional (in the sense of deliberate) rather than merely negligent behaviour. It is the intent to commit the dealing, which is relevant.

Dishonesty is not required although deliberate fraud or dishonesty will fulfill the element required

Dealings which Amount to Conversion

Taking possession of goods:
Taking a possession of goods with the intention of keeping them permanently is a conversion.

Similarly, taking possession of goods and using them has been held to be a conversion.

Using and Abusing Possession:

Use – a serious misuse of the plaintiff's property will amount to conversion because it is a denial of the plaintiff's right to possession.

With abuse, only when the abuse is intentional is it conversion. Deliberate destruction of goods is conversion, although negligent destruction or damage will be insufficient because of the lack of requisite intention.

CASE - Penfolds Wines v Elliot (1946) 74 CLR 204 – intent to make use of the bottles with the intent to exercise an act of ownership on his behalf or of

someone…other than the plaintiff.

Transferring Possession

Withholding possession: Unqualified holding is a conversion
CASE - Flowfill Packaging Machines v Fytore (1993) – a liquidator was appointed to the defendant company. This was an event entitling the plaintiff to terminate a bailment (by way of lease) between the defendant company and the plaintiff, and to repossess the bailed machinery. The plaintiff formally terminated the lease, and demanded that the machinery be returned.The liquidator company refused to give back the machinery and claimed that it was entitled to retain the machines for a reasonable time until it could establish with reasonable certainty that the plaintiff was entitled to them.

The Supreme Court J held that the defendant had committed a conversion from the date the lease was formally terminated. ' The defendant was treating the goods as if it were their own. There was a demand for the goods, which was followed by a refusal – which amounted to conversion.'

Also 'the reasonable time to investigate rule' usually has no application at all where there is no doubt about the plaintiff's title to the goods.

Denial of Plaintiffs Right: Where a defendant's act is a repudiation or absolute denial of a plaintiff's rights in a chattel.

Conversion of co-owners:
Where a co-owner A destroys goods or sells so as to alienate title from the other co-owner B, then B may sue in conversion, but if A merely uses the goods even to the exclusion of B then this is not a conversion.

Parr v Ash (1876) 14 SR (NSW) 352; Kitano v Commonwealth (1973) 129 CLR 151)

DEFENCES TO INTNETIONAL TORTS:

Civil Liabilities act does not apply to intentional torts *except in the case of self defence.*

Self Defence:

• A defendant's intentional tort may be justified if it is committed in self-defence. In such cases, force may be used to defend one's own or another person's property or person.
• The force must be reasonable in all circumstances.

New South Wales tort reform and self-defence:

• In NSW, self-defence found primarily in legislation rather than the common law.

• ***Civil Liability Act 2002*** **(NSW) - PART 7**

S 52 provides ***limitations*** – self defence does not apply to a person who uses forces with the intention or recklessness causing death in order to protect property, to prevent criminal trespass, or to remove a person committing a trespass.

This section also provides that conduct carried out in self-defence. It involves 2 limbs:

- **Actual** attack **or** threat of imminent attack
- **Reasonable belief (in the circumstances as perceived by D) that person/life is in danger Reasonable belief** (in the circumstances as perceived by D) that person/life is in danger.
- Force can only be used if **reasonably necessary, not excessive**

S 54: No damages to be awarded where conduct of P on the balance of probabilities constitutes a "serious offence"

Self Defence at common law:

At common law, a person who is attacked or threatened with an attack:

- may use such force to protect himself
- where he/she reasonably has no other option open to them
- and believes their life is in danger or that the attack or threat will cause serious bodily harm

CASE – McCLelland v Symons 1951 – 3 year disagreement over the repairs of the boundary fence with neighbour, plaintiff picked up rifle and pointed it at the defendant making an oral threat. Defendant picked up a metal crowbar and struck the plaintiff, knocking him on the ground and causing a fractured skull, concussion and a 60% permanent loss of sight in one eye.
Court found that the blow was struck in self-defence.

• Self-defence cannot be pleaded when the incident that called for the self-defence is past and a retaliatory blow is struck by revenge.

• It is for the defendant which pleads the defence to establish it.

Note – a pre-emptive strike may, depending on the circumstances, constitute self-defence.

Defence of another person at common law:

CASE – R v PORTELLI 2004 – The question becomes whether the defendant believed on reasonable grounds that it was necessary to do what he/she did in defence of another person.

According to this doctrine, a person may come to the defence of another who is attacked or threatened with an attack:

a) using such force as is necessary to protect the other person where

b) he or she reasonably believes that the other person's safety is in danger

CASE – Gambriell v Caropelli –
The defendant was held not guilty of battery as she had an honest and reasonable belief that her son was in danger and was justified in protecting him using reasonable force.

- There needs not to be any pre-existing relationship with the person to be able to use defence for them.
- The obiter dicta in Gambriell states that the defence may be raised even when the belief of the defendant was incorrect.

Defence of own property at common law:
Reasonable force may be used to defend one's own or another person's property. Property includes both land and goods.

CASE – Hackshaw v Shaw 1984 – plaintiff accompanied her boyfriend Cox onto a farm where Cox stole the defendant's petrol. Defendant had been aware of this ongoing theft and hid to catch them. He fired a rifle shot and called out to Cox to go away and leave the car. The defendant fired a second shot at the car to frighten Cox but it penetrated the door and hit the plaintiff in the arm.

The trial judge and the High Court held that the use of firearms against trespassers was not justifiable in terms of self-defence of property. Not reasonable I guess.

Consent:
2 views about the nature of consent and trespass.
1) plaintiff must prove the absence of consent
2) not an element of trespass torts, it is a defence.

• Be voluntary: genuine and come from a competent person. For example, if consent is obtained through duress or fraud, it will not be valid. ***CASE – FREEMAN v HOME OFFICE 1984.***
People who do not have capacity are minors, intellectually disabled people and unconscious persons.

• Consent may be withdrawn at any time. A withdrawal must be clear and communicated to the defendant.

CASE – PLENTY v DILLON 1991 – expressly refused police entry onto his land and asked that his summons be sent by posted. Despite this the police stull entered the appellant's land to serve the summons.
Trespass had occurred as consent to the entry of the police upon the appellant's land had clearly been withdrawn.

• Must be no vitiating factors nullifying consent

• Be in relation to the act complained of: given specifically in relation to the act complained of. ***CASE – MCNAMARA v DUNCAN 1971 –*** clearly established that playing a contact sport does not mean that consent is given to all forms of bodily injury and contact caused in that game.

Specific situations:

Consent in sport:
CASE – PALLANTE v STADIUMS – person gives consent to such violence which is reasonable with respect to the sport in question.

The nature and rules of each particular sport will need to be examined in order to properly determine the validity of consent to the behaviour or action complained of.

Courts therefore do not accept the assumption that if a player knows that prohibited act may occur during the game, that player has consented to such an act.

Consent to medical procedures:

Trespass to the person:
The patient must understand the nature and effects of the procedure.

- . If a patient is not warned of **risks** then the proper remedy is in Negligence not Trespass.
- **No doctrine of 'informed consent' in Australia:** *Rogers v Whitaker* (1992) 175 CLR 479*:* For valid consent, a patient must be advised in broad terms of the nature of the procedure to be performed.

Generally, necessity will override the general rule of the need for consent where a patient is in imminent danger and a medical procedure is necessary.

- *A minor is … capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed…*
- ***Minors (Property and Contracts) Act* 1970 (NSW)** ss 14, 49
- Consent of minor over 14 to medical treatment is effective
- Consent of parent/guardian of child under 16 is effective

Necessity:
Necessity operates as a defence where trespass has occurred in 'urgent situations of imminent peril' to life or property.
The acts of the defendant are reasonably necessary to protect life or property, not just convenient.

CASE – MURRAY v MCMURCHY 1949 – tied the patient's fallopian tubes after finding fibroid tumours on the wall of the uterus during delivery of her child.

This was not necessary and the operation could have been postponed and the patient's consent could have been obtained.

Necessity and trespass to property:
An act which damages property will not be a trespass where the damages occurs because of an attempt to save a life.

Necessity will also operate as a defence where the defendant has damaged the plaintiff's property while attempting to save the defendant's or another's property.

Not available in cases of negligence:
Necessity is not available in negligence cases where the defendant has been negligent.
CASE – ***RIGBY v CHIEF CONSTABLE OF NORTHAMPTONSHIRE 1985***

Provocation:
Generally provocation is not available as a defence to an action in tort.

Children:
It is possible for infancy to operate as a defence to an intentional tort, although much depends on the facts of the case and the age of the infant.

Insanity:
The defence of insanity is available depending on the ability of the defendant to understand the nature and quality of the tortious act even though he might not appreciate that it is wrong.
The onus of proving the defence is upon the party seeking to rely on it.

Civil Liability Act 2002 (NSW) – limits damages for loss to a person which results form a serious offence committed by that person who is mentally ill.

Self-help:
This refers to actions undertaken by a person who is wronged by another to obtain redress without court intervention. Variety of self help actions are available:

- recapture of goods
- re-entry onto land
- abatement of nuisance

Those who defend their actions in self help must be able to demonstrate that they acted reasonably.

Ex. Of measure that goes beyond reasonable in self help ***CASE – BIRD v HOLBROOK 1828*** – defendant had set up a spring gun to protect his tulips from being stolen. He did not warn of the existence of the spring gun and the plaintiff was injured by the gun.

Trespass to land: Civil Law (Wrongs) Act 2002 (ACT)

Statutory Authorisation:
It is defence to intentional torts if the person can show the act is authorised by Parliament. This defence will only operate where the words of the statute clearly authorise the statutory authority to engage in tortious conduct.

INTRODUCTION TO TORT OF NEGLIGENCE:

• Liability in negligence deals with unintentional wrongdoing which amounts to more than mere carelessness but less than deliberate.
• Tort Law reform now deals with negligence mostly under the CLA, as well as common law in Australia.

'Components' of an action in negligence as follows:

- Duty (foreseeability)
- Breach (foreseeability)
- Causation
- Remoteness (foreseeability)
- Actual Damage

The development of the tort of negligence was in the landmark decision in ***CASE – DONOGHUE v STEVENSON [1932]*** – Lord Atkin put forward a general proposition defining the relations between parties that would give rise to a duty of care. This case established negligence as an action in its own right as a separate tort and which recognised a general principle.

Donoghue v Stevenson 'neighbour principle':
The CASE – Mrs Donoghue went to a café where she drank a ginger beer which had been manufactured by the defendant. Part of the contents of the bottle was poured into the glass and Mrs Donoghue drank it. When the remainder of the bottle was poured in the glass, the decomposing remains of a dead snail were discovered in the liquid. Mrs Donoghue suffered a shock and gastroenteritis.

Couldn't bring action in contract or fraud. Mrs Donoghue succeeded in appeal for her action, by a bare majority which recognised a duty of care owed by the manufacturer to the ultimate consumer of a product.

Lord Atkins 'neighbour principle': You must take reasonable care to avoid acts or omission, which you can foresee would be reasonably likely to injure your neighbour, meaning people who are so closely and directly affected by your act that you ought to reasonably have them in contemplation as being so affected.

The Duty of Care:
Whether a duty of care exists is a question of law. There are 2 legal determinations:

1) If relationship between the plaintiff and the defendant is an 'established duty category'. The scope of the duty will vary within established

relationships.
2) If not an established relationship for duty of care, will it be necessary to establish that a duty was owed between the relationship in the circumstance.

Established categories:

a) **Motorist and other highway users** – March V Stramare
b) **Occupier of land and lawful entrant** - Moddbury, Strong v Woolworths, Adeels Palace
c) **Manufacturer and consumer** – Donoghue v Stevenson
d) **Employer and employee** – McLean and Tedman
e) **Doctor/dentist and patient** – Rogers v Whitaker (1992)
f) **Hospital and patient**
g) **School and pupil** – Commonwealth v Introvigne

No established duty = Novel cases:
In novel (Fact situation that has never been hear before) fact is divided into 2 legal considerations:
1) Reasonable foreseeability
2) an additional test – salient features + policy which confirms a legal/factual link between the duty owed by the defendant to the plaintiff (no more proximity test)

Establishing Reasonable Foreseeability:
• A plaintiff will have to demonstrate that reasonable person in the position of the defendant would recognise that negligent behaviour may cause injury to another person.

• Precise sequence of events does not necessarily have to be foreseeable.

BEST CASE TO USE FOR FORESEEABILITY
CASE – Chapman v Hearse (1961):

Facts: Mr Chapman drove his car so negligently that it was involved in a serious collision on a dark wet night. Chapman was thrown out of his car onto the roadway. A medical doctor, Dr Cherry, who was driving past shortly after to offer medical assistance to Chapman, when he was run down and killed by the defendant Mr Hearse. Chapman argued that he owed no duty of care to Dr Cherry because the doctor was unforeseeable, in that his presence on the roadway and the chain of events leading up to his death were unforeseeable.

Held: Reasonable foreseeability: In agreement with the Full Court of Appeal, the High Court **doesn't think the sequence of events needed to be reasonably foreseeable - instead**, it needs to be a consequence of the same class. It is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of a wrongful act.

Atypical plaintiffs:

Rule:

- D has no Duty to take special steps to protect atypical P
- BUT if an atypical P is hurt in situation where normal P would have been hurt, they can recover for ALL d amage (even extra). = Courts more likely to extend RF that classify P as atypical P.

CASE -
Haley v London Electricity Board [1964]:
Facts: D‟s employers created trench and put some makeshift barriers around it. P (blind) tripped over it and fell in, becoming deaf.

Held: The defendant was in breach of duty. It was foreseeable that a blind person might walk down the street and they should be given appropriate protection. Easy for D to take precaution.

- Note: It can be ascertained that as the law developed, the courts were more likely to accept that personal responsibility and diversity in society would play a part in these situations. A defendant may be found to have a duty to vulnerable people.

CASE - Levi v Colgate Palmolive (1941)
Facts: Bath salts caused the plaintiff an allergic reaction.

Held: Defendant held no duty as it was not reasonably foreseeable that abnormal members of the community may be affected.

Note: **No duty of arises when a person who is abnormally sensitive is affected if the act is incapable of injuring a normal person.** However, if the D is aware of the specific abnormality, they may have a duty to take special precautions to protect that person. If it is reasonably foreseeable that a sensitive person may be hurt, there will be a duty of care.

- Jordan CJ: mere fact that abnormal persons exist in the community does not alter the general standards by which rights and duties are established.
- **Persons who trade/supply ordinary foodstuffs and articles of ordinary domestic use have no DOC to issue warnings that use may cause discomfort/injury to abnormal person**

Additional Test – Salient Features + Policy:

Salient Features:

• Reasonable foreseeability alone is not a sufficient condition to impose a duty of care.

• HC no longer used Proximity, instead have established a concept of ‘salient features’ which operate in conjunction with RF to establish a duty of care.

CASE – Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 –

Facts: The Plaintiff [Ryan] contracted Hepatitis A after eating infected oysters made by the Defendant [Graham Barclays].

Issue: Whether Graham Barclay Oysters Pty Ltd, Great Lakes Council and NSW was liable in negligence towards Grant Ryan and others who contracted Hepatitis A from oysters from Wallis Lake. Heavy rain in Nov caused runoff, which resulted in contamination Hepatitis A. Mr Ryan claimed that they could and should have prevented the contamination break out. Plaintiff claimed that the govt and council are liable for nonfeasance, not misfeasance.

Held: The HC held that the public authorities had a responsibility for public health and safety but that Mr Ryan failed to establish that they owed a duty of care to individual consumers of Wallis Lake oysters. The state and Council were therefore not liable.

The Barclay company accepted that they had a duty of care to consumers to take reasonable care to see that the oysters were fit to be eaten by consumers, but the High Court found they were not in breach of this duty so were not liable in negligence. They already did what they could to try and avoid contamination.

The only alternative available to the company was to stop harvesting and selling the oysters for a potentially indefinite period of time or to relocate the business to another waterway near no humans. **This represented the most expensive and inconvenient type of action in alleviating the risk of harm to consumers**. Barclay was too remote from the end consumers of the oysters.

Salient features include (there is not exhaustive list):

- *The vulnerability of [plaintiff]: Perre v Appand*
- *The degree of control of [defendant]: Graham Barclay Oysters v Ryan*
- *The special knowledge available to *defendant+ of *plaintiff's+ situation*
- *Policy considerations: Indeterminate Liability: Esanda Finance v Peat Marwick*
- *Coherence of the law: (Sullivan v Moody)*
- *Conflicting Duties: (Sullivan v Moody)*
- *Personal Autonomy of Plaintiff (C.A.L. No 14 Pty Ltd v Motor Accidents Board & Scott) – preventing an act could impede on someone's autonomy*

Public Policy:

Policy also often comes into play in novel cases where there is no precedent for that case.

Policy factors to which the court will have regard are administrative, ethical or moral, economic, justice and public interest factors, and the appropriate role and scope of the tort of negligence (what is fair and reasonable).

Advocates' immunity:

• Barristers and solicitors do not owe a duty of care to clients for work done in court. This is decided on the basis of finality - if a barrister can be sued for negligence, the case can be reheard, which would undermine the judicial system.

• This immunity extends to work done out of court, as long as the work done is so closely connected with the conduct of a case in court that it can fairly be said to affect the way the case is conducted in court. It will not extend to things such as wills, which have no bearing on court cases. Hill v Van Erp (will case)

CASE - D'Orta- Ekenaike v Victoria Legal Aid (2005):

Facts: Mr D'orta was charged with rape and sought assistance from Victorian Legal Aid which retained Mr McIvor as his barrister. Was advised to enter guilty plea at committal proceeding, which was wrong, but on arraignment in the County Court he pleaded not guilty. His guilty plea was led in evidence during the trial.
He was convicted and sentenced to three years' jail. Was later acquitted at a retrial and claimed losses for time in between. It was a very clear case of negligence.

