**Trespass to Person – Assault/Battery/False Imprisonment**

\*Note: Trespass actionable *per se* (i.e. no need to prove damage)

Battery

1. Was act positive and caused direct interference with P – i.e. unlawful physical contact?
* Indirect act – if people in between P & D involuntarily act for compulsive self-preservation, trespass (*Scott v Shepherd*).
* If indirect act causing injury, not trespass (*Hutchins v Maughan; Southport v Esso*).
1. What *mens rea* is required?
* Hostility not necessary (*Rixon v Star City*).
* However, exclusions to battery include physical contact acceptable in ordinary course of everyday life (*Rixon; Collins v Wilcock*).
1. Fault?
* No trespass without fault:
	+ D not liable unless intention or negligence present (*Williams v Milotin; Weaver v Ward*).
* Defendant has burden of proof unless highway case (*Venning v Chin*).
1. Defences?

Assault

1. Was there a threat by defendant that made plaintiff fear imminent harm (*Rozsa v Samuels*)?
* Conditional threats may act as defence (*Tuberville v Savage*), but not if unreasonable/unlawful (*Rozsa v Samuels*).
1. Was there a reasonable apprehension of harm?
* If person believes harm imminent and feels trapped, then acceptable (*Zanker v Vartzokas*).
1. Fault?
* Defendant has burden of proof (*Weaver v Ward; Williams v Milotin*) unless highway case (*Venning v Chin*).
1. Defences?

False Imprisonment

1. Was there a total restraint of freedom of movement/deprivation of liberty?
* Includes psychological restraint (*Symes v Mahon*).
* Knowledge of restraint unnecessary (*Murray v Ministry of Defence*).
* Partial obstruction not FI (*Bird v Jones*).
* Was there reasonable way to escape imprisonment? (*Zanker v Vartzokas; McFadzean v CFMEU*).
	+ Waiting for police help, but delay – still false imprisonment, but duration of event relates to damages recoverable.
	+ If chance of injury escaping, then false imprisonment (*Burton v Davies*).
1. Was there a contractual relationship between the parties?
* Not FI if restriction in compliance with contract (*Balmain Ferry* – applies to all fare evasion cases; *Herd v Weardale* – foreman brought up miner at scheduled time).
1. How direct was the restraint?
* D is jointly liable if police act on direction of D, but not where arrest/detention is result of officer’s independent assessment (*Dickinson v Waters Ltd*).
1. Fault?
* Defendant has burden of proof (*Weaver v Ward; Williams v Milotin*) unless highway case (*Venning v Chin*).
1. Defences?

**Trespass to Person – Defences**

1. Was consent given?
* **Onus of proof** on defendant to prove plaintiff consent (*Marion’s Case*).
* If **everyday conduct**, ‘battery’ is impliedly consented to (*Collins v Wilcock*).
* Consent in **sports** to force, but violence in contravention of the rules unacceptable (*McNamara v Duncan; Giumelli v Johnston*).
* **Medical practice**:
	+ **Explaining nature of procedure** in broad terms to patient negates battery (*Rogers v Whitaker*).
	+ Trespass applies if **wrong procedure** on patient, even if not doctor’s error (*Chatterton v Green*).
	+ Getting patient to **sign form** still trespass if explanation not given (*Chatterton*).
	+ **Minors may give consent** depending upon individual understanding/intelligence relating to procedure (*Marion’s Case*).
1. Was act in self-defence/defence of another/defence of property?
* Did accused believe in reasonable grounds that action was necessary for self-defence (*Zecevic v DPP*)?
	+ If more reasonable action available, self-defence defeated (*Fontin v Katapodis; Rozsa v Samuels*).
* If defendant uses self-defence **mistakenly**, must prove belief was honest and reasonable (*Ashley v Chief Constable*).
* In **defence of others**, defendant must prove actions taken necessary and reasonable (*Goss v Nicholas*).
1. Was act performed out of necessity?
* Acceptable to avoid imminent threat of grave harm if not out of proportion to avoided harm (*In re F*).
	+ Possibly justified if reasonable belief interference was necessary, even if greater harm caused as result (*Proudman v Allen*).
* Automatic reaction to protect oneself appropriate defence (*Scott v Shepherd*).
* **Contrary policy considerations** may defeat defence (*Southwark* – i.e. everyone will squat if council can’t acquire land).
* Prevention of suicide defence (*Crimes Act 1958 (Vic)* s 463B).
* **Medical necessity:**
	+ Must be necessity to act reasonably when not practical to communicate with person (*In re F (Mental Patient: Sterilisation)*).
		- Extended, convenient procedures not applicable (*Murray v McMurchy*).
	+ *Medical Treatment Act 1988 (Vic)*:
		- s 5 – If patient refuses treatment, is over 18, of sound mind and procedure explained to them, medical practitioner and patient can witness a ‘refusal of treatment certificate’.
		- s 5A – If patient has agent/guardian they can act on their behalf.
		- s 5B – Agent/guardian can refuse medical treatment for patient.
		- s 5C – Tribunal can suspend/revoke authority to refuse treatment.
		- s 6 – MP commits medical trespass if continues procedure despite knowledge of ‘refusal of treatment certificate’.
1. Did defendant have legal authority to perform act?
* **Statutory powers of arrest** (*Crimes Act 1958)*:
	+ s 457-9: Arrest must occur with a warrant, unless crime being committed or (for police) there is a reasonable suspicion of offence committed.
	+ s 461-2: Reasonable arrest not unlawful, even if no offence committed.
* **Common law**:
	+ Person arrested must be told why, unless crime very obvious (*Christie v Leachinsky*).
	+ Obligation to release/bring before court in reasonable time (*Dallison v Caffery*).
1. Contributory negligence?
* No (*Wrongs Act 1958 (Vic)* ss25-26; *Horkin v North Melbourne*).