Held: High Court held an advocate cannot be sued by a client for *negligence in the conduct of a case or in out-of-court work affecting the decision in the conduct of the case.*

Police: Criminal investigations and preventing self-harm:

• Police investigating crime do not owe DOC to individuals of public in failure to apprehend a dangerous criminal.

CASE - Hill v Chief Constable of West YorkShire [1989]:

Facts: The plaintiff was the mother of the last victim of the "Ripper" and brought a claim that the police had been negligent in their investigation and had failed to apprehend the murderer in time to avoid the death of her daughter.

Held: No duty of care owed. Police investigation involves many decisions on matters of policy and discretion and it would be inappropriate to subject those decisions to a common law duty of care.

• There is no duty of controlling another man to prevent his doing damage to a third either.

Auditors:

• Auditors do not have a DOC to third parties that suffer economic loss from relying on audited accounts.

CASE – Esanda Finance Corp v Peat Marwick Hungerfords (1997) –
• Statutes already assign civil/criminal liabilities to auditors
• To increase auditors' liabilities would only aggravate the admin of justice, the cost of auditing services and etc.

Child Protection Agencies:
• Child welfare officers, social workers, doctors investigation child abuse do not have DOC towards parents to conduct investigation carefully to avoid psychological injury to them

CASE – Sullivan v Moody (2001) – thought the girl had been sexually assaulted by her father. She was examined and her father had not sexually abused his daughter. Mr Sullivan underwent extreme shock and distress.

The HC concluded in a joint judgement that no such a duty of care existed. Those reasons were:

- o Intersected across other legal principles eg. defamation law
- o DOC would be incompatible with the duty to uphold children's interests as paramount
- o Liability is indeterminable–not limited only to parents of children.

• There is no duty for a parent to take action to protect their children (Robertson v Swincer). This is for three reasons:

- There are no clear standards of what constitutes sufficient parental supervision
- If there was such a duty, it would apply at all times the child is with the parent, and even the most prudent and alert parent would inevitably breach the duty.
- If there was such a duty for supervisors, friends and relatives would be discouraged from volunteering to supervise the children (Robertson v Swincer)

Armed services in wartime:
Policy has dictated that the armed services do not owe a duty of care in respect of damage caused by them during an active engagement against in the enemy in wartime.

CASE – SHAW SAVILL & ALBION CO LTD v COMMONWEALTH (1940) – So whilst a duty will be denied in respect of active operations against the enemy, there is a definite limit to the immunity.

Joint illegality:
No duty of care.

Subsequently the High Court was held in ***CASE – Miller v Miller*** – that a duty existed and recovery of damages between individuals engaged in joint illegal enterprise is possible in cases where the injured party withdraws from the enterprise.
Plaintiff was allowed to recover against the defendant driver of the stolen car because prior to being injured she requested that the vehicle stopped to allow her to get out.

BREACH OF DUTY:

• Having established existence of duty owed by D to P, it is then necessary to establish the 2nd element of breach of that duty.

Negligence – s 5 of CLA – '*failure to exercise reasonable care and skill*'

The P must prove:

1. That the risk was reasonably foreseeable
2. The defendant's response to the foreseeable risk was not reasonable, so did not reach the standard of care required.

Steps under Statute: Division 2 - s 5B General principles:

Step 1 – Determine if SOC has been breached:

S 5B(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known then they are negligent)
(***Chapman & Hearse, Wagon mound)***

(b) the risk was not insignificant, (or traditionally under common law, not far fetched of fanciful) (***Wyong v Shirt)***

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions (if they didn't do what was reasonable to prevent foreseeable risk, then negligence)
(***Romeo v Conservation Commission of NT, McHale)***

CASE - Wagon Mound No. 2 [1967]
Facts: WM a ship taking oil & some spilt in water. Chief engineer wasn't too worried bc this oil wouldn't catch fire unless heated to a very high temp. Welding work somewhere else created a spark which ignited debris floating- this heated oil and caused a large fire- 2 ships burnt.

Held: No doubt that WM owed a DoC to other ships, though WM argued that oil catching fire wasn't reasonably foreseeable since oil had a very high flash point.

PC: ***"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 or fanciful.***" *(Lord Reid at 643)*

Therefore PC decided that risk of fire was RF & chief engineer should have done something about it.

CASE – Chapman v Hearse:
High Court held that it was reasonably foreseeable that the negligent driving of both Chapman and Hearse could cause the risk of the injury/death to people such as Dr Cherry that could have stopped to help.

CASE - Wyong v Shirt:
Facts: P inexperienced water-skier was injured when he interpreted a sign saying 'deep water' as indicating the whole area was deep water, whereas in fact it only indicated the presence of a deep dredged channel in the middle.

Sued council for misleading sign. Council said highly unlikely that a RP would read that way.

Held: HC had to decide whether foreseeable. Mason J: ***"A risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable."***

As long as its real, not fanciful or far-fetched it can still be foreseeable even if it extremely unlikely

CASE – Romeo v Conservation Commission NT:
Facts: 15 year old girl, fell off height, bcos no fencing.

Held: While it was reasonably foreseeable that an intoxicated plaintiff may be injured by falling over the edge of unfenced cliffs in a nature reserve, D was not liable for the P's injury. To prevent injury would have required fencing of a long line of cliffs in a nature reserve area, a huge undertaking to prevent an injury that the court found to be a very low risk of occurring.

A reasonable person would not have fenced it off wrecking the beauty of the area, because of a small risk that was too expensive to avoid.

• However there are certain cases of people who require special consideration when taking into account whether they could foresee and take care with respect to risks of harm:

Children and the elderly:

• [D] is child = lower standard ***(McHale v Watson)***

• Appropriate to set standard according to what child of same age/experience as D. however, held that where child engages in adult activity, standard should be

that of a reasonable adult and not a reasonable child: *Tucker v Tucker*

• [D] is elderly = lower standard

Disability:
• [D] is disabled = no change (Carrier v Bonham), unless it is a mental disability which limits capacity.

The Beginner:
The law gives no special consideration to learners and beginners.

Intoxicated plaintiff:
The HC has explicitly stated that the relevant standard of care is that of the reasonable sober person.
CLA s49 Effect of intoxication on duty and standard of care – the fact that a person is intoxicated does not change the standard of care owed to that person

Defendant with inexperience:
No change in standard of care
Imbree v McNeilly -

- held that the standard of care owed by a learner driver to a supervising passenger was the ordinary standard of a reasonable prudent driver.

Special Skills:

The standard of care is judged according to those skills if the fact situation demands it. (Rogers v Whitaker)

Professionals and Industry practise:

Works like special skills – if fact situation needs it then the reasonable person would likely have used those skills.

The HC refused to accept that the industry practise should set the standard of care. Common or industry practise may itself be negligent because the conduct of the defendant is measured against that of the objective reasonable person rather than against that of other people in the community.

Tort Law Reform and professionals:

S 50 Standard of care for professionals – (dealing with a professional defendant instead of an ordinary one, we don't use 5B, we use this)

(1) A person practicing a profession 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.

• **S 5O IS A DEFENCE to be pleaded & proved by the Defendant.** This does not only apply to the medical professionals but all professionals.

• **CLA S 5(P) Risk warnings by professionals:**

5(P) Provides that S5(O) does not apply to Professionals giving or failing to give warnings, advice or other information in respect of the risk of death or injury which is associated with the provision of a service .

You can't 'use' this section, you can only say that it exempts professionals in **s 5O** from issuing a warning.

Best CASE for this - Rogers v Whitaker (1992):

Facts: The defendant was a specialist ophthalmic surgeon who failed to advise a patient of a relatively small risk (1:14000) that an operation to improve the vision of one may lead to a condition called 'sympathetic opthalmia' causing loss of sight in the other eye. The plaintiff claimed that the defendant had been negligent in failing to warn her of the risk.

Held: The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing have special skill – in this case of an ophthalmic surgeon specialising in corneal and anterior segment treatment. The defendant had breached his duty to warn the plaintiff of the 'material' risks associated with the provision of her treatment.

Step 2 – Calculus of Negligence:

S 5B(2)

(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, *(Bolton v Stone)*

• Foreseeable "risk is not far-fetched or fanciful" (Nagle v Rottnest Island Authority)
• SOC "increases in proportion with danger involved"
SOC increases as likelihood increases

Case: Bolton v Stone [1951]

Facts: P was struck on the head with a cricket ball as her garden backed onto an oval. This was an unusual occurrence. In 30 years balls hadn't cleared the 5m fence often, only 5 or 6 times.

P failed although risk, was small & held to be reasonably foreseeable, likelihood of it happening was so small that the reasonable person would not take steps to avoid it.

Held: 2 factors that led to the failed claim was the small likelihood of a ball escaping the ground, and the impracticality of any precaution other than ceasing to play cricket on the ground especially since there was already a veru high fence for precaution.

Lord Reid said ' **the test to be applied here was whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent danger**."

B) the likely seriousness of the harm, (*Paris v Stepney Borough Council)*
- SOC increases as seriousness increases:

- *Paris v Stepney Borough Council* particularly grave consequences, as already blind in one eye. SD knew about P's danger. Should have taken more precautions. Foresaw seriousness.

Case: Paris v Stephney Borough Council [1951]

Facts: P was a one eyed motor mechanic. P lost sight of his other eye when a chip from a rusty bolt he had struck hit him in his good eye. D didn't supply any safety goggles. The employer knew of his disability thus they knew how serious the consequences of accident. D said no other mechanics had safety goggles and therefore not neg.

Held: Court said you have to consider the **"gravity of consequences**". As D knew that P had only one good eye, and that the loss of his second eye would be particularly serious to him, and whilst ordinarily the areas employer wouldn't provide goggles to mechanics in such a case the RP would provide protective goggles for D due to the gravity of the consequences.

C) the burden of taking precautions to avoid the risk of harm, *Romeo v Conservation Commission of NT* (1998)
The court must weigh the gravity of the risk and the probability of its occurrence against the burden, expense, or inconvenience required to remove it. Where the risk is easy to avert, it is likely that D will be found to have breached.

- Risk must be balanced against precautions that may avert the harm.

- a defendant is not required to take expensive precautions when the risk is low and an injury is unlikely to occur
- Easier + practical to avert - more likely to have breached SOC:

***Romeo v Conservation Commission NT** (1998):*

Held: While it was reasonably foreseeable that an intoxicated plaintiff may be injured by falling over the edge of unfenced cliffs in a nature reserve, D was not liable for the P's injury. To prevent injury would have required fencing of a long line of cliffs in a nature reserve area, a huge undertaking to prevent an injury that the court found to be a very low risk of occurring.

15 year old girl, fell off height, bcos no fencing. Whilst reasonably foreseeable that an intoxicated person may be injured, the D was not liable as to prevent the injury would require fencing along a line of cliffs. Applied principle in Bolton and Stone enlivens it. the council owes you a duty.

The P argues there was no warning signs. Likelihood of falling vs. the cost

D) the social utility of the activity that creates the risk of harm. *Caledonian Collieries Ltd v Speirs, DaBourne*

• The greater the social utility of the act, the more likely it is that the defendant's behaviour will be assessed as reasonable.
• The necessity of emergency life saving measures has also excused what would otherwise be a negligent dangerous operation.
One must balance the risk against the end to be achieved. The saving of life or limb justifies taking considerable risk.

Daborn v Bath Tramways Motor:

Facts: wartime driver of left hand drive ambulance turned without signalling. Car close behind her. Signalled with her left hand that she was going to turn right, no rear view mirror and sign on back of ambulance warned of left hand drive. Collided.

Held: ambulance driver had lower SOC as she had done all that was reasonably necessary.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in

which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

Hindsight Bias:

The courts have recognised that when the calculus of neg is being applied to D's conduct, it is crucial that D's conduct be assessed from a prospective vantage point: this is the courts must apply the standard of care to the defendant's

conduct having regard to the defendant's knowledge and responsibilities immediately before P's injury. Recognised in *Vairy v Wyong Shire Council* and in *Adeels Palace v Moubarak.*

Subsequent Conduct of D:

At common law if D has taken a precaution after an accident, this is not an admission of liability of negligence. This position is maintained in NSW in the CLA, s 5C(c).

Obvious risks and 'scope of duty':
At times, the court will conclude that **there is no negligence even where a reasonable person in the defendant's position foresees a risk of injury and does nothing about it**. The reason for this is that risk exists in everything, and reasonable person in some circumstances would do nothing to avoid the risk where it is known or obvious to most members of the community.

Proof of Negligence:

- P bears the legal onus of proof **(CLA s5E)**
- Standard: balance of probabilities
- D may bear an "evidentiary" onus of proof in some instances to counteract P‟s claims.
- P has to prove on BOP, it was **more probable** than **not** that D breached the duty of care.
- An inference of negligence can only be drawn from **proved facts**, which make it **more likely than not that D was negligent.**

10. SCOPE OF LIABILITY: CAUSATION:

10.1 - Causation:

In order to succeed in a claim in negligence, a plaintiff will have to prove, on the balance of probabilities, that the damage suffered was caused by the negligent act of the defendant.

10.2 – Tort Law reform, causation and Scope of Liability:
S 5D *CIVIL LIABILITY ACT (NSW) 2002*

2-STAGE APPROACH

1. **THAT NEGLIGENCE WAS A NECESSARY CONDITION OF THE HARM (FACTUAL CAUSATION – D's negligence was the cause) AND**
2. **THAT IT IS APPROPRIATE FOR THE SCOPE OF D'S LIABILITY TO EXTEND TO THE HARM (SCOPE OF LIABILITY – D should be liable for harm).**

s 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***) **(the but for test),** 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)*** **(normative question, legal causation)**

STEP 1 – The 'But For' Test/ Necessary Condition

S 5D(1)(a) – Factual Causation

• HC said – forget common sense and value judgements, you must strictly apply 5D 1(a) and (b)

• Meaning if it wasn't for that condition the plaintiff would not have suffered loss. This is seen as the statutory formulation of the 'but for' test.

• If the 'but for' test is satisfied, D's negligence can also be said to have been necessary condition of P's injury.

Weakness = not reliable for causation where 2+ causes = result in conclusion that none of two+ causes is cause of P's loss. nor will it determine which of several causes might be ***the*** cause of damage.
March provides example of type of case in which fail to differentiate causes

CASE - Adeels Palace Pty Ltd v Moubarak (2009):

Facts: A dispute on the dance floor at AP, erupted and came to involve a fight between the plaintiff, Mr Moubarak, and a fellow patron, Mr Abbas. Mr Abbas left the premises and, after a short while, re- entered with a gun and shot Mr Moubarak and Mr Bou Najem, another patron.

Held: **P were unsuccessful because it was held that any failure of D to provide security personnel at its restaurant-nightclub on New Years Eve was not a cause of the plaintiffs' damage: that the provision of security personnel would probably not have prevented the entry of the gunman to the restaurant or the shooting of the plaintiffs.**

STEP 2 – Normative Question/Should D be liable for harm:

• Once 'but for' is satisfied, courts embark on normative consideration of whether D ought to be liable for the injury

• This test is applied in more complex cases where it is not as simple as using the necessary condition test.

Novus Actus Interveniens – Intervening act breaking chain of causation:

• When an intervening act (completely unrelated act) breaks the causal link between D's negligence and P's loss.

• The intervening occurrence, if it is possible to be sufficient to sever the connection, must ordinarily be either:

a) human action that is properly to be regarded as voluntary, or;
b) a casually 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.

• The intervention of an act or decision of the plaintiff does not necessarily negate causation especially "in cases where the negligent act ...was itself a direct or indirect contributing cause of the intervening act or decision."

• A negligent act of the D which simply puts the P at a time in a place where some other event occurs will not make the D liable. ***Canterbury Bankstown RLC v Rogers***

Chapman v Hearse (1961) 106 CLR 112:

Facts: D drove negligently and hit into another car, flipping his own over and being knocked out of it into the

road where he lay unconscious. Several cars stopped by to help the victims of this accident. One was P, who rushed towards the appellant. Whilst he was attending to the unconscious Appellant, Dr. Cherry was struck by the Respondent (Hearse) who was also driving negligently. Dr Cherry died as a result. Court decided on the case, and the Appellant owed money to Dr. Cherry's estate

Held: Reasonable foreseeability: In agreement with the Full Court of Appeal, the High Court doesn't thinks it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of a wrongful act.

'Common sense' approach applied: Looked at the risks created by the neg act of D and then look at whether the second act of neg is the 'very risk' likely to materialise 'in the ordinary course of things.

Intervening act**:** D argued that the neg driving by Hearse severed the causal link between D's earlier neg and Dr Cherry's death.

It can be said that the first act act exposed the plaintiff to negligence by third party, and therefore the chain of causation is not broken. ***A foreseeable 'intervening act' does not break the chain of causation***

Voluntary Acts:

• Not every 'voluntary human action' that takes place will qualify as a novus actus interveniens.

CASE – Haber v Walker [1963]:

Facts: The plaintiff's husband had been very severely injured in a car accident which led to a serious depressive illness and eventually suicide. The defendant's negligent driver argued that, as the deceased had voluntarily taken his own life, act severed the causal link between the defendant's negligent and the death of the deceased.