**Trespass to Land – Trespass/Nuisance**

Trespass

1. Does the plaintiff actually have standing to sue?
* Only if they have possession – actual or constructive/adverse (*Newington v Windeyer*).
* License insufficient (*Vaughan v Shire of Benalla*).
1. Was there a **direct interference** with land?
* Slightest crossing of boundary sufficient.
	+ No trespass/nuisance if aircraft flying reasonably/ordinarily overhead (*Wrongs Act 1958* (Vic) s 30).
	+ Air boundaries limited to height necessary for ordinary use/enjoyment of land (*Bernstein v Skyviews*).
	+ Aircraft owner liable if object falls from plane and damages land (*WA* s 31).
* If indirect connection, then not trespass. See trespass to person (*Southport v Esso*)
* Landlord can trespass if interferes with tenant rights (*Lavender v Betts; Perera v Vandiyar*).
1. Was the act **intentional**, or **negligent**?
* Ignorance not an excuse unless proved that there was no way of knowing trespass occurred (*League of Cruel Sports v Scott*).
1. What if trespass occurred long before an injury occurred?
* Still considered trespass, as original trespass is **continuing** (*Konskier v Goodman*).
1. What defences are available?
* Was there an **express or implied license** to enter the land?
	+ **Police** have implied license to enter an occupier’s land via an open driveway for the purpose of dealing with an offence spotted from the street (*Halliday v Nevill*).
	+ Implied license to enter **businesses**, but limited to bona fide patrons seeking information or services (*Lincoln Hunt v Willesee; Rinsale v ABC*).
	+ If third party seeks to use information gathered from another’s trespass the third party cannot be subject to an injunction (*ABC v Lenah Game Meats*).
* Was there a **revocation of consent**?
	+ Must be communicated to licensee, who must have reasonable time to leave premises (*Cowell v Rosehill Racecourse*).

Nuisance

1. Is plaintiff actually allowed to sue?
* **Only** if they have an interest in the land:
	+ **Spouse** of the owner cannot sue does not own land (*Oldham v Lawson (No. 1)*).
	+ **Family members** of the owner cannot sue (*Hunter v Canary Wharf*).
1. Does interference fall into following categories?
* Material injury to property (*St Helen’s Smelting v Tipping*); or
* Personal discomfort/interference with sensibilities
	+ More than fanciful inconvenience (*Walter v Selfe*).
	+ If P overly sensitive, will have to put up with ordinary nuisance from neighbours (*Munro v Southern Dairies*).
	+ Noises which people cannot become accustomed to equate to nuisance (*Seidler v Luna Park*).
1. Who can be sued?
* Person creating the nuisance (*Fennell v Robson Excavations*).
	+ Includes those without possession or control of land (*Halsey v Esso*).
* Person in control/possession/ownership of land, for their or others’ nuisance.
* Persons continuing or adopting a nuisance.
	+ Occupier liable if aware/should be aware of hazard, but not taken reasonable steps to remedy situation (*Sedleigh-Denfield; City of Richmond v Scantelbury*).
	+ Even if steps taken, failure to discharge duty to act means liable (*Hargrave v Goldman*).
1. Can a plaintiff sue for any form of annoyance or inconvenience?
* **No.** Common and ordinary actions for use/occupation of land exempt (*Bamford v Turnley*).
* Factors to determine if nuisance or ordinary inconvenience:
	+ Extent of interference, duration, character, frequency, time (*Seidler v Luna Park*).
	+ Question of reasonableness (*Clarey v Women’s College*).
		- If nuisance caused by house design, noone else complains, action fails.
	+ Locality. If interference characteristic of area, then unlikely to (*Munro v Southern Dairies*).
	+ Sensitivity of plaintiff irrelevant, only nuisance if interferes with ordinary life (*Robinson v Kilvert*).
1. Are there any activities protected from nuisance claims?
* Yes:
* Interference with business activities through overlooking of land (*Vic Park Racing*).
* Interference with television reception or obstructing view (*Hunter v Canary Wharf*).
1. What defences are available?
* Consent:
	+ Was there an express or implied license to enter the land?
		- Police have implied license to enter an occupier’s land via an open driveway for the purpose of dealing with an offence spotted from the street (*Halliday v Nevill*).
		- Implied license to enter businesses, but limited to bona fide patrons seeking information or services (*Lincoln Hunt v Willesee; Rinsale v ABC*).
		- If third party seeks to use information gathered from another’s trespass the third party cannot be subject to an injunction (*ABC v Lenah Game Meats*).
	+ Was there a revocation of consent?
		- Must be communicated to licensee, who must have reasonable time to leave premises (*Cowell v Rosehill Racecourse*).
* Statutory authority:
	+ Acts only allow activity if required/authorised and nuisance is an inevitable consequence (*Lester-Travers v City of Frankston*).
* Defendant brought it in himself by moving to area (*Sturges v Bridgman; Miller v Jackson*)
	+ To what extent can land use change the character of an area to make previously innocent activity unreasonable?
1. What remedies are available?
* Self-help/abatement – i.e. occupier can take steps to stop nuisance, like chopping encroaching tree branches down.
	+ However, must be done in reasonable time and proportional.
	+ Limited to emergency situations and not option after a court case (*Burton v Winters*).
* Injunction – Stop the defendant from continuing nuisance activity
	+ ‘Coming to the nuisance’ elements considered here, as well as public interest and difficulties in relocating activity.
	+ May result in damages awarded if public interest in keeping ‘nuisance’ running (*Miller v Jackson* – cricket).
		- Or not, depends on activities (*Kennaway v Thompson* – waterskiing).
		- NOTE: Damages for loss of land value rather than pain/suffering. Therefore single incident of disturbance unlikely to result in damages.

**Negligence: Duty of Care**

Settled law – duty exists

1. Main way to identify the above – was D’s act direct and positive?
* Reasonable foreseeability **alone sufficient** to show duty of care (*Sutherland Shire Council v Heyman*)
	+ Negligent if risk foreseeable (*Wrongs Act 1958* s 48(1)(a)).
	+ Would reasonable person foresee that D’s conduct would risk injury to P or class of people like P (*Wyong Shire Council v Shirt*).
* Must be ‘not insignificant’ risk (*WA* s 48(1)(b)).
	+ Real, not far-fetched possibility of harm to P (*Sullivan v Moody*).
	+ Not unlikely to occur (*Caterson v Comm for Railways*)
1. How far does duty extend?
* **Generally:** Neighbour principle.
	+ Duty to people reasonably closely/directly affected by actions (*Donoghue v Stevenson*).
* **Specific examples:**
	+ Drivers/road users (*Chapman v Hearse*);
	+ Employer/employee (*Hamilton v Nuroof*);
	+ Product liability (*Donoghue v Stevenson; Grant v Australian Knitting Mills*; *Australian Consumer Law* s 54 – guarantee as to acceptable quality of goods);
	+ Occupier’s liability (*Australian Safeway Stores v Zaluzna; Modbury Triangle Shopping Centre v Anzil*).

Settled law – no duty exists

* Legal practitioners doing court-related work (*D’Orta-Ekenaike v Victoria Legal Aid*).
* Military in active operations (*Shaw Savill & Albion v The Cth*).
* Parents, impossible to set std (*Robertson v Swincer*).