Held: The Full Court of the Supreme Court of Victoria found that the conduct of the deceased was not really a voluntary act, as it was the result of the severe depressive illness caused by the defendant's negligence. Therefore, the causal link was not broken and the defendant was liable for the death.

The 'very risk' created by the defendant:

• Some circumstances – the voluntary action of a person is exactly what the defendant has a duty of care to protect the plaintiff against.

CASE – March v Stramare (1991):

Facts: In early hours of morning, Defendents, fruit and vege merchants, parked truck in middle of six- laned road at night to load. Truck had its rear and hazard lights operating. Street moderately well lit. had been using this method to unload truck with a forklift for as long as they could remember.

At 1am, P (March), drunk/speeding, drove car into back of truck and suffered severe injury. NB: intoxicated to such extent his driving skills significantly impaired

Duty of care to take reasonable care to avoid foreseeable injury to such other road users.

ISSUE: causation issue was whether the D's negligence in leaving the truck in the centre of road was cause of P's damage, or whether P's own negligence was cause of his loss, or whether both events were causally related to damage

HELD: on trial, 70% contributory negligence against the P, HC overturned it. on appeal, full court found D not liable. 2nd respondent's wrongful act in parking truck I'm middle of road created situation of danger, risk being careless driver would act in way that A acted. McHugh J held Ds liable on basis that P's injury was within scope of the risk created by their negligence

The 'but for' test did not assist in this instance. Majority held that more flexible approach needed

Decision: The respondent was held partially liable even though it was unlikely that March would have sustained his injuries "but for" him being intoxicated.

The defendant's wrongful conduct has generated the very risk of injury from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things.

The court rejected the "but for" test as the exclusive test for causation and found the respondent liable on the basis that a reasonable person would not park a vehicle in the middle of the road at night time and that the act by the respondent was a **significant factor** in the injuries sustained by March.

• The fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct.

Negligent medical treatment breaking chain of causation:

• Subsequent negligent medical treatment ***(Mahony v J Kruschich):***
Not an intervening act if: o P acts reasonably in seeking/accepting treatment

o Only an intervening act if treatment/advice is ***"inexcusably bad"***

***Mahony v Kruschich (Demolitions) Pty Ltd* (1985):**

HC considered whether subsequent medical treatment for an injury caused by D would sever the causal link between D's earlier act of neg and the exacerbation of P's injury caused by the poor medical treatment.

Held: *Negligent medical treatment subsequent to negligent injury would not necessarily remove liability for D1 unless the subsequent injury was 'inexcusably bad', so obviously unnecessary or improper that it fell outside the bounds of reputable medical practice.*

10.7.5 – Coincidence:

• A tortfeasor will not be liable where injury is caused by a coincidence, even where the tortfeasor's actions might have resulted in the plaintiff being in the place at the time when the coincident occurred, so long as the risk to the plaintiff has not been increased by the actions of the tortfeasor.

Cantebury Football Club v Rogers – broke his jaw, went to London to impose his fitness. At London he broke his leg and tried to sue the first person claiming that had his jaw not been broken he would have not gone to England to get match fit. This didn't work because the chain of causation was broken.

STEP 3 – Exceptional cases – Material contribution:

S 5D(2) Exceptional cases

(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.

• **SO,** even though P cannot establish causation on the balance of probabilities, a court may accept an increase in risk as proof provided it has considered whether or not, and why, liability should be imposed on D.

Strong v Woolworths Ltd **[2012] HCA 5**

Facts: P slipped on a 'French fry' potato chip on the floor of a shopping centre and was injured.

Held: The Court of Appeal held that the plaintiff had failed to prove on the balance of probabilities, that any failure by the defendant to have a system of regular inspection and floor cleaning in place had caused the injury.

The Court of Appeal held that s 5D(1) requires a plaintiff to establish that the defendant's negligence *caused* the particular harm: that is "but for" causation. The Court took the view that under s 5D(1) it would not be sufficient for a plaintiff to establish that a defendant's negligence *materially contributed* to the harm.

The HC rejected the Court of Appeal's 'speculation' that the chip was likely deposited at lunchtime, and instead held that the deposit of the chip was a hazard with an approximately equal likelihood of occurrence throughout the day.

Means that where the defendant's breach of duty is not in dispute, the plaintiff will not fail to establish causation merely because there is an absence of evidence positively establishing the causal link between the defendant's breach and the incident giving rise to the plaintiff's injury.

Cumulative Causation: material cause at common law:

• Where there are several causes which, in combination, contribute to the plaintiff's loss, then at common law, so long as each is held to be a material cause, the plaintiff is entitled to succeed against the tortfeasor. ***(March v Stramare)***

• The plaintiff is entitled to recover the full damages from any one of the tortfeasors against whom the judgement is obtained. The defendants are entitled to seek contribution form other tortfeasors.

• Must prove on the BOP that the breach of duty materially caused or contributed

to the injury and thus is liable

Increased risk: cannot prove D's act material, only that D's act COULD have been a cause

- Increased risk: [Plaintiff] will argue that although they cannot establish the exact cause of the injury, *defendant's+ act increased the risk of *plaintiff] suffering loss ***(McGhee v National Coal Board).***

Held: Could not prove D would have prevented dermatitis with shwoers. But since, increased risk and risk materialises – he was found liable.

- A material increase in risk is not the same as a material contribution to injury
- Court may infer causation where a D materially increased risk of injury: ***Wallaby***

10.9 – Causation in 'Failure to Warn' Cases:

s 5D(3) of CLA:

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.

CASE – Wallace v Kam:

Facts: Mr Wallace suffered from a condition of the lumbar spine and Dr Kam, a neurosurgeon, performed a surgical procedure on him which had 2 risks, minor and one more serious. Dr Kam did not mention either of these risks before surgery.

It was not successful. The patient's lumbar spine condition did not improve and he sustained minor risk temporarily. Mr Wallace sued Dr Kam, alleging that he had negligently failed to warn him about the two risks of the surgery and that the failure to disclose had caused the patient's injury, because if he had been warned about either of the risks, he would not have agreed to the surgery and so would not have suffered the injury.

Held: The normative judgment pursuant to s 5D(1)(b) was that the **surgeon's liability should not extend to "harm from risks that the patient was willing to hazard**"

• So plaintiffs will now have to prove by means other than their own statements what they would have done if the defendant had acted prudently.

Multiple Sufficient Causes:
o P's injury is the result of more than one cause, but total loss would probably have occurred in any event owing to other sufficient cause.

• Acceleration of injury/death:

D not found liable when condition/risk/harm would have developed anyway. But pay damages for acceleration.

• Subsequent injury: later separate independent injury occurs at later time:

Jobling v Associated Dairies: "Vicissitudes of life"principle to reduce damages – put P in place as they would have without D's tort, not necessarily better or worse position.

• Additional causes: P already at loss, then D's negligence happens

REMOTENESS:

• A question about the *extent of damage* for which a defendant will be liable.

SCOPE OF LIABILITY - REMOTENESS OF DAMAGE:
S 5D(4) *CIVIL LIABILITY ACT* 2002 (NSW)

- S 5 – definition of 'harm';
- **S 5D(1)(b)**

- 'scope of liability' (encompasses issues of causation and remoteness);
  - **S 5D(4)** Court to consider 'whether or not and why defendants should be liable for harm suffered by the plaintiff' – enables the court to take policy considerations into account.

Common Law: Reasonable Foreseeability:

STEP 1 -
• At COMMON LAW the test for REMOTENESS is *REASONABLE FORESEEABILITY OF THE DAMAGE*: ***The Wagon Mound No 1 [1961] AC 388***

• The meaning of "REASONABLE FORESEEABILITY": The ***Wagon Mound No 2 [1967] 1 AC 617*** – it would occur to the mind of the reasonable person in the position of the D as not being far-fetched.

• *Civil Liability Act* does not displace these common law rules.

The Wagon Mound No 1 [1961]:

Facts: Plaintiffs were the owners of a wharf which was severely damaged by the defendants, who were the charterers of a ship, The Wagon Mound. Employees of defendant on ship negligently spilled fuel oil into the water which ignited, causing a large conflagration on the bay. The evidence at trial was that the 'flash point' of the oil was extremely hig at 170F and that it would not have been evident, even to the chief engineer of the Wagon Mound, that the oil spilled onto the water might catch fire.

Held: The trial judge found that the fire was unforeseeable. The defendant's employees could not reasonable have been expected to know or to have foreseen that the oil was capable of catching fire if spilled on water. Only happened bcos some molten metal, ignited some debris, which acted as wick to heat oil.

Eventual appeal to the Privy Council. D **not liable for dmg** which was **not reasonably foreseeable** consequence of D's.

STEP 2 –

- The **KIND** of damage must be foreseeable: the plaintiff need only show that the **kind of damages** was foreseeable, and not that the precise type of damages or the full extent of seriousness of it was foreseeable.

Hughes v Lord Advocate [1963] AC 837 – some kind of burns injury foreseeable though not the full extent.

- The **MANNER** of injury is relevant: the precise manner in which it occurs need not be foreseeable.
-

Doughty v Turner Manufacturing **[1964] 1 QB 518;** ***Jolley v Sutton London BC*** **[2000] 3 All ER 409**

Wagon Mound (No 2):

- Confirmed reasonable foreseeability of kind of dmg suffered by P is test for remoteness
- Ps were owners of two vessels Cirrmal and Audrey D, which were undergoing repairs at Sheerlegs - Wharf and dmged by fire
- Evidence/findings 'substantially diff' from (No 1)
- I**SSUE**: whether risk of fire dmg was foreseeable at the breach stage of negligence inquiry
- **PRECEDENT**: Reasonably foreseeable = if risk of injury was a 'real risk' which would occur to mind of a reasonable man, would not brush aside as far-fetched – per Lord Reid
- Finding that a **reasonable person in position of chief engineer of the 'Wagon Mound' would have been aware of "a real risk"** of fire after the furnace oil spillage into Morts Bay
- Risk of fire, though small, was reasonably foreseeable - **real risk, not fanciful, therefore damage not too remote and duty to take reasonable care to prevent dmg exists**
- Elimination of risk involved no difficulty/expense, charterer of WM was liable for dmgs

Hughes v Lord Advocate [1963]:
FACTS: employees of Scottish Post Office left very deep manhole open in street when they ceased work. It was dark, and to alert public of the danger, employees left a canvas tent over the manhole together with several kerosene warning lamps. P aged 8y/o and friend 10y/o tied lamp to a rope and lowered themselves down manhole to explore. While leaving manhole, P tripped over lamp which fell into hole, causing explosion and fire w/ flames leaping high into air. P knocked back into hole and severely burned. D argues remote, manhole, children, maybe that's ok ->but then to suggest that kid's would get out and bump lamp causing explosion - that is not foreseeable.

HELD: dmg to P not too remote, as kind of injury, burn injury foreseeable **even though extent of P's severe injuries not foreseeable**. Noted D would escape liability on ground of remoteness only if estb that P's dmg was diff in kind from that which was foreseeable.

CASE – Mount Isa Mines v Pusey (1970):

Facts: the plaintiff was employed by the defendant and went to the aid of two fellow employees who had been very badly burned when the electrical switchboard exploded owing to the negligence of the employer. The medical evidence was that the plaintiff developed schizophrenia as a result of the shock associated with this event. The plaintiff claimed damages for nervous shock. Further evidence showed that the plaintiff's was a very rare consequence.

Held: HC - that some type of mental disturbance was a foreseeable consequence of the defendant's negligence and that the plaintiff's mental illness was not a different kind of damage. The HC took a very broad view of the plaintiff's injury.
Windeyer J held that ***'only harm of a like kind'*** need to be foreseeable.

Psychiatric Injury:

- **Psychiatric Injury cases** using differing levels of abstraction: *Kavanagh v Akhtar* (1998) 45 NSWLR 588. NOTE the psych injury cases may have different outcomes under the CLA because of special provisions for mental harm cases in Part 3 of the Act.

Kavanagh v Ahktar (1998):

- **ISSUE:** NSWCoA to consider whether psychiatric illness (unusual consequence) was reasonably foreseeable

- **FACTS:** P Mrs Akhtar, shopping in store, suffered perma/debilitating left shoulder + arm injury when heavy box of goods dropped onto her in D's

shop, as result of negligence of two of D's employees. After, she found increasingly difficult to carry out domestic duties. Hard to care for her long hair. Cultural/religious reasons, extreme effect on husband's attitude to her. Marriage broke up, P suffered severe depressive illness. D argued marriage breakdown/associated psychiatric illness unforeseeable consequences of accident

- **HELD:** foreseeable that P's injuries would place strain on her marriage and such strain lead to breakdown in marriage, in turn lead to psychiatric illness. Husband's extreme reaction irrelevant, so long as psychiatric injury is itself regarded as foreseeable consequence of physical injury inflicted

- **CLASS**: egg-shell skull applies to social/economic/religious attributes of P might make P more susceptible to injury
    - Reasonably foreseeable that partner would leave after you disfigure their partner
    - Made use of cultural context
    - Husband comes from this culture, you take your victim as your find them
    - P's psychiatric illness was foreseeable

The "Eggshell Skull" rule:

• Rule: D takes P as he finds him. ***Kavanagh v Ahktar (1998)***

• D pays for all damage, even where:
- *P may suffer from pre-existing weakness*
- *D's act caused injury resulting in susceptibility to further illness/injury. Ex. If another foreseeable injury is caused by first injury.*

• Damage of a diff kind to be distinguished from severity of dmg -> eggshell is about extent of dmg

• The extent of harm/injury need not be foreseeable as long as the kind of harm is R.F.: ***Hughes v Lord Advocate***

DEFENCES TO NEGLIGENCE:

- contributory negligence
- the common law defence of ***volenti non fit injuria*** (available but rarely used)
- 'new' statutory *Civil Liability Act* defences relating to obvious risk; recreational activity and risk warnings; dangerous recreational activity; inherent risk.
- Illegality

- particular defendants with limited liability: e.g. rescuers and volunteers

Contributory Negligence:

• Contributory negligence is a man's carelessness in looking after his own safety. Meaning the plaintiff contributed to the damage resulting from the negligent act.

• This means that:
  a) contributory negligence is no longer a complete defence (there are rare exceptions)
  b) there is a *statutory scheme of apportionment* based upon fault rather than the common law defence of contributory negligence.

S 5R(1) of the CLA – Standard of Contributory Negligence.

s 5R(1) To prove plaintiffs other person's negligence you do the same as what you would do to prove negligence.
Defendant needs to show that:

1) the plaintiff failed to take the reasonable standard of care in the situation
2) the risk/damage was **reasonably foreseeable** and **not insignificant** and was partly caused by the plaintiff's negligent act (causation and scope of liability)

SO, the whole process: duty to protect themselves/others, breach, causation etc.

CASE – ***Roads and Traffic Authority of NSW v Dederer*** *(2007)* –

Facts: 14.5 year old plaintiff who suffered partial paraplegia when he dived into a river from the railing of a road and a pedestrian bridge constructed and maintained by the defendant. It was known to the defendant that many young people regularly jumped form the bridge into the river below.

Held: High Court held that the road authority was obliged to exercise reasonable care so that the road was safe for *users exercising reasonable care for their safety.*

The RTA did not cease to owe Mr Drederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from a bridge. However, 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**.' The RTA had not breached its duty of care, with the result that the plaintiff was wholly unsuccessful because of his own negligence.

5R(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.

• Courts compare the degree of departure form the standard of care of the reasonable person of both the plaintiff and the defendant. **Courts are 'just and equitable' - requirements of** Law Reform (Misc Provisions) Act 1965 (NSW) s9

***CASE – Pennington v Norris (1956)**:*

Facts: the plaintiff, a pedestrian, was struck by the defendant's car while crossing a road at night in Tasmania. He was walking normally and showed no signs of intoxication, though he had had a few drinks. The plaintiff suffered various injuries. Under the Tasmanian apportionment legislation, the trial judge reduced the plaintiff's damages by 50% for contributory negligence.

Held: This was appealed and the High Court held that the plaintiff's damages should be reduced by only 20% stating that:

- While the defendant's negligence is a breach of duty owed to other persons and therefore blameworthy, the plaintiff's contributory negligence is not a breach of any duty at all, and it is difficult to impute moral blame to one who is careless merely of his own safety. Hence in our opinion, the negligence of the defendant was in a higher degree than that of the plaintiff.
- Also the road was very misty and dark, so the plaintiff had less of a fault.

• In cases of employers duty of care - *thoughtlessness, inattention or inadvertence will not necessarily amount to contributory negligence* because such behaviour by employees is seen to be within the spectrum of risks against which an employer should take reasonable care.

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.

Zanner v Zanner [2010] **–** courts considered 100% reduction in damages.

Facts: 11 year old boy was allowed by his mother to driver car a short distance into their driveway. He had done this previously with his dad. Mother, the plaintiff, was standing on the driveway in front of the car, directing her son who was driving very slowly. The boy's foot slipped off the brake and onto the accelerator running down his mother.

Held: With respect to the issue of culpability of the defendant, his conduct was a matter of inadvertence and that **he permitted his foot to slip from the brake to the accelerator thus causing the vehicle to lurch forward.**
On the other hand, the [plaintiff]'s departure from the standard of care… involved first, permitting an 11 year old to drive, and second, standing immediately in front of the vehicle in circumstances when it must have been obvious to her that if the first appellant lost control of the vehicle, she was inevitably going to be struck by it with some force.

Intoxication:

• **At common law *there is a presumption of contributory negligence*** in the case of a passenger injured in a motor accident where that person relies on a driver who was intoxicated. ***Joslyn v Berryman***

• Though it could be considered a breach of duty inquiry of a voluntary assumption of risk.