Grey area

1. Was there reasonable foreseeability of harm?
	* Negligent if risk foreseeable (*Wrongs Act 1958* s 48(1)(a)).
	* Would reasonable person foresee that D’s conduct would risk injury to P or class of people like P (*Wyong Shire Council v Shirt*).
2. Do salient features of case demonstrate existence of duty?
* Consider following features (*Sullivan v Moody*):
	+ Policy considerations affected by imposition of duty?
	+ Any conflict with different areas of law?
	+ Is liability indeterminable if duty were to be found?
1. Does case consider duty of licensees to patrons?
* Duty to reasonably protect patron from others’ violent conduct (*Adeels Palace v Moubarak*).
* No duty to protect intoxicated patrons from consequences of their alcohol consumption (*CAL (No 14) v Motor Accident Insurance Board*).

**Negligence: Breach of Duty**

General

1. What is standard of a reasonable person in D’s position?
* If not done in previous section, discuss *Wrongs Act* s 48(1)(a)-(b).
* What precautions would be taken by reasonable person to prevent harm (*WA* s 48(1)(c); *Vaughan v Menlove*)?
* Relevant personal characteristics?
	+ Minors - capacity normal for child of that age (*McHale v Watson*).
	+ Inexperience - Does not lower std of care (*Imbree v McNeilly*),
	+ Mental impairment - Does not lower std of care (*Carrier v Bonham*).
	+ Special skills/expertise - Std of what reasonable person with said skills expected to do (*Wrongs Act* s 58(a)).
		- Court disregards P’s expectations that D had a higher qualification than job requires (*Phillips v William Whiteley* – jeweller, not surgeon).
		- If D shouldn’t be doing job, skill threshold as per professional in that field.
	+ Time of conduct:
		- Occurs at time of negligent act (*Wrongs Act* s 58(b)).
		- D not at fault if no way of knowing harm likely at time of incident (*Roe v Minister of Health*).
1. Has D fell short of relevant standard of care (i.e. Negligence calculus)?
* Court to consider (*Wrongs Act* s 48(2)):
	+ Probability of risk occurring if care not taken (a);
		- Greater probability of harm, greater degree of care required (*Bolton v Stone*).
		- Should be weighed up against other considerations, not in isolation (*Romeo v Conservation Commission of NT*).
	+ Likely seriousness of harm (b);
		- More serious the harm, greater precautions required (*Paris v Stepney Borough Council*).
	+ Burden of taking precautions (c);
		- Just because action could be done in a different way doesn’t by itself affect liability (*Wrongs Act* s 49(b)).
		- Risk/gravity of injury to be balanced with availability/cost of precautions (*Graham Barclay Oysters v Ryan*).
		- Even if D can reasonably foresee harm and has available precautions, doesn’t automatically mean D negligent (*Romeo v Conservation Commission of NT*).
	+ Social utility of activity that creates risk of harm (d);
		- If D acting to prevent/attend emergency then not liable (*Watt v Hertfordshire County Council*).
	+ Other relevant things.
		- Legislative standards (*Tucker v McCann*).
		- Personal characteristics of defendant.

Professional Negligence

1. Is D a professional, i.e. an individual practicing a profession? (*Wrongs Act* s 57).
2. Has D (if doctor) diagnosed/treated P?
* Not liable if acted in widely accepted manner by ‘peer professional opinion’, unless court finds this opinion is unreasonable (*WA* s 59).
1. Did doctor advise P?
* s 59 does not apply (*WA* s 60).
* General duty by doctors to disclose risks without being asked.
	+ Risk material if reasonable patient would find info significant, or doctor aware patient could find info significant (*Rogers v Whitaker*).
	+ Duty discharged if D takes reasonable care giving information (*WA* s 50).
* Amount of advice given by doctor depends on (*F v R*):
	+ Nature of matter discussed; nature of treatment; patient’s desire for info; patient’s temperament/health; whether emergency or not.

**Causation and Remoteness**

Causation – Factual

1. Was negligence necessary condition of harm suffered (*WA* s 51(1)(a))?
* ‘But for’ test – did D’s conduct materially contribute to harm (*March v Stramare*).
	+ If P injured regardless of D’s actions, not ‘but for’ (*Barnett v Chelsea*).
* P bears burden of proof to demonstrate causation (*WA* s 52).

**Above test usually sufficient, but if not consider below:**

1. What if multiple possible causations?
* Court will apply the most ‘common sense’ causation to incident (*March v Stramare*).
1. What if lack of proof that D caused harm?
* FC can still be established if appropriate case in accordance with established principles – court to consider if liability should be imposed (*WA* s 51(2)).
* FC established if P cannot prove exact cause of harm, but can show D’s breach materially increased risk of harm (*McGhee v National Coal Board*).
* FC established if P can demonstrate injury avoided if D not negligent (‘increased risk’):
	+ P can show that (i) D breached duty of care; (ii) breach increases risk of P suffering particular injury; and (iii) P suffers that type of injury (*Chappel v Hart*).
1. What would P have done if warning given (‘failure to warn’ cases)?
* Determine P’s actions subjectively (*WA* s 51(3); *Chappel v Hart* – eye treatment).

Causation – Legal

1. Should responsibility be imposed on negligent party (scope of liability, *WA* s 51(4))?
* General cases – Step 2.
* Medical – Step 3.
1. Did a *novus actus interveniens* occur? Either:
* Causally independent action so unlikely to occur that is **coincidence** (*Haber v Walker*).
* Voluntary human action.
	+ Chain only broken if P’s actions were free and informed (*Bennett v Minister*).
		- Involuntary act from pressure of circumstances not NAI (*Caterson v Commissioner for Railways*).
	+ No break if D’s wrongful act created very risk of injury resulting from P’s prior negligence, and injury occurs in ordinary course of events (*March v Stramare*).
		- i.e. If P’s negligent act wouldn’t have caused injury without D’s action, then causation remains.
* **Examples:**
	+ Suicide (*Haber v Walker*).
	+ Motor collision – if not for D’s actions person would not be in position to be injured (*Chapman v Hearse*).
	+ Third party intervention (e.g. medical treatment):
		- D liable if treatment grossly negligent (*Mahoney v Kruschich*).
1. Did *NAI* occur (‘failure to warn’ medical claims)?
* D only liable if failure to warn caused P to undergo procedure.
* Subjective, should be determined in light of all circumstances (*Wrongs Act* s 51(3); *Rosenberg v Percival*).
	+ Note: Can be inferred from objective facts if no direct evidence.

Remoteness

Two step approach (*Metrolink v Inglis*):

1. What type of loss was suffered?
* Ordinary case - broad approach (*Hughes v Lord Advocate*).
	+ Examples of broad categories:
		- Burns (*Hughes v Lord Advocate*).
		- Mental illness (*Mt Isa Mines v Pusey; Nader v Urban Transit Authority*).
		- Death, despite it being car crash and death was drowning (*Versic v Connors*).
* Unusual case - narrow approach.
	+ Property damage by fouling, not fire (*Wagon Mound No 1*).
	+ Nervous shock from accident, not depression (*Rowe v McCartney*).
	+ Burns from splashing, not eruption (*Doughty v Turner*).
	+ Rat bite/food poisoning, not Weil’s disease (*Tremain v Pike*).
* Policy considerations to be noted as well.
1. Was each kind of loss reasonably foreseeable (*Wagon Mound No 1*)?
* ‘Eggshell’ rule – D must take victim as they find him/her (*Stephenson v Wait Tileman*).
	+ Applies when injury part of a reasonably foreseeable class of injuries, but the injury sustained is greater because of P’s sensitivity (*Nader v Urban Transit Authority*).
	+ Only initial injury needs to be foreseeable, not extent/manner. Examples:
		- Pre-existing special hypersensitivity (*Smith v Leech Brain*).
		- Special susceptibility caused by initial injury (*Stephenson*).
		- Family environment (*Nader v Urban Transit Authority*).