STATUTE: In NSW, **Civil Liability Act 2002 (NSW) s 50**, provides that a court must not award damages at all to an intoxicated plaintiff unless the death, injury or damage to the plaintiff would still have occurred if the plaintiff had been intoxicated.

- Where the court is satisfied that the damage would have occurred even if the plaintiff was not intoxicated, then a mandatory findings of contributory negligence applies.
- When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or greater, determined by the court. **S 50(4)**

Exception – this section does not apply where the intoxication was not self-induced.

ALSO - It should be noted that the 'intoxication provisions' of Part 6 of the CLA 2002 (NSW) do not apply at all to motor accident cases.

- If failure to wear seatbelt contributed to her injuries, this will constitute contributory negligence: Eagles v Orth this is a mandatory statutory reduction, regardless of contribution to injury 25%. ***Motor Accidents Act 1988 NSW s74***

Set answer:

[D] should be advised that the defence of contributory negligence can be raised since both [P] and [D] were intoxicated at the time of the incident. The basis for such an allegation is that by being under the influence of alcohol, [P] failed to take reasonable care of their own safety, or by relying on an intoxicated person, [D], they failed to act reasonably. Queensland jurisdiction legislated that there is a presumption of contributory negligence (s47 of CLA) by [P]. [P] may be able to rebut this presumption of contributory negligence by proving on balance of probabilities, that their intoxication did not contribute to the breach of duty or that the intoxication was not self-induced (s47(3)).

By virtue of s 48 of the Act, [P] is also presumed to be contributory negligent by relying on the intoxicated [D]. Again, this presumption may be rebutted upon proof that intoxication of [D] did not contribute to the breach of duty.

OTHER PRINCIPLES TO BE CONSIDERED:
• CHILDREN – a child will be assessed against the standard of care or a reasonable child of like age and experience (McHale v Watson (1966))

• POLICY – At Common law, the social utility of the defendant's act may be taken into account ex CASE – Chapman v Hearse.

• Imminent danger – Courts will often not hold a plaintiff negligent where the negligence of the defendant had placed the plaintiff in a position of imminent personal danger.

Voluntary assumption of risk – volenti non fit injuria at CL:

• **A COMPLETE DEFENCE**: ***Scanlon v American Cigarette Company (Overseas) Pty Ltd (no3) [1987] VR 289.***

• **Common Law Elements** of the defence:

- P Freely & Voluntarily Accepted the risk; just knowing is not enough
- P Knew the full nature and extent of the scope of the risk;
- P Actually Perceived the risk of danger.

The risk:

- The **risk** which the P took must be **precisely identified**. Is that the risk which materialised and which injured the plaintiff?
- ***Rootes v Shelton (1967) 116 CLR 383***: P had assumed the risk of water skiing, but not risk of hitting something in the water. D failed.

• P must **actually & subjectively** be aware of the risk: ***Scanlon v American Cigarette Company (Overseas) Pty Ltd*** (no3) [1987] VR 289. The test is **NOT** objective.

• Not available for:

- Motor accident cases: *Motor Accidents Compensation Act* 1999 (NSW) s140.
- Work place accident cases: *Workers Compensation Act* 1987 (NSW) s151O.

Obvious risks – often overlaps with volenti so is the same thing

5G CLA Injured persons **presumed** to be **aware** of '**obvious risks**'

- **UNLESS P can prove** on balance pf Probabilities that s/he was **not aware** of the risk: A **rebuttable presumption.**
- S **5F CLA Obvious** risks **defined as "obvious** to the reasonable person in the position of the person" suffering harm.
- So **effect of s. 5G** is to make it **easier** for D **to rely** on **common law defence of *Volenti*** because of presumption that P aware of obvious risk.

- Under **s 5H of the CLA,** the defendant does not owe a duty of care to be proactive and to warn the plaintiff of *an obvious risk*.

- This does not apply if the plaintiff has requested advice or information from the defendant, or where the defendant is required by written law to warn the plaintiff of the risk, or the defendant is providing professional services and the risk is one of death or personal injury to the plaintiff during the service.

New Civil Liability Act defences:

- **5G** Injured persons **presumed to be aware** of '**obvious risks**' defined in s.**5F**
- **5H No proactive duty to warn of obvious risk**
- **5I No liability for materialisation of inherent risk**

5K, 5L No liability for materialisation of Obvious risk of Dangerous Recreational Activity:

The definition of 'dangerous recreational activity' in NSW **s5K** is one involving a 'significant risk of physical harm'.

Fallas v Mourlas (2006); whether hunting kangaroos by spotlight was a "dangerous recreational activity" within s 5K of the NSW CLA,

P was shot by D when they were sitting together in a stationary car while part of the group engaged in kangaroo shooting at night. P had remained in the car to hold the spotlight for other shooters and D, on re-entering the car, negligently discharged his gun when it was apparently jammed. On appeal by the majority of two to on, the defence under 5L failed. The judges were not united in their approaches to the way in which the CLA should be interpreted.

Issue 1: whether P was engaged in a dangerous recreational activity within the meaning of s5L? What does significant mean? What was the activity engaged in by P?

Ipp J:

- the word significant must mean more than trivial.
- However the test is not so high as to mean 'likely to occur'

• Test for determining the scope of an activity must be the 'particular activities engaged in by P at the relevant time.'
• The activity was 'sitting in the vehicle holding the spotlight for the other shooters outside, on the basis that at various times one or more of the shooters might leave or enter the vehicle with firearms that might or might not be loaded.'

Tobias JA:
• Significant means 'a risk which is not merely trivial but, generally speaking, one which has a real chance of materializing.

Issue 2: Whether the risk that caused P's injury was 'obvious.'

Ipp J:

- For the defence to be applicable the 'obvious' risk which injures P need not be one of the 'significant' risks which make the activity dangerous.
- Referred to s5L(3) which provides that a risk may be 'obvious' even though it has a low probability of occurring, so that risk may be 'obvious' without being 'significant'

Tobias J:

- The reasonable person in the circumstances would have recognised a risk that the pistol might still have been loaded and might accidentally be discharged and that, accordingly, the within the s5F definition.

Held: General disagreement of whether the risk of being shot as a result of the negligence of one of the shooters was an 'obvious' risk.

Falvo v Oztag (2006):

FACTS: Mr Falvo seriously injured his right knee while playing a game of Oztag, a form of touch rugby. The game was played on a reserve occupied and controlled by the local council. The reserve was grassed but in some areas the grass had disappeared through wear and tear and the Council had levelled these areas with sand. Mr Falvo ran towards the opposing team's try line he encountered a bare patch, his knee gave way when his foot went into the sand and he collapsed in pain on the ground.

HELD: Court of Appeal said:

- DISMISSED #1 -> "slightly differing levels and sandy patches on sports grounds are part of the practical realities of everyday life to which a legal principal must be applied", and that "it is impractical to require sports grounds to have surfaces that are perfectly level and smooth".
- HELD #2 -> TJ erred in finding Oztag was 'dangerous recreational activity' - a DRA 'can not mean an activity involving every day risks attendant on games such as Oztag which involve a degree of athleticism with no tackling and no risk of being struck by a hard ball
- DISMISSED #3 -> Nature of his injuries indicated they were caused by change of direction at pace, so his own manouvres.

A risk is significant both where potential harm is catastrophic but the risk is low or where the likelihood of the occurrence and the harm are both more than trivial.

5M No duty of care for recreational activity where risk warning:

• A 'risk warning' is a warning given in a manner in which is reasonably likely to result in people being warned of the risk they are assuming before they engage in the recreational activity.

• **s 5M(5)** of CLA states that a risk warning must warn of the general nature of the particular risk. *Need not be specific.*

CASE - Action Paintball Games Pty Ltd (In liquidation) v Barker [2013] NSWCA 128:

Facts: The plaintiff tripped over a tree root and injured herself playing laser tag the warning given by the referee was held to be adequate by the Court. The warning was "there's a lot of sticks and obstacles in the way, so not to run full out, because you might fall over, and hurt yourself".

Held:

- **s 5M(5)** does not require the risk warning to be specific.
- plaintiff was not an *"incapable person"* for the purpose of **s 5M(2)** and that she had the capacity to understand the risk warning provided to her by Action Paintball.
- If there were a duty to warn of the hazard there was no duty to also remove the hazard

Exclusion clauses:

• s 5N of CLA

• A provider may still be liable where they have not complied with safety standards, law or relevant codes.

• Can also be called a waiver.

Inherent risks:

• s 5I of CLA

• An 'inherent risk' is a risk of something occurring which cannot be avoided by the exercise of reasonable care and skill.

• Where an 'inherent risk' materializes, a person will not be liable in negligence for harm suffered by another person as a result of that risk. Ex. Sky diving.

• A defendant may be held liable for failing to warn of an inherent risk.

Illegality:

S 54 CLA

A court is not to award damages in respect of liability... if the court is satisfied that:

(a) the oersonwhose death, injury or damage is the subject of the proceedings was, at the time of the incident that resulted in death, injury or damage, engaged in conduct that (on the balance of probabilities) , and

(b) that conduct contributed materially to the risk of death, injury or damage

CASE – Miller v Miller [2011]:

Facts: the 16 year old plaintiff, who had been drinking, suffered catastrophic injuries when she was one of 9 passengers in a car which she had stolen and which was being driven by her 27 year old uncle. The plaintiff had asked the defendant to let her out twice when he was driving in a dangerous manner, speeding and failing to stop at lights. She also knew that he was intoxicated.
The defendant refused to stop to let the plaintiff out of the car and he eventually lost control of the car which crashed. Struck a pole, and left her tetraplegic.

Held: If a person is complicit in the crime and is injured as a result, it would be inconsistent with statutory purpose to impose a duty of care on one participant in favour of another.

However, when a plaintiff withdraws from the illegal activity, if the damage occurs after the withdrawal, then the plaintiff is no complicit in the illegal joint enterprise and is therefore owed a duty of care by the defendant.

Other defences:

Good Samaritans: *CLA* ss56-58

_____'s intervention "may well" have worsened Mike's injury **(*Kent v Griffiths*)** but ____ is protected by the 'good Samaritan' provisions of the CLA. George comes within the definition – a person who in 'good faith and without expectation of reward' comes to the assistance of a person 'apparently injured': s56. Such a person not incur personal liability for any act/omission when assisting in an emergency: s57(1) even if causation is proved ***(Adeels).***

Does not apply to:

1. Who impersonates a health care, emergency services worker or police officer or falsely represents skills in respect to emergency assistance: s58;

2. Whose intentional or negligent act/omission caused the initial injury or risk
3. Where the ability of the Good Samaritan to exercise reasonable care and skill was significantly impaired by reason of the influence of alcohol or a drug voluntarily consumed AND he or she failed to exercised reasonable care and skill.

Volunteers: *CLA* ss61-66
• There are limits on the exclusion of liability, so a volunteer may be personally liable in the following circumstances:

a) volunteer at the time was engaged in conduct which constitutes an offence

b) the volunteer was intoxicated and failed to exercise due care and skill while doing their work.

c) where the liability was required under a written State law to be insured against.
d) If the volunteer knew, or ought to reasonable have known, that he or she was acting outside of the scope of activities authorized by the community organisation or contrary to instructions.

Food Donors: ***CLA*** s 58 C

Immunity – BUT
The food must be safe to eat at the time it was donated, and donor must be given adequate information about the handling of the food.

CATEGORIES OF DUTY OF CARE:

Unborn child:

• The law does not recognize that an unborn child is owed a duty of care. Any duty to an unborn child crystalises at birth.

• The duty of care owed by the defendant to the now living baby will extend to any injuries suffered before the child has the legal personality given to it by its birth.

- ***Watt v Rama*** **[1972] VR 353** Driver owed a duty of care to unborn child.
- ***Lynch v Lynch*** **(1991)** 25 NSWLR 411mother owes duty to unborn child only with respect to driving - not extended to other lifestyle choices.
- ***X and Y v Pal*** **(1991)** 12 NSWLR 26 Duty of health care professional to woman, her fetus and future unborn children.

Wrongful Birth:

Wrongful birth claims will succeed, wrongful life will not.

- **Claim by Parents** to whom a Duty of Care is owed
- But for D' s negligence the child would not have been born: parents would not have to provide financial support
- ***S70 -72 CLA*** substantially overturns common law as determined in ***Cattanach v Melchoir*** (2003) 215 CLR 1.
- ***S71 (1)*** Prevents recovery in cases of wrongful birth for the cost of raising a child and loss of earning while raising the child.
- ***S71 (2)*** the additional cost of raising a disabled child can be recovered.

Wrongful life:

- **Claim by Child** who asserts he/she is owed a duty of care by parents' health care professionals whose negligence allowed P to be born.

- *McKay v Essex Area Authority* [1982] QB 1166 No duty to child re advice to mother of appropriateness of abortion.
- *Bannerman v Mills* (1991) Aust Torts Reps 81-079 (NSW Sup Ct, Master Greenwood) Followed *Mckay*
- *Harriton V Stephens* (2002) NSWSC 461(Studdert J)
- No duty for wrongful life:
- Sanctity of life – devaluing their life
- Self esteem of people with disabilities
- Exposure of parents to liability
- Impossibility of assessing damages – can't compare damages associated with their life to non-existence.

CASE - ***Harriton v Stephens* (2004)59 NSWLR 694**
(NSW Court of Appeal)
No duty for wrongful life

- Majority (Spigelman CJ & Ipp JA) confirmed the decision of Studdert J at first instance finding no duty.
- Impossibility of comparing non-existence with a disabled existence.
- Mason J in dissent:

-no real difference between wrongful birth and wrongful life cases.
-Children born alive because of D's neg and in this sense the D caused the suffering of the P.
- Impossible to compare a life with disabilities with non-existence: therefore no damage recognizable by law

Product liability/Manufacturers duty to consumers:

• Product liability refers to the remedies available to individuals who are injured by defective products or who otherwise **suffer loss or damage** caused by defective products.

• 3 main sources of law for PL:

- Claim in negligence against manufacturer of defective product:
  o ***Donoghue; Grant v Australian Knitting Mills (1935)***
- Person purchases product, common law contract created
  o Claim for breach of contract against supplier of defective product
- Statutory causes of action- *Competition and Consumer Act (Cth)* (2010).
  o New cause of action, does not replace CL

Grant v Australian Knitting Mills (1935):

Dr Gant bought underwear from a retail shop in Adelaide. The underwear had been manufactured and supplied to the retail shop by Australian Knitting Mills. As a result of wearing the underwear, Dr Grant was hospitalized after developing an acute rash. His illness was severe. He sued both the retail shop and Australian Knitting Mills – succeeding against the former in contract and the latter in negligence.

The Privy Council held the retailers liable in contract for an implied breach of the conditions of the terms of sale and held the manufacturers liable in negligence for the failure to take reasonable care in the manufacture of the product.

• Can also refer to atypical plaintiffs here, which is mentioned under established categories of breach under **BREACH.**

5. Mental Harm

Pure mental harm

- Defined as mental harm other than consequential mental harm: **s 27**

For ____ to succeed in an action for pure mental harm, the following must be established:

Element 1. recognised psychiatric illness - s31

- The condition must be recognisable (under statute, CLA s 31)
- Bob's condition was not mere 'grief and sorrow'. It was a 'catatonic state', a rec psychiatric illness (under DSMV). Thus this condition is satisfied

Element 2. Reasonable foreseeability – s32(1)

- The requirement under CLA S32(1) is that D must have reasonably foreseeable that a person of normal fortitude in the P's position would suffer mental harm (Also in Tame, Annetts)
    - No definitive test for 'normal fortitude' however recommendations of community standards
    - Court may take into account whether 'D knew or ought to have known about fortitude of the P': s32(4)
- The relevant circumstances in determining this are in s32(2), although none of these factors by themselves will be decisive. HC interpretation of s32(2) 'being' injured can take place over an extended period of time and it must be understood against the background provided by CL of negligence: *Wicks v State Rail Authority of NSW* (2010). Thus reference made to cases to assist.
    - Whether mental harm from sudden shock
        - *Tame and Annetts* HC rejected notion harm must be 'sudden shock' → tho decisive consideration
        - Did not witness accident, but witnessed Sam while he was still trapped and in danger (sufficient: *Wicks*)
    - Whether P witnessed, **at the scene** a person being killed, injured, or put in peril.
    - Nature of relationship btwn P and person injured/put in peril
        - *Mount Isa Mines* – P employed by D and was rescuer to V
        - *Annetts* – D was employer of the teenage victim who had given assurances to P's parents
        - *Jaensh v Coffey* – P was wife of V
    - Whether there was pre-existing relationship btwn P and D
        - *Rowe v McCartney 1976* – P suffered psychiatric illness after friend gravely injured in a car accident, he was solely to blame. P was passenger, and it was her car. Her illness developed from feelings of guilt surrounding the accident and recovery was denied. The court said that the type of mental illness that would have been reasonably foreseeable was one arising from nervous shock from seeing or hearing about the injury or another or shock or worry about her own injury.

        - although a pre-existing relationship with ASE is not so clear, Joe was intending to climb and would have used an ASE harness and so the manufacturer/consumer relationship may be enough.
- Here _____. The court will find any person of normal fortitude will / will not suffer from a recognised psy illness after such an event.

Element 3. Limitation on recovery arising from shock

- NSW limit shock to either close family members or witnesses: s30(2)(5)
- S30(2)(a) is satisfied, as the P witnessed, at the scene, the V being killed, injured or imperilled
    - Requires present at scene of accident. Changed from CL, can no longer recover where witnessed immediate aftermath of accident if not fam member
    - Assuming aftermath was time he remained trapped, it satisfied s30(2)(a) (*Wicks*)
- S30(2)(b) satisfied, as D is a _____ and is thus a close family member as defined by s30(5)
    - defines close member as: parent/other person with parental responsibility; spouse or partner; child or stepchild of V; a bro/sis, half-bro/sis, step-bro/sis
    - In NSW, rescuers attending the scene after an accident has occurred would be excluded unless they happened to be related to one of the Vs: *Sheehan v SRA 2009*
- It should also be noted any CN by Sam would also reduce Jane's dmgs (s30(3)).
- However, this will be contingent on earlier conclusion. If Don's guilty of contrib neg, Bob's dmgs will be reduced in the same proportion (s30(3)) and if Don's action defeated by s50 (intox) or s54 (illegality) → **S30(3)**(4) or 3rd party defences means damages reduced for contributory negligence of primary victim.
    - In NSW, defence which would defeat 3rd party's claim will also defeat P's claim for shock. P's damages reduced to reflect any contributory negligence by third party. Confined to shock cases
- Further Notes
    - Psychiatric injury resulting from 'shock' where someone other than the P or D has been injured, killed or endangered.
    - P's own shock-induced illness resulting from fear for his own safety within CL duty: *Dulieu v White 1901*
    - 'peril' seem to require some element of imminence, as well as something more than mere risk of minor injury. May also require that harm be possible.

Conclusion

- ASE would probably owe Joe a duty of care in relation to his pure mental harm – overall the facts appear a lot closer to *Annetts* than *Tame*.

Breach

Breach of duty is same as discussed for ___ above.

And 'but for' causation (s5D(1)(a)) is given by the facts – '_____as a result of seeing and being involved in_____'

S 33 Liability for economic loss for consequential mental harm:

• Consequential mental harm is a mental injury that results out of a physical injury.

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.

The legislation imposes a double requirement on plaintiffs who suffer consequential psychiatric injury.

a) damages for economic loss resulting from the negligent infliction of mental harm should be awarded only in respect of recognized psychiatric illness, even if the mental harm is consequential on physical injury.
b) Such damages should be recoverable only if the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognized psychiatric illness if reasonable care was not taken.

The primary victims contributory negligence reduces the secondary victim's damages in the same proportion as that of the primary victim.

Occupier's Liability:

In general, the occupier of premises owes a duty of care to persons who come onto the premises. While it developed as a separate category of tort law, it is now considered under the general principles of negligence. A

CASE -
Australian Safeway Stores Pty Ltd v Zaluzna (1987)
Plaintiff [Zaluzna, respondent] went into the Defendant's store [Australia Safeway, appellant]. It was raining outside so the foyer was wet and the defender slipped and injured himself. The Plaintiff sued for negligence.

Held: An occupier's liability towards entrants is governed by the principle of the ordinary common law duty to take care. The fact that the respondent was a lawful entrant upon the land of the appellant establishes a relationship with 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.

It was reasonably foreseeable that an entrant coming from outside on a rainy day can slip if the foyer does not have any preventative measure there to keep entrant from slipping.

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000):

This case determined when an occupier of premises may be liable in negligence to a person who is injured, whilst on the premises, by the deliberate wrong doing of a third party.

The plaintiff, an employee of a video store, was attacked while walking to his car in the shopping centre where he worked after the store closed.

Held: The duty of care owed by the shopping centre to lawful entrants did not extend to taking positive steps to control the acts of criminals.

***Strong v Woolworths* Limited [2012] HCA 5**

Facts: Mrs Strong was an amputee who used crutches to assist her in walking. As she was shopping at Woolworths, one of her crutches slipped on a hot chip causing her to fall and sustain injury.

HC Held: Woolworths was responsible for the injuries of a customer who slipped on a hot chip. The failure of Woolworths to adopt a system of inspection and cleaning was a necessary condition that caused the appellant's harm.

Employers Duty to Employees:

• An employer owes a **non-delegable DOC** to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of injury then the employer must devise a method of operation to eliminate the risk *(Kondis v STA).*

• *I.e.* ***a safe system of work.*** ***McLean v Tedman* (1984)**

• If you can get workers comp, you can only bring an action in common law damages if your injury is more than 15%.

Hamilton v Nuroof (WA) Pty Ltd (1956)

Facts: Labourer hired to help cover the roof of 6th floor building with bitumen. The 6th floor was stepped back from the 5th and instead of pulling buckets of bitumen up with rope (case says perhaps to prevent dirtying the walls) they were passed up by hand. The hot bitumen went in his face and he flicked away and the rest came down on him.

The Calculus: Dixon CJ and Kitto J:

• It has been said that a reasonable and prudent employer is

- bound to take into consideration the degree of injury likely to result;
- bound to take into consideration the degree of risk of an accident;
- entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures...
- On the facts of the present case it may fairly be said that
- the degree of injury likely to result would be grave;
- the degree of risk of an accident was real and not fanciful or inconsiderable;
- there was no degree of risk to any person in taking precautionary measures and the degree of risk of defacing the wall was not great and could be met completely by the exercise of ordinary care

***McLean v Tedman* (1984)**

• Garbage collecting case

• In such a situation it is not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard of care expected of the reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others. [8]

• ***The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system.*** Accident prevention is unquestionably one of the modern responsibilities of an employer

***Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44**

P complained repeatedly about her work conditions. She suggested either extra time or giving the stores to other employees. Employer did not listen. She went to the doctor because she was not able to lift products any more and the doctor diagnosed her with a psychological disorder and was referred to a psychiatrist. She sustained a recognised psychiatric illness as a result of her work.

Held: McHugh, Gummow, Hayne and Heydon JJ: In this case, it was not found to be reasonably foreseeable that the employer should have foreseen a psychiatric illness.

WORKERS COMPENSATION

- The basis of the workers comp legislation is to provide that an employee is entitled to receive **statutory compensation in respect of any injury or illness arising 'out of or in the course of the employment.'**
- *See Zuijs v Wirth Bros, Stevens v Brodribb, Hollis v Vabu for tests on employment.*
- Entitlement depends not on establishing that the employer is at fault, but rather on **establishing that the injury or illness is connected to the employment.**
- *Fault in as irrelevant concept.*
- Employers are required to carry workers comp insurance.
- In addition to common law but the legislation restricts damages available at common law: **workers compensation act 1987 (NSW) ss 151E – 151T.**
- Damages may be awarded only for past loss of income and loss of earning capacity (s 151G) with a ceiling on the maximum amount recoverable. No other heads of damage are allowed.
- There is a threshold requirement that the plaintiff be at least 15% permanently impaired (s151H) with the degree of impairment to be established by medical assessment (s151H(4)).

CHPT 17 - PURE ECONOMIC LOSS; NEGLIGENT MISTATEMENT:

- 'PURE ECONOMIC LOSS': SOLELY FINANCIAL OR ECONOMIC HARM – P has suffered NO PHYSICAL INJURY TO PERSON OR PROPERTY.

Distinguished from:

- 'CONSEQUENTIAL ECONOMIC LOSS' – where plaintiff suffers injury TO PERSON OR PROPERTY and the economic loss claimed resulted from that harm eg: loss of income

17.2 – Pure economic loss:

• A claim for pure economic loss arises where the plaintiff has suffered economic loss *which is not consequent upon any physical injury to person or property.* ONLY ECONOMIC.

17.2.1 – The 'economic torts':

• There is an important distinction to be drawn between intentional conduct causing economic loss and negligent conduct or words causing economic loss. In the case of intentional conduct causing pure economic loss, the proper remedy lies in 'economic torts', such as passing-off, deceit, injurious falsehood etc.

• In the case of negligence causing economic loss, the courts say that reasonable foreseeability is not enough in imposing a duty of care. There must be some limits on this.

17.3 – Policy:

• The most often cited policy considerations in these cases is the fear of 'indeterminate liability'.

17.3.3 – No liability in tort or for otherwise lawful commercial activity:

• As long as such practices are within legal bounds, the courts have opined that the law of tort should not interfere to make unlawful what would otherwise be lawful commercial activity.

•This particular immunity from liability protects the common law concerns with the autonomy of the individual and its desire to give effect to the choices of the individual by not burdening his or her freedom of action.

Pure Economic Loss:

Pure economic loss may arise in 2 ways:

1. **Through a negligent mis-statement (*Hedley Byrne)***
2. **As a result of a negligent act or omission**

• The courts have drawn a distinction between cases where pure economic loss is caused by a negligent statement and those where the economic loss is caused by a negligent act.

Negligent Misstatements:

- ***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** (1964 HL obiter) opened door to recovery in negligence in limited circumstances.

Must establish salient features of Duty of care for negligent misstatement

- 'special skill of D'
- Reasonable reliance
- D must know (or reasonably ought to know) that P will rely on advice

Element 1 - Special Skill of the Defendant:

• is not a pre-requisite for DoC. It is not *essential* that D is *in the business* of giving advice: *MLC v Evatt* (1969) 122 CLR 556

• It is D's "*willingness to proffer the information or advice*" which is relevant (*MLC v Evatt* per Barwick CJ at 573-4)

***MLC v Evatt* (1969) 122 CLR 556:**
FACTS: P was policy holder with D insurance company. Sought info and advice regarding investment, they were told it was good investment, as a result of assurance, P kept shares + purchased more. HG Palmer liquidation and P lost investment. Claimed MLC breached duty.

• Barwick CJs approach confirmed in *Shaddock v Parramatta City Council* (1981) 150 CLR 225

- **FACTS**: Council failed to disclose that property subject to road widening plans when it was subject to. Ps claimed financial loss.
- The council owed a duty of care to the plaintiffs to take reasonable care in the giving of information -> **not prerequisite to DoC that D be 'in the business'** of giving info or advice.

Note: The HC stated in this case that while it was reasonable for the plaintiff to rely on the certificate issued by the council which did not disclose any road widening proposal, *it would not have been reasonable to rely on advice which was given over the phone to the plaintiffs solicitor by an unidentified council employee because of the informality of such oral advice.*

Element 2 – Reasonable reliance:

- Plaintiff **must show** that it was **reasonable** to rely on the advice in all the circumstances (*MLC v Evatt*)
- Reasonable reliance by the P on the information provided by the D

• Factors going to reasonable reliance include:

- Nature of subject matter
- Occasion of the interchange
- Identity and relevant positions of parties & capacity to exercise judgment.
- P's access to other expert advice (vulnerability?)

CASE - Shaddock v Parramatta CC (1981) 150 CLR 225:

- Same issues apply to giving of advice **or** information
- Reasonable reliance by P. is crucial.
- P requested info & **D knew Pl would rely** on info **and for what purpose they were asking for/relying on info.**
- D was **only person in possession of info**.
- **Circumstances** in which info given relevant to reasonable reliance.

Held: it was reasonable reliance to rely on council certificate, but not reasonable to rely on advice given over the phone by an unidentified council employee because of informality of such oral advice.

CASE - Tepko v Water Board 2001:

- Unreasonable to rely on estimate. **The figure given was at best 'a ballpark' figure, that had been provided reluctantly, and only after much pressure by the plaintiffs.** The plaintiffs also had access to other expert advice and the Bank was unaware that the figure was required for the plaintiffs bank.

Element 3 - D must know (or is ought to have known) that P would rely on info:

• The courts will not impose a duty of care in circumstances where the defendant does not know or could not have known that the plaintiff would receive and rely on the information and advice given.

CASE - *San Sebastian v The Minister* (1986) 162 CLR 340:

- P did not request info from D.
- D did not know P would rely on info – was public info.
- D did not make the statement with the intention of inducing the P to rely and act on info.

For a duty of care to arise, the defendant must have known or ought to have known that the plaintiff would rely on the advice. The defendant must have made the statement with the intention of inducing the plaintiff to rely on it.

CASE - ***Esanda Finance v Peat Marwick Hungerfords*** (1997) 188 CLR 241:
The plaintiff loaned funds to a company Excel, in reliance on a report prepared by a finance company, Peat Marwick Hungerfords. The borrower defaulted on the loan.

Essanda claimed that it had acted on reliance of audited accounts which breached mandatory accounting standards in relation to preparing the accounts.

- P did not request info from D.
- D did not know that P would receive or rely on info for a purpose that would be likely to lead P into a transaction .
- **In absence of a request for info from P, D must intend to induce P to rely on info or know it was likely to lead P into a transaction, unless other factors are present (intention to induce not essential for duty)**
- Purpose for which info prepared/given out relevant – here auditor's report was prepared to comply with regulatory regime.
- Policy considerations, including cost of services, the need to avoid personal responsibility etc. – McHugh J.

Breach:

- Facts support the argument that D failed to take reasonable care in giving the information and advice. The P suffered dmg as a consequence of the negligent misstatement.
- The dmg was the exact kind of dmg that might reasonably have been expected to result – a 'difference to the share price'

Causation:

• P must prove the negligent act caused the economic loss caused the economic loss.

o Although [defendant] is liable for the damage which flows directly from his misstatement, *plaintiff's+ damages are limited to that which is reasonably foreseeable (*South Australia v Johnson*)

Statute for negligent misstatements causing PEL:

- *Australian Consumer Law*, s 18 -'misleading or deceptive conduct' Statutory remedy. Person who suffers loss has remedy in dmgs puersuant to legislation
- *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA *(ACL* does not apply to financial services)
- *Professional Standards Act 1987* (NSW);
- ***Civil Liability Act 2002*** **(NSW) – Pt 4 Proportionate liability**

Other considerations: Disclaimer: Generally a duty of care will not arise where the defendant disclaims responsibility for the accuracy of the information given to the plaintiff. ***(Hedley v Byrne; Tepko)*** However, will not be effective where the circumstances are such that it is reasonable for the plaintiff to rely upon the defendant's advice. Sometimes courts say unfair discl -> unsuccesful

Indeterminacy: It is a one on one conversation so therefore there is indeterminacy. Person breaks down on the bridge.

Negligent Acts:

- Australia – High Court recognised duty in:

Caltex Oil (Australia) Pty Ltd v the Dredge 'Willemstad' (1976) 136 CLR 529

Held: The defendant owed a duty of care to Caltex to avoid causing it pure economic loss.

The fact that the loss was foreseeable is not enough to make it recoverable. Presumption against damages for non-consequential economic loss. ***However, there are exceptional cases in which the defendant has the knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take*** care ***not to cause him such damage by his negligent act.***

Duty of care: McHugh's indicia in ***Perre v Apand*** are used to identify DoC.

a) reasonable foreseeability of loss
b) indeterminacy of liability – ascertained class, in other words could you foresee that just certain people will be affected not on everyone
c) commercial burden – if its going to place a commercial burden then there would be no duty of care.
d) autonomy of the individual (law should not interfere)
e) vulnerability of the plaintiff to risk – they are vulnerable if they are not able to protect themselves from the risk
f) knowledge of the defendant of the risk and its magnitude
g) control and reasonable reliance

• **These salient features are considered in novel cases.**

Perre v Apand:

Facts: Ps were several related parties who owned potato farms in South Australia, and grew, washed and packed potatoes. The P sold their potato crops into WA, as did many of the SA producers.

D was a large manufacturer of potato crisps and supplied experimental potato seed to one of its growers who had a farm in the vicinity of the plaintiff's farm. Some of the seed supplied by the defendant to the plaintiff's neighbour's was diseased. WA regulations prohibited the import into that state of potatoes grown or processed within a 20 km radius of an outbreak of the disease. As a result, the Ps were unable to sell their crops for at least 5 years into WA which was a more lucrative market than others available.
The P's crop was not affected but they suffered economic loss as a result of being unable to export their crop to WA. The Ps claimed that D owed them a duty of care to avoid this economic loss.

Held (High Court): A duty of care was imposed on the defendants. The decision heralded a new approach to the duty of care question, **adopting what came to be known as the 'salient features' approach.**

COURT REASONING:

CJ Gleeson, J Gummow (combination of factors and incrementalism)
***knowledge*:** Apands had knowledge of existence of potato growers and there's a need to take care when supplying seeds and consequents of potential diseased outbreak and harm eventuating to P.
Vulnerability of P not in a position to protect themselves, since the WA regulation prevented them from exporting.
Control of Apands had control of the risk so should assume responsibility.

J Goudron (recognised legal rights)
Where D is in a position to control another's exercise or enjoyment of legal rights, they can come under a duty of care. P is dependant on D's position of power and duty to avoid negligently impairing or destroying such rights [616]

J McHugh (incremental approach)
***Reasonably foreseeable*:** harm negligently inflicted was RF consequence of D's conduct.
***Indeterminacy of liability*:** D ought to have known P. Perres were an ascertainable class. If otherwise no duty owed, or it would mean a 'ripple effect' [202] of a chain of parties.
Burden on commercial activity: doesn't unreasonably interfere with the Apand's commercial freedom.
Vulnerability of P: subject to D's control, the P not in position to protect themselves [204].
Knowledge: did D know conduct would cause a loss to P. Apands ought to know of potato growers within a 20km radius of the affected area as well as the WA regulations preventing exports.

Reasonable foreseeability

- Reasonable foreseeability – Ps are members of an 'ascertained class'. This can be a large class and nevertheless still be 'ascertained'.
- *Perre v Apand 1999* – diseased potato seed. WA regulations prohibited import of potatoes grown close to outbreak. Ps unable to sell crops 5 yrs. Economic loss as unable to export crop to WA.