**Negligence Defences**

Voluntary Assumption of Risk

1. Was it an inherent risk (*Wrongs Act* s 55)?
* Person not liable for risk that occurs and cannot be avoided by exercise of reasonable care.
* If so, D not to be held liable.
* If not, continue through steps.
1. Was risk an obvious risk? If so, go to **Element 3**.
* Obvious, or common knowledge to reasonable person even if low chance of happening (*Wrongs Act* s 53).
* Onus on P to rebut presumption of appreciation of risk (*WA* s 54(1)).
	+ Elements 1 & 2 assumed to be present unless P shows otherwise – D to meet element 3.
* Not applicable to health service given/omitted, or risks associated with work done by one person for another (*WA* s 54(2)).
1. **Element 1:** Did P know fact/circumstances that gave rise to risk?
* Subjective, what P actually knew rather than ought to have known (*Scanlon v American Cigarette Company*).
	+ Courts can look at all evidence and make inferences from it.
1. **Element 2:** Did P fully appreciate the risk that actually caused their harm?
* Applies if P can appreciate risk, regardless of remote chance of occurring (*ICI v Shatwell*).
* Drunkenness means unlikely to appreciate risk (*Banovic v Perkovic*).
1. **Element 3:** Did P freely/voluntarily accept the risk causing injury?
* No pressure on P to assume risk.
	+ If person aware D could cause harm (drunk driver) then P has accepted risk (*Insurance Commissioner v Joyce*).
* Normally doesn’t apply between master/servant due to economic constraints on servant hindering freedom of choice (*ICI v Shatwell*).

Illegality

No general principle denying person engaged in unlawful act from taking legal action for injury (*Henwood v Municipal Tranways Trams*).

**Two exceptions:**

1. Is there evidence that the law intends to prevent negligence claims by lawbreakers?
* Court to consider, *inter alia*, whether P doing illegal activity/intoxicated (*Wrongs Act 1958* (Vic) s 14G).
1. Is this a situation where it is inappropriate to set the standard of care?
* No duty if nature of illegal activity makes it impossible to define std of care (*Gala v Preston*).
* However, based on old ‘proximity’ principle so may not relate to modern cases.
* No duty when joint participation in serious crime regardless of illegality effect (*Italiano v Barbaro*).

Contributory Negligence

1. Did P fail to take reasonable care of themselves, thus causing harm/partial harm?
* If so, will not defeat claim but will reduce damages to extent equitable (*WA* s 26).
* P’s negligence reviewed in same manner as D’s negligence (*WA* s 62).
	+ Std of care is that of reasonable person, determined on basis of knowledge at time of harm.
1. Did P’s failure cause/contribute to P’s harm?
* Same causation principles as D (*WA* s 62).
* Rebuttal arguments for P:
	+ Sudden emergency – if P in danger/inconvenience because of D’s negligence, compare degree of danger against risk taken to avoid it (*Caterson v Commissioner for Railways*).
	+ Anticipating negligence – reasonable person would account for possible carelessness of others (*Jones v Livox Quarries*).
1. What can damages be reduced to if CN applicable?
* What is ‘just and equitable’ according to relative culpability (*Pennington v Norris*).
	+ P’s damages can therefore be reduced by 100 per cent (*WA* s 63).

Good Samaritans/Volunteers

* Good Samaritans – *Wrongs Act* s 31B:
	+ (1) GS a person who assists in emergency/accident without reward, and person getting assistance at risk of/appears at risk of injury/death.
	+ (2) Not liable in civil proceedings by assisting or providing advice over phone or other forms of communication.
* Volunteers – Not liable for anything done/omitted in relation to voluntary work (*WA* s 37):
	+ s 34 – Community org = group that does community work using volunteers.
	+ s 35 – Volunteer = person doing voluntary work, even if given some level of remuneration.
	+ s 36 – Community work = Work for some form of charitable purpose, includes arts/science/sports/environment/politics/etc.
	+ s 38 – s 37 excluded if volunteer acts outside scope of work/contrary to instructions/under influence.
	+ s 40 – No indemnity for liability under above sections.

Limitations of Actions

* Action must be brought within 6 years of occurring (*Limitation of Actions Act 1958* (Vic) s 5(1)).
* Action for damages for trespass/personal injuries (inc. wrongful death) brought within 3 years from when P first realises injury occurred (*LAA* s 5(1AA)).
	+ Action expires 3 yrs after date P discovers cause of action, or 12 yrs from date of act/omission, whichever is first (*LAA* s 27D(1)).
* Court may extend limitation period if good reason for delay (*LAA* s 23A).