Knowledge

- Defendant has specific knowledge of P
- Apand knew risk to growers of potatoes and owners of land and consequence for supplying uncertified seed.

Indeterminacy of liability

- Policy considerations – indeterminate liability – must not make otherwise legitimate commercial activities tortious
- NO INDETERMINANCY, Licence holders as ascertainable class (*Perre, Johnson Tiles*)

Vulnerability of P

- Vulnerability of P - Ps vulnerable as couldn't have done anything to

protect themselves from D's ___ want of reasonable care.
- In this context, vulnerability to risk means not that the plaintiff was exposed to risk but that by reason of ignorance or social, political or economic constraints, the plaintiff was not able to protect him or herself from the risk of injury." at *80+. McHugh

Autonomy

- Must allow autonomy of individual to pursue legitimate commercial interests

Control

Reliance by P and assumption of responsibility by D are indicators of P's vulnerability

- *Hill v Van Erp* – duty imposed bcos solicitor in accepting instructions to draw and supervise the execution of the will, had assumed responsibility to her client and to the intended beneficiary
- P relied on D and D assumed responsibility: *Perre*

Liability for faulty nature of structure – characterised as "purely economic loss"

- ***Bryan v Maloney* (1995)** – duty of care owed by builder of residential premises to subsequent purchasers (decided on proximity principles but 'salient features' still applicable: vulnerability & reliance & policy factors);

- ***Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004)** –

Commercial building designed by CDG. The plaintiff Woolcock subsequently purchased the premises. It then became apparent that the building was suffering substantial structural distress as a result of settlement of the foundations, requiring steps to be taken to prevent damage to property or person. Woolcock alleged that CDG and its employee owed to Woolcock and had breached, a duty to take reasonable care in designing the foundations.

Held:no duty owed by engineers of commercial premises (P not vulnerable);

And then to finish of negligence claim:

Causation: P must prove misstatement/act caused economic loss.

Breach (not an issue):

- Assuming DoC owed, must be estb. that breach. Reasonable builder would have taken care to construct adequate foundations.

Remoteness : Damages limited to what is reasonably foreseeable.

Damages:

Pt 4 CLA – Proportionate Liability: Pt 4 CLA determines that pure economic loss actions are subject to proportionate liability. Therefore [plaintiff] may only recover from *defendant's+ the proportion of total damages for which [defendant] is responsible.

CHPT 18 – STATUTORY AUTHORITIES:

Statutory Authorities and Negligence:

For a statutory authority to be liable on the tort of negligence all the usual elements of the tort must be made out: **duty of care, breach of duty, causation and remoteness.** The purpose of the statute creating the power/duty must also be examined.

LOOK AT CLA: Part 5 - applied in determining whether a public or other authority has a duty of care or has a duty of care or has breached a duty of care in proceedings for civil liability.

S- 42- Principles concerning resources, responsibilities etc of public or other authorities - does the authority have a duty of care or not

S-43 Proceedings against public or other authorities based on breach of statutory duty – inserted into the CLA following the Presland case

S-44 When public or other authority not liable for failure to exercise regulatory functions – *not so important*

45 Special non-feasance protection for roads authorities

S-46 Exercise of function or decision to exercise does not create duty

Policy

• Performing functions within limited budgetary resources often requires making difficult policy choices and discretionary judgments

• Reluctance of courts to impose affirmative CL duty upon a SA is due to difficulty of balancing nature of a public authority against the reality of its powers.

• On one hand, nature of SA is to promote the public good. So, local council governs in the best interests of a local area and road authority ensures roads operate for greater public good

• On other hand, this objective of statutory authorities to promote public good is limited by the reality that such authorities operate within limited budgets and are often given wide statutory discretion as to how they choose to perform their

statutory functions within such budgets. (Gaudron J in *Crimmins*)

Allocation of resources arises when injured P claims injury suffered would have been prevented by SA making area that were injured safer ->*Romeo*

Establishing a Duty of Care at Common Law:

There are two possible aspects of the duty of care of a statutory authority:

1. Where Authority exercises an authorised statutory power negligently
2. Where Authority fails to exercise an authorised statutory power at all.

- There is no single common law test to establish duty of care in novel situations **(*Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; *Amaca Pty Ltd v NSW* (2004)).**
- This is the case with respect to establishing when a statutory authority has a positive duty to act (see ***Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330).**

Distinguish between nonfeasance and misfeasance:

• Foreseeability of harm is not enough to establish a duty of care in non-feasance cases.

"**Generally speaking**, a public authority which is under no statutory obligation to exercise a power comes under **no common law duty** to do so … **But** an authority **may by its conduct** place itself in such a position that it **attracts a duty of care** which calls **for exercise of the power**." Per Mason J at [23].

Graham Barclay Oysters v Ryan (2002):

People ate oysters grown in the polluted lake. Oysters had sucked up the fecal matter from the lake and had Hepatitis A viruses. In them which these people contracted when they consumed the contaminated product. The plaintiffs sued both the growers and the distributers (Barclay companies), the state government and the local government claiming that both statutory bodies should have done more to protect consumers given they had the power to remedy pollution problems under The Local Government Act 1993.

Held: The private company (Barclay) was found liable, as a manufacturer owes a duty to its consumers (Donoghue v Stevenson) but no duty was owed by statutory authorities because of the way they managed the contamination, as this was a 'policy decision'. **The Council had little control over the contamination.**

o Gummow and Hayne: **A legislative grant of power is not the same thing as a duty of care.**

(INCRIMENTAL APPROACH) McHugh J in this case and in ***Crimmins*** (see below) **set out a list of matters which the court must take into account to determine whether a public authority has a duty of care.** McHugh J suggested that **if the first four were satisfied, and the last two were answered in the negative,** the court would hold that a duty of care existed.

Incremental approach: (use at the beginning of all cases to establish a duty of care)

SATISFY THESE 4:

1. Was it reasonably forseeable from the perspective of the public authority that its acts/ omissions might result in injury to the plaintiff or his/her interests?

2. Was the authority in a position to control the situation which brought about the harm?

3. Was the injured person vulnerable?

4. Did the authority know or ought to have known of an existing risk of harm to the plaintiff or the class of person who included the plaintiff? (Knowledge)

ANSWER THESE 2 IN THE NEGATIVE:

5. Would the imposition of a duty of care impose a liability with respect to the defendant's core policy-making or quasi-making or quais-legilsative function ? In other words would a duty of care limit their ability to legislate.

6. Is there any policy reason which denies a duty of care?

- Another method of developing a duty is by establishing reliance (although many judges have criticized this). So it is good to also establish reliance as well as these 6 points when determining if there is a DOC.

WHEN A DUTY BECOMES OPERATIONAL:

Pyranees Shire Council v Day (1998):

Facts: Fire damaged fish/chip shop chimney. Council wrote to tenants asking them to fix and warning not to light fire until fixed. Tenants assigned lease to new tenant and did not pass on warning fire spread and damaged shop and other shop.

HC: D liable. They had failed to act in 2 ways:

1. council failed to notify the owners of the adjoining property of the risk of the fire hazard (they sent notice only to prev tenants)

2. council failed to exercise its quite extensive statutory powers to ensure that notice, once issued to the tenants was complied with. Eg. Penalties.

• SO, if statute doesn't confer a duty, the common law will generally not impose such a duty. **S 44** .However the conduct of defendant (e.g starting to do something and not following up on it) might attract as duty, as in this case. In such a case, the statute (Local Government Act) facilitated the existence of a common law duty.

The power is discretionary until it is put into action, that's when it becomes operational and becomes a duty.

The Road Authority: *CLA* s 45:

provides **complete defence** for non-feasance *(***except** where authority **actually aware** of particular risk see: *North Sydney Council v Roman* (2007) 69 NSWLR 240*)*

A finding of actual knowledge does not by itself establish a duty of care or a breach of that duty. Actual knowledge is a necessary but not the only condition required in establishing liability.

A plaintiff must prove:

1) Actual knowledge of the risk by the authority.
2) That the authority negligently failed to exercise its functions or exercised its functions negligently.

North Sydney Council v Roman (2007)

Facts: Roman was injured at night when she fell into a large pothole. She sued North Sydney Council alleging they were negligent in failing to maintain the road by repairing the pothole, claiming economic and non-economic loss for the ongoing pain and impact of the resulting injury to her foot. Street sweepers regularly swept the gutters in the street near the hole and were instructed at induction to identify hazards and report them to their supervisor.

Held: The actual knowledge of the council street sweepers of the need to repair the pothole did not render the council aware of the particular risk. The street sweepers did not have the responsibility of carrying out or authorizing those repairs.

Evidence demonstrated no officer at a decision making level had 'actual knowledge' of the particular pothole, followed that council did not have such knowledge so exception to s52(1) was not engaged and statutory immunity prevailed.

A connection must be made btwn the person with actual knowledge of the particular risk and the person able to, but who failed to, carry out the roadwork which would have avoided the harm

OMMISSIONS:

• The general rule is that in cases of pure omission (e.g where the plaintiff is placed in danger by an event unconnected to the defendant), the common law will impose no duty of care. Similarly, there is no general duty to control the actions of third parties (Smith v Leurs). There are exceptions to these presumptions.

• Generally, a defendant does not owe a duty to take positive steps to protect a potential plaintiff from a risk of injury (**no duty to rescue**): c.f. *Lowns v Woods (Dr's failure to attend in an emergency)* (1996)

• Generally **no duty to protect persons from themselves**: personal autonomy - *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215

Here are some of the exceptions – positive duties to act:

1. Landowners and escape of fire:

• Occupiers have positive duty to remove hazards to adjoining land.

CASE - ***Hargrave v Goldman (1963); Goldman v Hargrave [1967]***

Grazing property. Following an electrical storm, a tall tree was struck by lightning and caught fire close to the boundary of Goldman's (defendants) property. Goldman doused the surrounding area with water to prevent the fire escaping and engaged a tree feller to cut the tree down. Two days later, the fire escaped from the stump and caused damage to Hargraves property.

Held (High Court): Found for the plaintiff Hargrave. To have owed a duty of care the defendant must have knowledge of the danger, the consequence must have been foreseeable and they must have been able to abate the consequence.

On appeal (Privy Council): Appeal dismissed. Landowners owe a **positive duty** to act to contain hazards occurring on their land whether natural or manmade. Even if you did not create the hazard, but its on ur property. You owe a duty to stop it from going next-door. If you do nothin' at all.

2. Duty to control children:

• Schools/Teachers owe duty in some circumstances to control children's behaviour: *Geyer v Downs* (1977)

CASE - *Geyer v Downs* (1977:

School says we don't start till 9. Student gets hit by a softball bat by a fellow pupil at 8:50. There was no supervision. Generally, schools opens gate for 8:15. Once on premises, they are your problem. Argued teacher's responsibilities only started when school day begun. Headmaster cannot require teachers to supervise other than from 9 to 3:30pm. Instead, responsibility begins when student is on your premises.

• Parents **may not owe a duty to their own children** to protect them from

injury: *Roberston v Swincer* (1989)

• Parents may **owe a duty to third parties to control children**: *Smith v Leurs* (1945)

CASE - Robertson v Swincer (1989):

P was crossing street. Ran back to say bye to parents. Hit by car. Sued on contributory negligence. Owe a duty of care to child, failed in that duty.

Held**: A parent owes his/her child a duty of care regarding any positive act she performs. However, the duty does not extend to omissions, even if the failure to act leads to the child sustaining injury.** The rationale behind this is that any duty of care in respect to failing to take action is unrealistic and demanding on parents, and lacking in clarity in terms of what constitutes appropriate parenting. It was found that you cannot expect a parent to control the action of their child for 24 hours a day, realistically.

3. Duty to Protect:

• Occupiers duty of care does not extend to random criminal acts of third parties*:Modbury*

CASE - Modbury Triangle Shopping Centre v Anzil (2000).

Plaintiff was an employee in video shop who was attacked while walking to his car in the shopping centre where he worked after the store closed.

Held: The duty of care owed by the shopping centre did not extend to taking positive steps to control the acts of criminals.

Gleeson CJ: **The general rule is that there is no duty to prevent a third party from harming another...the common law does not ordinarily impose liability for omissions.**

• **Police** will not owe a duty of care to individual members of the public in failing to apprehend a dangerous criminal during the course of their investigation: ***Hill v Chief***

CASE - ***Hill v Chief Constable of West Yorkshire [1989]***

Held: Police investigating a crime do not owe a duty of care to individual members of the public in respect of their failure to apprehend a dangerous criminal. The decision in favour of the police was based on lack of proximity between the parties and also on policy grounds.

No Duty to Rescue:

• The presumption is that there is no general legal duty to go to the aid of another in distress/peril. However, additional factors may result in the finding of a duty of care.

CASE - ***Lowns v Woods (1996):***

The defendant was a doctor who refused to attend to a boy who was suffering from an epileptic fit. The boy was not and had never been the doctor's patient.

Held (NSW Court of Appeal): The doctor was under a positive duty to act and was liable in damages. Medical emergency. Relates to nature of medical practitioner's act itself, special knowledge – in the circumstances a reasonable person would apply knowledge. He was under the oath, duty to act. Even though there is no statutory requirement by Medical Regulation Act and it could be an unfair burden.

The Dr knew, that consequences would be dire. Aware that his failure to attend could expose Patrick to further injury. He was GP, could have done it.

J Mahoney said - the real reason was bc there was a professional/moral obligation to attend to a child.

4. Protection for Good Samaritans:

Part 8 CLA

6. • Will **not incur personal liability** for any act or omission which occurs when they are **assisting** in an emergency: s 57 (1). A good samaritan does not incur any personal civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured.

• At CL, no obligation to help them, but if u did, u owed them a duty of care to do it properly. Could be sued for assisting to help. CLA reduces the scope for which you can bring against a Good Samaritan.

A Good Samaritans employer will not be protected where vicarious liability for their conduct operates (i.e off duty ambulance officer may be the responsibility of their employer if acting in the course of their employment): s57 (2).

CHPT 20 – Vicarious Liability and Non Delegable Duties:

Basic rule in the tort of negligence is that no person shall be liable for another's wrongful acts unless:

Vicarious liability:

1. **Non-Delegable duty:**

- Common law and *Civil Liability Act* applies.

20.2 - Vicarious Liability:

• Vicarious liability is a form of **strict liability, whereas delegated duty is not**. It arises because of the **relationship** between a **person** and a **tortfeasor.** The burden of proof for VL lies with the P.

• At common law there are two principles areas where vicarious liability arises:

1. Employee/employer
2. Principle/agent.

• In order to vicarious liability to arise, plaintiff must prove:

1) A relationship of employment or agency between D and the wrongdoer.
2) A tort committed.
3) A tort must occur during the course of the relationship.

CLA s3C

any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.'

Employer and Employee:

- **An employer is vicariously liable for the torts, including negligence, of an employee committed during the course of their employment.**

• ***This is a two-step process – the worker must be:***

(1) an employee; and
(2) ***they must be injured or must been subject to a tort acting in the course of employment, must be associated to their employment.***

To achieve vicarious liability [defendant] must be an employee – not a contractor and must be acting in the course of employment. In an exam question, if it refers to somebody as an employee and no other facts are given, just take it on the facts.

Element 1) Employee:

• Whether there is an employment contract or not is up to the court to determine, and the court will not take into account the description used by the people in the relationship.
• Courts will look at factors surrounding the relationship to determine it.

• An 'Independent contractor' is not employer/employee. **No vicarious liability.**

To determine the legal nature of the relationship courts utilise a number of tests. These include:

- the description of the nature of the relationship in a written or formal

contract
- whether tools are supplied or maintained by an 'employer'
- if they are independent contractor or not
- who is control of who
- whether a normal wage is paid, as opposed to commission, retainer, etc (for independent contractors)
- what forms of tax are paid and by whom they are paid

No single test will be sufficient. This was established in:

CASE - ***Stevens v Brodribb River Sawmilling Co Pty Ltd* (1986):**

HC had to determine whether fellers, sniggers and truckers working in the timber industry were independent contractors. The facts stated that the fellers cut down trees which the snigger pulled to a ramp by tractor and from there the trucker carried the logs to the defendant sawmill. The plaintiff trucker was injured through the negligence of a snigger while a log was being loaded.

Held: the HC held that D sawmill was not vicariously liable for the acts of the snigger as the snigger was not an employee.

Independent contractors

- Court rejected notion of any one single test to determine nature of relationship
- *Other relevant matters include, but are not limited to, the degree of control, mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee*
- These are factors, but are not determinative.

Wilson and Dawson JJ judgement:

- *The other indicia of the nature of the relationship have been variously stated and have been added to from time to time.* ***Those suggesting a contract of service rather than a contract for services include:***

- **the** right to have a particular person do the work,
- the right to suspend or dismiss the person engaged,
- the right to the exclusive services of the person engaged and
- the right to dictate the place of work, hours of work and the like**.**

- ***Those which indicate a contract for services include:***
- work involving a profession, trade or distinct calling on the part of the person engaged,
- the provision by him of his own place of work
- or of his own equipment,
- the creation by him of goodwill or saleable assets in the course of his work,
- the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax.

The approach of applying various indicia has been used in subsequent cases:

CASE - ***Hollis v Vabu Pty Ltd* (2001) 207 CLR 21:**

D owned a courier business. The appellant suffered injury to his knee through being knocked down by a bicycle courier. The courier, although unidentified, was wearing a uniform stating the respondents' trade name, 'Crisis Couriers.' The issues was whether Vabu was an independent contractor or an employee, because if they were an employee then there's VL. The appellant sued Vabu (traded as crisis couriers) on the basis that, as the courier was an employee of Vabu and he had been negligent, Vabu was vicariously liable.

Held by HC: crisis couriers vicariously liable as its bicycle couriers were employees. **The enterprise test – if the conduct is identified as representing the enterprise, should carry obligation to 3rd parties to bear cost of injury or dmg to them of one acting for enterprise.**

> Court referred to the **'enterprise test'** : 'Where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly held vicariously liable.'

The High Court examined the facts of the relationship between the courier and the courier company, identifying 7 considerations as bearing upon whether the courier was an employee:

1. Couriers were not providing skilled labour. They are unable to make an independent career as a free- lancer. Facts do not support that running own enterprise.

2. Couriers had little control over the manner of performing their work. E.g. assigned to a work roster, not able to refuse work.

3. Couriers were presented to the public as emanations of Vabu: uniforms with logo of Crisis Careers. Certain attire not permitted, requirement to be clean shaven. Couriers required to wear Vabu livery in part for advertisement. Unable to personally identify each courier.

4. Deterrence of future harm - Vabu had knowledge of the dangers to pedestrians and failed to adopt a means for individual identification of the couriers. Major policy consideration by SC of Canada in *Bazley v Curry* deterrence of future harm. Employers reduce accidents, intentional wrongs by efficient organisation and supervision. Failure to take measures may not suffice to establish a case of tortious negligence directly against employer

5. Vabu superintended the courier's finances: Vabu produced pay summaries and couriers were required to dispute errors by a certain time. No scope to negotiate remuneration, annual leave stipulated. Limited scope for pursuit of any real business enterprise on their own account.

6. Although couriers had to provide own bicycles and do own repairs,

this is nothing contrary to a relationship of employment. Does not indicate existence of relationship of independent contractor

7. Vabu had control over the allocation and direction or deliveries.

• In sum, the court found that they were an employee.

• The decision in Hollis v Vabu, was applied in CASE - Sweeney v Boylan Nominees Pty Ltd, however with very different outcomes.

• theres a difference between a contract of service and a contract for service – contract of service means that you're an employee, and a contract for service is when you're an independent contractor.

CASE - Sweeney v Boylan Nominees Pty Ltd (HCA 16 May 2006) – latest case on the difference between employees and independent contractors: *HC held Boylan Nominees not VL for sub-standard maintenance work performed by independent contract on a fridge in their service station.There was an agreement that the defendant would always repair the fridge if anything went wrong. Mrs Sweeny suffered physical injury when opening door of fridge at a service station to buy milk and door fell off on top of her and seriously injured her. Could the service station be liable? Boylan responsible for maintenance of fridge.*

Gleeson CJ, Gummow, Hayne, Heydon & Crennan J held that Boyland was not vicariously liable (only Kirby J dissenting) because:

- Approved & applied *Hollis v Vabu; NSW v Lepore, Scott v Davis* but took a more narrow approach
- No clear principle underpinning the development of vicarious liability
- But some basic propositions are central to this body of law -
  - Distinction bet. Independent Contractors & Employees
  - Importance attached to the course of employment
- Found mechanic was independent contract, not employee of Boylan as he conducted own business,
- Circumstances of present case very different from *Hollis* - here mechanic was engaged in his own business: he invoiced respondent co for work done; he had his own Worker' Comp & public liability insurance; his own company dealt with the respondent; the respondent did not control the way he worked; he supplied his own tools and equipment; he was skilled; he was not presented as an "emanation" of the respondent,
- The mechanic was an independent contractor & the resp. was not vic. liable for his tort.
  - Kirby dissented alone and thought he was liable on grounds of agency

Element 2) Acting in the course of employment:

- Is the employee carrying out the work s/he was employed to do? If the answer is yes, then the employer will be liable even where the employee is **carrying out the work in an unauthorised way.**

- Employer not vicariously liable where employee is "<u>on a **frolic of his own**</u>": ***Joel v Morrison.*** Several categories where employers will not be vicariously liable:

A) <u>Passion and Resentment:</u>

• Employers will not be vicariously liable for acts of passion and resentment.

CASE - ***Deatons Pty Ltd v Flew* (1949):**
A barmaid threw a glass filled with beer at a customer as she was angry at his foul behaviour when he was intoxicated, and struck her. It hit him in the face.

HELD she was employed to service drinks to customers, not modify their behaviour or assault them. Very personal attack out of passion and resentment.

B) <u>Unconnected Acts:</u>

• For an act or omission by an employee to not attract vicarious liability, it must be unconnected with the employment. Where the employee has gone 'on a frolic of his own' solely for a purpose with no connection to the employer's business, there is no VL.

CASE - ***Ruddiman and Co v Smith (1889):***

employee used a washroom and left tap running, flooding the adjoining premises. The use of the washroom was an authorised act so they employers were held liable.

C) <u>Employer prohibitions:</u>

• Where the employer has imposed an express prohibition upon the employee, the question the court asks is whether 'it is a prohibition which limits the sphere of the employment or only one which deals with the conduct within the sphere of employment?'

CASE - ***Bugge v Brown* (1919)**

A farmhand was entitled as part of the payment for his work to be supplied with cooked meat. For one meal, the defendant grazier supplied the plaintiff with raw meat and directed him to cook it himself in a small hut on D's land. The farmhand cooked the meal on a different part of D's land on a small fire, and as a result the fire spread and damaged the plaintiffs neighbouring property.

Held: The fire was caused by the employees negligence so D was vicariously liable for the farmhand's acts as it was within the scope of his employment.

D) <u>Criminal Acts of employees:</u>

The criminal nature of an act done by an employee during he course of employment will not affect whether an employer is vicariously liable. However, there must be sufficient connection between the acts done and the employment. Therefore, where an employee performs his or her duties in a criminal manner, the employer will may still be liable.

CASES - ***Morris v Martin:***

The Indemnity Principle:

- Has been removed by legislation.
- Employee's Liability Act 1991 (NSW) s3: employer's right of indemnity has been removed ensuring that he employer will indemnify the employee against liability.
- Common law: may be able to recoup loss for employee's breach of an implied term in contract to exercise all reasonable care and skill during the course of employment.

20.2.2 Principal/Agent:

• Vicarious liability may extend beyond employer/employee such as in principal and agent.

Nature of relationship: The principal gives the agent authority to act or enter into agreements on behalf of the principle. However, is not necessarily a servant.

- The principal's liability will arise in relation to acts of the agent done in the course of carrying out the principal's **authority (*Soblusky v Egan* (1960) 103 CLR 215, *Scott v Davis* (2000) 204 CLR 333).**

- Vicarious liability only applies to relationship of principal and agent when there is sufficiently close connection between principal's business and agent's actions.
- Must be within purpose of the agency, it is legally the principal and as such the principal is liable vicariously because he is getting the agent to do stuff for him.
- The legal classification of agency is restricted for the application of Vicarious Liability in 2 circumstances:
  1. When the owner of a motor vehicle allows another person to drive it.
  2. When the principle holds out the agent as having authority to perform the act.

1. Motor vehicle – car owner and car driver:
• Soblusky v Egan (1960) case – the HC estavlished that the owner of car will be VL for acts or omissions of driver of vehicle, where that person is driving with owner's permission

• To be considered 'driving with permission' two elements need to be satisfied:
  - A request by the owner that the driver use the vehicle

- An interest by the owner in the purpose for which the vehicle is being driven

2. Principal holds out agent:

- Where the Principle holds the agent out to a third party as having authority to act, the principle may be VL for tortious acts by that agent.
- **For VL to operate the element of the principle holding out the authority of the agent to act negligently must be present.**
- **This is a narrower test than the 'course of employment' test – in general** only liable for agent's conduct for acts done with reference to carrying out the that authority

20.3 – Non-Delegable Duties:

- A non-delegable duty of care is not a duty to take reasonable care/ensure that care is taken, and is not a form of strict liability.
- This means **even if you get somebody to do this work for you, you can't delegate your duty of care to anybody else. It remains with you.**

- Irrespective of how much reasonable care was exercised in the selection of the delegate, D will remain liable where the D fails to ensure reasonable care is taken **(*Kondis v STA*).**

Relationships which give rise to NDD

- ***Hospital/patient*** *– Ellis v Wallsend District Hospital (1989) 17 NSWLR 553; Albrighton v RPAH [1980] 2 NSWLR 542*
- ***School authority/student*** *– Commonwealth v Introvigne (1982) 150 CLR 258;*
- ***Land occupier/danger to neighbor/non natural use of land*** *– Burnie v General Jones Pty Ltd (1994)179 CLR 520*
- ***Employer v Employee*** *– Kondis v SRA (1984) 154 CLR 672.*

The common law position on NDD has been **altered by statute**. **s5Q CLA** now renders a non-delegable duty as if the liability were the vicarious liability of the defendant, thus enabling the non-delegable duty to be discharged.

CLA s 5Q:
Division 7 Non-delegable duties and vicarious liability 5Q Liability based on non-delegable duty

• SO BASICALLY, A breach of non-delegable duty is to be treated as if it were vicarious liability.

• If you are unable to sue under VL, you can try under NDD. Example, suing independent contractors.

Common Law non-delegable duties:

Test is control of Principle over the risk and the vulnerability of the plaintiff. Duty to ensure that care is taken.

1) Hospital and patient:

• Since ***Ellis v Wallsend District Hospital* (1989),** hospitals are liable for all those who discharge services in its name, private or public, regardless of whether they are independent contractors.

IN this case: the plaintiffs went to a private doctor who wasn't employed by the hospital, merely used their facilities. However, there was no non-delegable duty, because the honorary surgeon was not an employee.

• Hospital owes a non-delegable duty of care to a 'public' patient: ***Albrington v Royal Prince Albert Hospital* [1980]**

Neurologist was very negligent and severed the plaintiff's spinal column. She was left a paraplegic. There was no relationship of employer/employee but this was a case of a non delegable duty to take care.

• Difference if 'visting medical officers' – private doctors who use public hospital facilities to treat private patients.

2) School Authority and Pupil:

Commonwealth v Introvigne (1982) established that a school owes a non-delegable duty to its pupils.

Kid swinging on flag pole. He fell and the metal flagpole fell on his head.

Issue: Did school owe a duty of care to students who came to school early. It is appropriate that the school takes reasonable care to look after these children because the school is in control and students are vulnerable.

***NSW v Lepore Cases* (2003)** *3 cases heard together. P sued the State of NSW and his former primary school teacher for dmgs, claiming teacher smacked and touched him indecently. In separate proceedings, teacher pleaded guilty to common assault and was fined and sentenced. In the Samin and Rich cases, the Ps were victims of gross sexual misconduct by a teacher in Queensland.*

Issue: is conduct carried out while at work conduct 'in the course of employment?'

Held: school teacher's employer, NSW, was not VL for his conduct

Effectively determined by the Court that sexual assault committed by teachers were not acts 'done in the intended pursuit of the interests of the State in conducting the particular school. They were 'not done in the apparent execution of any authority they had'

The HC heard 3 cases simultaneously to determine if a school authority is liable in damages for the torts of teachers who sexual assault students at school. **HC held with a majority of 5:1 that a school may be VL for sexual assault on the basis of it being within the course of employment. However on the facts of the particular case, the school was not liable for criminal assaults of the teachers.**

Judgmentsc:

Gleeson CJ:

- **Non delegable Duty cannot be breached by deliberate act of sexual assault of student by teacher – can only be breached by failure to take reasonable care (negligence). This is how it must be argued.**
- VL of the school could not be dismissed on the basis that it constitutes serious misconduct on the part of the teacher. Where the teacher-student relationship is invested with a high degree of power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment.

Gummow & Hayne & Kirby:

- Non-delegable duty is a duty to take reasonable care + should not be extended to include responsibility for intentional defaults by the delegate. took into account various policy

Callinan (in dissent): concluded it would be an unreasonable burden to impose vicarious liability for an intentional criminal act on an employer.

• **The CLA implications**: **S 5Q(2)** states that this applies in an action in tort whether or not it is an action in negligence. However section 3B(1) excludes acts under s 5Q(2) that are intended to cause injury or death or sexual assault.

3) Danger to Neighbouring Land Users/Non natural use of land:

• Any dangerous use of land which is detrimental to neighbours will be subject to a non delegable duty: *Burnie Port Authority v General Jones (1994) – non-delegable duty of care to not burn down the building of the neighbour because that is not a natural use of the land.*

Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520: • Burnie Port Authority stored cardboard in a warehouse, and a separate individual contractor was allowed to weld near that flammable material. General Jones had stored frozen vegetables in the warehouse that were burnt in a fire resulting from the individual contractors' negligence. • Held that any dangerous use of land that is detrimental to neighbours will be subject to a non-delegable duty.
Transfield Services Australia v Hall [2008] NSWCA 294: • Mr Hall was injured at a Navy physical fitness facility at HMAS Sterling; fell around 10 metres whilst preparing to abseil down ropes. • Held that a non-delegable duty applied only in limited circumstances and that there is no non-delegable duty arising because work involves an extra-hazardous activity.

4) Employer/employee: (this is where people get mixed up in the exam bw NDD and VC)

IMPORTANT: For VC liability the employer must have done something wrong, there needs to be have been a tort in the course of employment. The employer will be vicariously liable for that.
But in NDD – there's no tort. The employer owes the employee a NDD to provide a safe system of work to make sure they're not injured in any way. NDD is a duty owed to the employee not to other people.
VC only applies to employees, NDD apply to employees and independent contractors.

The Non-delegable duty to employees is: Safe system of work. Workmates. Equipment is safe. Effective supervision. (however worker's comp always comes first)

***CASE - Kondis v State Transport Authority* (1984):**

The D, STA employed Mr Kondis as part of a team engaged in dismantling a large metal structure at a railway yard. STA hired a crane, owner of which was hired as an ***independent contractor,*** *and the crane was operated by one of the independent contractor's employees. Kondis was injured through negligence of the crane operator.*

Issue: Could STA delegate the safety of the site as regards to its employee? Would STA be liable of the crane operator's negligence?

Held:

- **Court found employer's duty to provide safe system of work was non-delegable**, this encompassed liability for negligence by its independent contractor who failed to adopt a safe system of work
- Held employer's duty to provide a safe system of work **extends to ensuring that employees + independent contractors** do not injure others who are employed in the course of employment. Such a duty is

considered to be a strict duty the breach of which attracts **strict liability**. The STA was directly liable for a non-delegable duty of care it owed to the P to create a safe system of work (this duty was not owed toanyone else).

- Where an employer contracts the services of an independent contractor, and the contractor injures any of the employer's employees, the employer will be liable for breach of its non-delegable DoC to provide a safe system of work

CASE - Century Insurance Co Ltd v Northern Ireland Road Transport Board (1932):

FACTS: the driver of a petrol truck was transferring petrol form the truck to an underground tank at a garage. While doing this, he lit a cigarette and threw the lit match onto the floor. The result was a fire and the filling station burnt down.

HELD: the driver's employers were held VL as the act was done in the course of his employment even though he was not authorised to smoke while loading tanks with petrol.

He was doing his job, but did it in the wrong way. Eg. like a bus driver who speeds

Employee's Duties to Employers

An employer owes a non-delegable DOC to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of injury then the employer must devise a method of operation to eliminate the risk *(Kondis v STA).* If you can get workers comp, you can only bring an action in common law damages if your injury is more than 15%.

Hamilton v Nuroof (WA) Pty Ltd (1956)

Facts: Labourer hired to help cover the roof of 6th floor building with bitumen. The 6th floor was stepped back from the 5th and instead of pulling buckets of bitumen up with rope (case says perhaps to prevent dirtying the walls) they were passed up by hand. The hot bitumen went in his face and he flicked away and the rest came down on him.

Employer's duty to ensure all reasonable steps are taken to provide safe system of working

The Calculus: Dixon CJ and Kitto J:

• It has been said that a reasonable and prudent employer is

- bound to take into consideration the degree of injury likely to result;
- bound to take into consideration the degree of risk of an accident;
- entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures...
- **On the facts of the present case it may fairly be said that**
- the degree of injury likely to result would be grave;

- the degree of risk of an accident was real and not fanciful or inconsiderable;
- there was no degree of risk to any person in taking precautionary measures and the degree of risk of defacing the wall was not great and could be met completely by the exercise of ordinary care

***CASE – McLean v Tedman* (1984):**
• Garbage collecting case – employer owes DoC to employee

• Employer was aware, did not take sufficient steps to stop them. In the workplace itself. What are duties ofemployer to employee.

• Garbage guys told do not run across the road, but they do it anyway. In other scenarios, there are workplace arrangements that must be followed. What steps have been taken by employer, they can only do what is reasonably possible. Are you aware they are following??? Punished???