**Negligence: Damages**

Personal Injury Victims

1. Is there only one person to claim damages from?
* Yes – Go to Step 2.
* No – Concurrent Liability:
	+ P can recover full compensation from any of the wrongdoers, both jointly or individually (*Wrongs Act* s 23B(1)).
	+ Recoverable contribution from each person shall be just and equitable according to extent of each D’s responsibility for damage (s 24(2)).
1. What losses are recoverable?
* Three heads of damage (*CSR v Eddy*) – Non-pecuniary loss, loss of earning capacity, actual financial loss.
* Non-pecuniary loss:
	+ Excludes intentional acts to injure, sexual misconduct (s 28LC(2)(a)).
	+ Threshold requirement:
		- Injury – significant injury, more than 5 per cent permanent physical impairment (s 28LB).
		- Psychiatric injury – more than 10 per cent permanent physical impairment (s 28LB).
		- Assessed by approved medical practitioner/psychiatrist/medical panel.
	+ Maximum damages:
		- Capped at $371,380 in 2002 (s 28G).
		- Court can refer to earlier decision to establish appropriate amount (s 28HA).
	+ **Medical expenses**
		- Medical expenses should be reasonable to treat injuries/cope with disabilities.
			* If additional costs sought that do not improve health benefits then this will likely be denied (*Sharman v Evans*).
		- Attendant care services:
			* Awarded whether or not services to be provided gratuitously (*Griffith v Kerkemeyer*), or by tortfeasor (*Kars v Kars*).
		- Gratuitous attendant services:
			* No damages unless reasonable need, injury solely caused need, and provided for less than 6 hrs a week for less than 6 mths (s 28IA).
* Loss of amenities:
	+ Damages for deprivation and ability to enjoy life based on obj/subj elements, greater weight on subj perception of loss.
	+ Permanently unconscious person damages significantly reduced. Also applies to pain/suffering (*Skelton v Collins*).
* Loss of expectation of life:
	+ Nominal sum (can’t place value on human life).

Property damage or economic loss

* Wrongdoers only liable for extent of their responsibility for loss (s 24AI(1)).
* Wrongdoers not required to contribute damages for another’s actions (s 24J):
	+ P must sue all wrongdoers together for full compensation.

Basic distinctions

* Pecuniary vs non-pecuniary:
	+ P – Financial losses from tort (e.g. medical expenses, loss of earning capacity).
	+ NP – Non-financial loss (e.g. pain/suffering, loss of amenities/expectation of life).
* General vs special:
	+ G – Losses unable to be proven precisely (e.g. future pec loss, non-pec loss).
	+ S – Can be proven precisely (e.g. Medical expense, loss of past earnings).

**Special Duty Categories: Mental Harm**

General

* P can still recover damages even if the injury arose wholly/in part from mental or nervous shock (*Wrongs Act* s 23).
* Common law not affected except in areas defined under Wrongs Act (s 71).

Mental Harm definitions (s 67)

* Consequential MH – MH caused by injury of any kind.
* Injury – Personal/bodily injury, includes psych injury.
* Pure MH – Non-consequential MH.

**Establishing Mental Harm claims**

1. Did P suffer mental harm?
* Psychological injury occurred (s 67), not mental distress (s 75).
	+ Consequential mental harm – MH caused by any other injury of any other kind (s 67).
	+ Pure mental harm – Any MH other than consequential MH (s 67).
1. Was the MH pure or consequential?
* **Pure** – go to Step 3.
* **Consequentia**l – go to Step 4.
1. **Pure:** Is recovery possible under s 73?
* Did P witness the event at the scene (2)(a); or
* Have a close relationship with the victim ((2)(b); *Annetts v Australian Stations; Gifford v Strang Patrick*)?
* If recovery possible, continue.
1. Did D owe a duty of care in relation to the pure MH?
* No duty unless D foresaw/could foresee that person of normal fortitude would suffer recognised psych illness if reasonable care not taken (s 72(1)).
	+ If D knows P has less than normal fortitude, then duty of care applies as per normal neg claim (s 72(3)).
* Are following circumstances present (s 72(2))?
	+ Mental harm caused by sudden shock;
	+ P witnessed, at scene, person being killed/injured/put in danger;
	+ Nature of relationship b/w P and person killed/injured/etc.
	+ Pre-existing relationship b/w P and D.
* Are salient features from case law present?
	+ Assumption of responsibility, vulnerability, control, no conflict of duties, interference with legit business activity, relationship b/w victim and P (*Annetts v Australian Stations; Gifford v Strang Patrick*).
1. **Consequential:** Is recovery possible from consequential mental harm?
* Not possible unless (s 74(1)):
	+ D foresaw/could foresee that person of normal fort. might suffer recognised psych illness if reasonable care not taken; or
	+ D known/ought to have known P is person of less-than-normal fort. and might suffer recognised psych illness.
* NOTE: Consequential MH occurs ALONGSIDE a physical injury.
	+ i.e. Establish normal negligence criteria, THEN consider remoteness.