• Not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard of care expected of the reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others. [8]

• **The employer's obligation is not merely to prove a safe system of work; it is an obligation to establish, maintain and enforce such a system.** Accident prevention is unquestionably one of the modern responsibilities of an employer

'Frolic of his own': In general the employer is not liable where the employee commits a torts while on a 'frolic of his or her own'

CONCURRENT AND PROPORTIONATE LIABILITY:

Multiple Tortfeasors

- main types of liability:

1. Joint & Several (Solidary) liability

- **Joint tortfeasors**
- **Concurrent Tortfeasors**

2. Several Tortfeasors causing different damage – each separately liable for damage caused

3. Proportionate Liability

- **A statutory invention!**

Where there are multiple tortfeasers whom the claimant may take action against

there are two main times of liability which may be imposed in terms of their contribution to the harm:

1. Solidary liability - only for personal injury claims

2. Proportionate liability – for every other claim

Solidary Liability – for personal injury claims

- Solidary liability describes the situation where more than one tortfeaser causes damage to a plaintiff and all are therefore liable to pay damages to that plaintiff.
- This means that each wrongdoer is entitled to recover 'contribution' from the other tortfeasers towards any payout made to the plaintiff.
- The most significant legal result which flows from the fact that persons are joint or concurrent tortfeasers is that at common law, they are jointly and severally liable. This means that each of them is individually liable to P for the whole of the damage suffered by P and that P may sue any or all tortfeasers.
- That is not to say that P may recover the damage more than once but P may obtain judgement against any or all tortfeasers.
- The choice as to who should be sued is P's, however it is open to D to join another D. (s38)
- Thus solidary liability may lead to claimants targeting 'deep-pocket' defendants.
- **As solidary liability is a joint or several liability, it has been replaced in law reform by proportionate liability, however, is still retained with respect to personal injury claims against multiple tortfeasors.**

1) Joint Tortfeasers – Acting in concert one single tort to further a common purpose, only one cause of action:

- Persons who commit one single tort so that the P has only one cause of action in respect of damage suffered.

- Where one tortfeasor is held not liable, none of them are liable because it is one tort.

- Where there is an agency, principle and agent will be joint tortfeasers if a tort is committed by one of them. Same for cases of VL.

- Will also exist where the tortfeasers act in concert to cause tortious damage provided it can be established there was 'a concurrence in the act or acts causing damage not merely a coincidence of separate acts which by their conjoined effect caused damage.'

CASE - ***Thompson v Australian Capital Television Pty Ltd*** **(1996) 186 CLR 574:**

Channel 7 and 9 broadcast a defamatory story under licence, that the step-father of a girl abused her and fathered her child when she was 14. This was never proven to be true. He sued the station.

Brennan, Dawson and Toohey: We have no doubt that Channel 9 and Channel 7 were joint tortfeasors. **The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage**. As was said in The Koursk, for there to be joint tortfeasors "**there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage**".

• Principal and agent may be joint tortfeasors where the agent commits a tort on behalf of the principal, as master and servant may be where the servant commits a tort in the course of employment.

• Persons who breach a joint duty may also be joint tortfeasors. Otherwise, to constitute joint tortfeasors two or more persons must act in concert in committing the tort.

2) Concurrent Tortfeasers – separate torts, one damage

Where even though persons not acting in concert or together in away way, they nevertheless inflict a single injury in that they are responsible for separate tortious acts which combine together to cause P's damage.

Under concurrent liability you can get 100% of your damages from one tortfeasor, but that's only if it's a case of personal injury.

CASE - *Chapman v Hearse:*

- *Hearse* created the situation in which the doctor got the scene and Chapman was the one who caused the injury
- Potential for 2 tort feasors, can sue from 2 people. In this case, sued initial tortfeasor who went to collect from subsequent tortfeasor, as in proportioning the damage.
- Plaintiff can never recover more than 100% of the loss, even if there is more than one cause of action against different D's. (s37 of Mis Prov Act)
- Contribution is usually sought by insurance companies, when the there is one single damage (???)

3) Several tortfeasers – separate torts, separate damage

- Where two separate tortfeasers will each commit a separate tortious act and each will cause a separate damage to same P.
- E.g. where P's car is damaged twice in two separate collisions, each caused by the negligence of a different driver on two different occasions.
- In this type of case, there can be **no question of contribution between tortfeasers**: each is responsible for the damage caused by each of them.

Contribution between tortfeasers:

Section 5 Law Reform (Miscellaneous Provisions) Act 1946 (NSW): 5 Proceedings against and contribution **between joint and several tort-feasors:**

1) Where damage is suffered by any person as a result of a tort (whether a crime or not):
    a. judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,

    b. if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered (or for the benefit of the estate, or of the spouse, brother, sister, half-brother, half-sister, parent or child, of that person) against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action,

    c. any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.

2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just (and equitable in QLD) having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Proportionate Liability – replaces solidary liability for economic loss and property damage

- Each wrongdoer is liable to the claimant only for his or her proportionate share of the claimant's loss.
- To obtain full compensation therefore, P would have to sue and recover payment for damages from all concurrent wrongdoers.
- Must be an apportionable claim.
- Wont be compensated for more than 100% of loss **(s37)**

• Proportionate liability has been specifically **excluded from applying to PERSONAL INJURY (CLA s34).** This means that solidary liability is retained with respect to personal injury claims against multiple tortfeasors for all torts.

• Tort reform has allowed proportionate liability to replace joint and several liability in **cases of economic loss or damage to property**.

Part 4 CLA

34 Application of Part

(1) This Part applies to the following claims (**"apportionable claims"**):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,...
(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(2) In this Part, a **"concurrent wrongdoer"**, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1)...
(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

34A: Certain concurrent wrongdoers not to have benefit of apportionment

35: Proportionate liability for apportionable claims

35A: Duty of defendant to inform plaintiff about concurrent wrongdoers (any other possible tortfeasors)

36: Contribution not recoverable from defendant

Practical effect of Part 4 *CLA*

- Joint and several (solidary) liability – only available for personal injury claims in NSW and in other claims not based on a failure to take reasonable care ; and
- Proportionate liability – for economic loss and property damage claims based on a failure to take reasonable care

WORKERS COMPENSATION IN NSW:

- The basis of the workers comp legislation is to provide that an employee is entitled to receive statutory compensation in respect of any injury or illness arising **'out of or in the course of the employment.'**
- ***See Zuijs v Wirth Bros, Stevens v Brodribb, Hollis v Vabu for tests on employment***.
- No fault scheme – establish that the injury or illness is connected to the employment. the employment must be a **"substantial contributing factor to the injury" (s 9A).**
- Employers are required to carry workers comp insurance.
  Workers compensation only applies to employees. Not for self employed or independent contractors. They will have to rely on common law.
- Workers compensation generally restricts, and in some cases removes altogether, damages available at common law: **workers compensation act 1987 (NSW) ss 151E – 151T.**

- Damages may be awarded only for past loss of income and loss of earning capacity **(s 151G)** with a ceiling on the maximum amount recoverable. No other heads of damage are allowed.

- There is a threshold requirement that the plaintiff be **at least 15% permanently impaired (s151H)** with the degree of impairment to be established by **medical assessment (s151H(4)).**

Workers Compensation Act (NSW) 1987 :

NOTE that by virtue of s 3B *Civil Liability Act* 2002 (NSW) the provisions of that act DO NOT APPLY to claims for damages in respect of injuries to workers caused by the negligence or other tort of the workers employer. (see also Part 5 Workers compensation Act (NSW) 1987.

• The 1987 *Workers Compensation Act* and the *Workplace Injury Management and Workers Compensation Act 1998* are to be read as if they are both part of the same act, though if there is any inconsistency the later Act is to prevail (s2A).

• Workers must rely on the Workers Compensation benefits instead of common law general damages.

If a worker recovers damages at common law from the employer there is **no further entitlement to workers compensation payments at all and weekly payments already paid must be deducted from the damages (s 151A).**

The Workers compensation scheme:

S 4 defines a WORKER as "a person who has entered into or works under a contract of service or apprenticeship with an employer..." The Act includes state government employees but Federal government employees have their own scheme.

What constitutes a "contract for service' is still determined by reference to the common law: ***Zuijs v Wirth Bros, Stevens v Brodribb, Hollis v Vabu***

INJURY is defined by S 4 ('87 ACT as amended):

- **Personal injury** arising **out of or in the course of employment**
- Includes **disease injuries** only where the employment was the **main contributing factor** to the disease. Includes aggravation, acceleration, exacerbation or deterioration of a disease only where the employment was the main contributing factor (s 4(b)). **Diseases of gradual onset** are included: ss15 & 16
- **Recess claims** (s 11)
- **Psychological injury** (s11A), though there are some limitations.
- **Does not include Dust Diseases** (except in respect of mine workers) which are covered by *Workers Compensation (Dust Diseases) Act 1942 (NSW).*
- **Heart attacks and strokes** are **not** compensable unless the nature of the employment results in **significantly greater risk** (s 9B).
- **Journey provisions s10** – injuries received on a periodic journey (from home to work & back) are compensable, **only** where there is a "**real and substantial connection** between the employment and the accident or incident" (s 10 (3A)), though the 2012 amendments restricting these claims do not apply to police officers, paramedics or fire-fighters or coal miners.

THERE MUST BE A CAUSAL CONNECTION BETWEEN THE EMPLOYMENT AND THE INJURY: the employment must be a **"substantial contributing factor to the injury" (s 9A).**

Serious & wilful misconduct of worker: S 14 disqualifies worker from entitlement unless the injury results in serious permanent disablement or death.

• The main benefits payable under the Australian workers compensation legislation are:

- periodic or weekly payments (to replace wages) for total or partial incapacity to work
- lump sums for permanent disability (calculated by reference to 'whole person permanent impairment)
- pain and suffering (subject to a serious impairment threshold)
- death benefits payable to the dependent of the deceased worker
- medical and other 'out of pocket' expenses

COMMON LAW CLAIMS

- **There is a Minimum threshold** below which a common law claim cannot be brought against the employer. The worker must be suffering at least 15% permanent impairment (or death of worker) **S 151H**
- The **degree of impairment is to be assessed** by Medical Assessment under Part 7 of the1998 Act : **S 151H(4)**
- **NO GENERAL DAMAGES** or **DAMAGES FOR ECONOMIC LOSS OTHER than LOSS OF EARNING CAPACITY** are recoverable at common law.
- There is **3 year limitation period** to bring an action at common law: **s**

151D

- An unsuccessful plaintiff under common law damages will be entitled to workers compensation benefits.

MOTOR ACCIDENTS COMPENSATION IN NSW:

Note: Most of the major provisions of the *Civil Liability Act 2002* (NSW) dealing with the substantive law of negligence apply also to motor accident claims.

The Motor Accidents Compensation Act 1999 (NSW):

- Unlike the Workers Compensation legislation, the Motor Accidents legislation **does NOT provide a no fault scheme** for compensation in respect of motor accident injuries (though, there are some special provisions about "blameless accidents" and accidents involving children under 16). **SO THERE IS A FAULT SCHEME**
- The **ONLY** remedy available to the victim of a motor car accident in NSW is in **TORT**, so the plaintiff will have to establish a cause of action in negligence or perhaps, in appropriate circumstances, in battery.

SPECIAL "BLAMELESS ACCIDENT" PROVISIONS:

1) A "blameless motor accident " is defined as one not caused by the fault of the owner or driver of any motor vehicle involved in the accident and not caused by the fault of any other person (s 7A)
2) **Death or injury to a person** that results **from a blameless accident** involving a motor vehicle that **has motor accident insurance cover**, is **for the purposes of a claim for damages**, **deemed** to have been caused by the fault of the owner or driver of the motor vehicle (s 7B)
3) Where a plaintiff avers that an accident was 'blameless', there is a rebuttable presumption that the accident was in fact blameless (s 7C).
4) There is no entitlement to recover under s 7B for a driver who is injured or killed where the accident was caused by an act or omission of that driver: s.7E
5) Damages may be reduced under this Division for the contributory negligence of a deceased or injured person (s 7F).
6) These sections ensure that a motor accident victim has access to damages from third party accident insurance funds, even where the victim cannot establish that anyone is at fault (though of course, the sections will not apply where the victim was at fault).

NO FAULT RECOVERY FOR CHILDREN UNDER 16 YEARS OF AGE:

- Children under 16 years of age have a 'special entitlement to recover damages' where death or injury results from a motor accident not caused by the fault of the owner/driver of a motor vehicle, even where the child is at fault. This entitlement includes only hospital, medical and pharmaceutical expenses, rehab costs, respite care, attendant care and

funeral or cremation services.
- 'Special entitlement' damages may not be reduced for contributory negligence of the child, even where a driver was at fault (s7K(5) and s 7L).

FAULT ACCIDENTS:

- Accident victims who are not injured in blameless accidents who are over 16 years of age **must rely entirely on the common law for compensation (unless their injuries satisfy the Motor Accidents (lifetime care and support) Act 2006).**
- The motor accident compensation act 1999 (NSW) provides for special procedures for motor accident claims and places very considerable limitations on the damages recoverable by motor accident victims.
- A Plaintiff cannot recover damages for non- economic loss unless there is at least 10% 'whole person impairment' and there is prescribed maximum sum that may be awarded for non economic loss.
- Also restrict amount of damages recoverable for economic loss by imposing both a threshold and a ceiling on such damages.

CONTRIBUTORY NEGLIGENCE: S 138

A Finding of contributory negligence is **mandatory** where:

- Plaintiff convicted of PCA offence
- Plaintiff voluntary passenger in vehicle driven by person whose ability is impaired by alcohol or other drug and claimant aware or ought to have been aware.
- Plaintiff failed to wear seat belt or helmet

Damages are to be reduced by such %age as the Court thinks just & equitable in the circumstances. See also s 49 *Civil Liability Act 2002* (NSW) – effect of **intoxication** on duty and standard of care.

DEFENCE OF VOLENTI NON FIT INJURIA is not available under the act EXCEPT where the claimant was driver or passenger in a vehicle engaged in Motor Racing (s 140)

THE NOMINAL DEFENDANT can be sued where a person is injured by the fault of an uninsured or unidentifiable vehicle. (ss 33-41)

DEATH CLAIMS:

[1] Survival of Actions (for the benefit of or against the estate of a deceased person):

- Section 2 *Law Reform (Miscellaneous Provisions) Act 1944* allows survival of a cause of action to the estate of the deceased, reversing original common law decision.

Some causes of action and heads of damage are excluded. These include suing on behalf of a dead person for defamation, and exemplary damages cannot be recovered when either of the parties become deceased.

• where a person has died as the result of injuries sustained in an accident in respect of which the action is maintained, then the estate cannot recover any non-pecuniary damages (for pain and suffering, loss of amenity of life, loss of expectation of life etc).

• There can be no recovery of financial loss (typically wage loss) for the period following the death – the 'lost years between the premature date of death and the date when the deceased would have ceased to earn income had he or she survived. This is because the deceased dependant's already have a separate claim for loss of earning capacity under the compensation to relatives.

• Where the death was caused by the tort which gives rise to the surviving cause of action, damages are to be calculated without reference to any incidental losses or gains to the estate as a result of the death. Eg. Superannutation to the estate is not taken into account.

• Where the tortfeasor dies before the victim, there is deemed to be an action existing against the deceased tortfeasor at the time of his or her death.

When the victim dies later, there would be no action in respect of that later death because the damage had not eventuated until after the death of the tortfeasor. In that case, the relatives would have no claim against the deceased tortfeasor's estate under the compensation to relatives legislation.

• Where a negligence action survives the death of a party, the tort reform legislation will apply to any claim, as it would to a claim by a living or against a living defendant.

Actions for Wrongfully Caused Death:

• There is other legislation which creates a separate cause of action for the benefit of the dependants of a deceased person who has died as a result of the wrongful act of another.

[2] Compensation to Relatives (for the benefit of the dependant relatives of a deceased victim):

- *Compensation to Relatives Act 1897-1969* (NSW):

- Which relatives benefit?

Under Section 4 *Compensation to Relatives Act 1897-1969* (NSW) and Section 3 *Motor Accidents Compensation Act 1999* (NSW) (definition of "Spouse")

In NSW, the list includes the spouse (indlucing de facto spouse or same sex partner, as well as parents, setp-parents, persons standing in loco parentis, grandparents, children including ex-nuptial children, grandhsildren, persons to whom the deceased stood in loco parentis, and siblings including half-siblings.

- A wrongful act, neglect or default:

The legislation in all jusridictions requires that the plaintiff show that the deceased died as the result of the 'wrongful act' neglect or default' of the defendant. The wrong need not necessarily be tortious, though it mostly is.

- The condition precedent:

The plaintiff will have to demonstrate that, had the deceased survived, the deceased would have had an action against the defendant. If the deceased would have had no action against the defendant, under the legislation will not have any claim either.

Where the deceased's right to recover against the tortfeasor were governed by the provisions of a contract made between the deceased and the tortfeasor contains an exclusion liability clause, the relatives of the deceased have been held to have no claim.
However if the damages are limited by terms of the contract, such limitations have been held to not bind to relatives who claim under the legislation.
CASE: Nunan v Southern Railway

Causation and foreseeability of death:
• The plaintiffs under the legislation must establish a causal connection between the wrongful act of the defendant and the death of the deceased.

CASE – Haber v Walker – the court there held that the death by suicide was caused by the defendant's wrongful act, namely the negligent driving which caused the motor accident.

• The legislation does not specifically impose any such requirement but the requirement of reasonable foreseeability of damage applies to liability in the tort of negligence.

• The court took the view that the claim by the relatives under the legislation was not subject to the concept of remoteness of damage.

Damages:

• The legislation is silent as to exactly what damages are recoverable on the death of a person, though in all jurisidictions does not stipulate tat certain payments consequent upon the death (for ex, superannuation, life insurance) are not to be taken into account in the assessment of damages.

• The High Court has now held by a majority in CASE – De Sales v Ingrilli (2002), that the prospect of a surviving spouse entering into a new relationship should into be considered unless at the time of the hearing such a relationship exists.

Solatium:

• No award of damages for the grief or emotional loss associated with the death of a relative. Except in SA and NT.

- Effect of Contributory Negligence by the Deceased: Section 5T *Civil Liability Act 2002* (NSW)

5T Contributory negligence—claims under the Compensation to Relatives Act 1897

(1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.

(2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.