Limitation on damages

* Cannot claim damages unless the mental harm is a recognised psychiatric illness (s 75).
	+ Mental distress (i.e. sorrow, grief, fear), not included.
* Higher threshold level (10%) for mental harm must be passed to claim damages (s 28LF). Non-economic damages can only be awarded if significant injury has occurred (s 28LE).

**Special Duty Categories: Omissions**

Generally no legal duty to take positive steps to help another. If omission in conjunction with positive act causes injury, this is *mere omission* and following not applicable.

1. Did D create the danger?
* If person creates danger, duty to exercise reasonable care to prevent others being injured (*Lawes v Nominal Defendant*).
* Duty to take reasonable care to remove hazards (not of their creation) from land if person:
* Knows of hazard, has ability to foresee consequence from not removing it, and has ability to remove it (*Goldman v Hargrave*).
1. Did D voluntarily accept responsibility?
* Duty can arise if D has undertaken to perform a task, and as a result P relies on the task being performed (*Sutherland Shire Council v Heyman*).
1. Is D a public authority?
* Public authorities’ duty of care in such circumstances complicated. Courts must consider (s 83):
	+ Financial/resource limitations of PA, scope of its activities, PA’s compliance with general procedures/applicable stds for exercise of its functions.
* Special relationships of responsibility:
	+ Teacher-student (*Geye v Downs*); Parent-child (*Robinson v Swincer*); Prison authority-prisoner (*Howard v Jarvis*).

**Special Duty Categories: Pure Economic Loss**

Negligent Misstatements

1. Was PEL suffered because of reliance on information/advice?
* If not, perhaps see negligent acts.
1. Was economic loss reasonably foreseeable?
2. Is P an immediate or non-immediate recipient of the information?
* Immediate – Step 4
* Non-immediate – Step 5
1. Was economic loss part of a ‘special relationship’ between parties?
* Arises from (*Esanda Finance v Peat Marwick*):
	+ Reasonable reliance by P that due care would be exercised; and/or
	+ Assumption of responsibility by D where known/should be known that information could be acted upon for a serious purpose with risk of loss if wrong.
* Additional factors – was any of the following present (*Hedley Byrne v Heller*)?
	+ Social occasion/business connection; form of inquiry/answer; payment for information; special skill; disclaimer of responsibility.
	+ Not necessary for D to be in business of giving relevant advice (*Hedley Byrne; Shaddock v Parramatta*. cf *MLC v Evatt* Privy Council decision).
	+ Ultimately presence of duty depends on case facts.
1. Limited negligence scope for non-immediate information (*San Sebastian v Minister*).
* Was there a ‘special relationship’ as per Step 4b?
* Policy considerations to consider, including effect on similar businesses, ‘floodgates’ of litigation and causation issues (*Esanda Finance v Peat Marwick*).
1. Are there statutory alternatives?
* Misleading and deceptive conduct by person in trade or commerce (*Australian Consumer Law* s 18).
* Action for damages if person suffers loss/damage by another’s conduct and conduct breached a Ch 2 or 3 provision (*ACL* s 236).

**Vicarious Liability**

1. Does D fit into the appropriate category for VL?
* Employer, Principal, Business Partner.
1. Was there a wrongful act by an employee of D?
* Multiple factors test to establish employment relationship – degree of integration into business, freedom in taking work, whether ‘under the cloak’ of business via uniform (*Hollis v Vabu; Stevens v Broadribb*).
* Permanent employer remains responsible for ‘borrowed’ employees (*Mersey Docks v Coggins*).
1. Was the act committed in the court of employment?
* Matter to be looked at broadly (*Ilkiw v Samuels*).
* Was tortious act within scope of employment – specifically authorised, reasonably incidental to employee’s duties (Salmand test; *Century Insurance v Northern Ireland*).
* Actions in emergencies can still satisfy criteria (*Poland v John Parr*).
* Express prohibition will not necessarily limit sphere of employment (*Bugge v Brown*).
1. Was tortious act intentional and outside scope of employment?
* If independent personal act unconnected with/not incidental to employment, then yes (*Deatons v Flew*).
* If sufficient connection between parties (done by scrutinising nature of employees’ responsibilities and relationship with P) then may be accepted (*NSW v Lepore* – NOTE: Policy considerations re: sexual abuse).
1. Was there dishonesty by employee?
* VL if employee commits fraud under cover of authority from employer (*Lloyd v Grace*).