**Trespass to Person**

**Battery**

***1 What is Battery?***

1. Occurs when the defendant directly and deliberately causes physical contact to occur to the person of the plaintiff without the plaintiffs consent or other legal justification.
   1. *Department of Health and Community Services v JWB (1992)*
2. Plaintiff bears the onus of establishing the balance of probabilities the first 3 requirements below.
3. The defendant bears the onus of proving the requisite state of mind was lacking.

***2 How to prove battery?***

1. **There must be an inference - physical contact - with the plaintiffs body**
2. Must cause physical contact
   1. **Clothing is enough -** Contact with the plaintiffs clothes is sufficient (*Fagan v Metropolitan Police)*
   2. **Throwing a Squib** – at someone (*Scott v Shepherd)*
   3. **Spitting in Someones face – (***R v Cotesworth)*
   4. **Cutting someones hair without consent** – *Forde v Skinner*
   5. **Removing a chair from a person sitting in it** – *Hopper v Reeve*
3. **This inference was a direct & positive act and not consequential**
   1. Inference is direct, not consequential; the inference must be immediate on the plaintiffs act
4. **Directness:** consequence of act must be immediate and inevitable – *Hutchins v Maughan (dogs eating poison baits); Southport v Esso.*
   1. **Not voluntary or immediate -**
      1. ‘where the injury is immediate, an action of trespass is available; where it is only consequential, it must be an action on the case’ (*Hutchins v Maughan)*
5. **Positive Act** – The act must be a positive act with application towards the plaintiff.
   * 1. **Obstruction–** Not enough to cause battery (*Campbell v Samuels)*
     2. **Cannot be a reflex or omission** – *Stokes v Carlson*
     3. **Course of Ordinary Life –** direct, positive, physical contact will not amount to battery when it has occurred in the course of everyday life. *(Re F Mental Patient: Sterilisation)*
        + 1. *‘jostling in a street or some other crowded place, social contact, at parties and suck like is an example of ‘exigency of everyday life’*
          2. Affirmed by High Court in *Department of Health and Community Services v JWB (1992)*
6. **Hostile Act** – Unclear whether the act is required to be hostile.
   * 1. **Anger** *– Touching a person in anger is battery (Holt CJ in Cole v Turner)*
     2. *Rixon v Star City* ***–*** *Tapping person on shoulder is within everyday life and is not deemed hostile*
     3. *Collins v Wilcock – Grabbing person on the arm to stop them walking away is battery and not accepted in everyday life*
7. **Consequential Act** – Where the act is consequential, then it is not direct.
   * 1. *Hutchins v Maughan – If you throw a log on the highway and it hits a person, then the act is direct. If you throw a log on the highway and it doesn’t it someone, but later someone trips on it – then there is no claim as it is not direct.*
     2. *Consequential* - If there are other acts necessary for the interference to occur, then it is not direct.
8. **The defendant had the requisite state of mind – the act of inference was voluntary and intentional or voluntary and negligent.**
   1. Act must be intentional or negligent
      1. **Not Intentional** – If the act is not intentional, it must be negligent to amount to a battery.
         1. *Williams v Milotin* **–** Truck driver seriously injured a cyclist – wasn’t intentional.
            1. *Decision -* HCA ruled negligent driving and battery.
      2. **Not Negligent** – If the act is not negligent, then the act must have been deliberate and wilful – ‘the defendant meant to do it’
         1. *McNamara v Duncan – Plaintif received punch in the head when playing football. Argued not intentional.*
            1. *Decision - Irrelevant that the defendant did not intend the consequences, act was intentional.*
      3. **Consequences Irrelevant** – It does not matter that the defendant did not intend the consequences of their act, only that the act was intended.
         1. *Refer to MacNamara v Duncan case*
   2. **Act must be voluntary**
      1. Act done in automatism is not voluntary (*Roberts v Ramsbottom)*
      2. *Weaver v Ward -* If A takes B hands and strikes C with it, B is not liable for battery to C because B act was not voluntary.
         1. A would be liable for battery on C as A’s act is both voluntary and intentional.
9. **No defense available to defendant**
   1. Defence must be proved by the plaintiff – *Marions Case*
   2. Consent & Necessity, Self-Defense
   3. **REFER TO DEFENCES**

**Assault**

***1 What is Assault?***

1. Occurs when the defendant deliberately causes the plaintiff to apprehend immediate physical contact (*Rixon v Star City)* 
   1. i.e. *Hit in head from behind* – is a battery but not an assault as the defendant is not in fear or apprehension
2. Plaintiff bears the onus of establishing on the balance of probabilities the first two requirements below.
3. Defendant bears the onus of providing that they themselves lack the requisite state of mind.

***2 How to prove assault?***

1. **There was an apprehension of immediate physical contact with the body of the plaintiff**
2. Must have an *apprehension of physical contact* by the defendant
3. **Direct Link** – there must be a direct link between the threat of the tortfeasor and the plaintiff and the plaintiff no longer feeling secure.
4. **Mere Words** – Are typically not enough *(Thomas v National Union of Mineworkers)* but can be if repeatedly threaten and abuse (*Barton v Armstrong)*
5. **Lawful Force –** If force is permitted by law then not assault (*Read v Coker, Police v Greaves)*
6. **Conditional Threat -** Roza v Samuels – A conditional threat can still be assault but you have to completely neutralise the threat – otherwise *Tuberville v Savage* - *‘if it were not assize-time I would take such language from you’*
7. **The defendant had a requisite state of mind; that is, their apprehension was reasonable**
   1. Act must be intentional or negligent
      1. **Not Intentional** – If the act is not intentional, it must be negligent to amount to an assault.
         1. *Williams v Milotin* **–** Truck driver seriously injured a cyclist – wasn’t intentional.
            1. *Decision -* HCA ruled negligent.
      2. **Not Negligent** – If the act is not negligent, then the act must have been deliberate and wilful – ‘the defendant meant to do it’
         1. *MacNamara v Duncan* – Plaintiff received punch in the head when playing football. Argued not intentional.
            1. *Decision -* Irrelevant that the defendant did not intend the consequences, act was intentional.
   2. **Reasonable Fear –** If the plaintiffs is at the mercy of defendant and has no idea if the harm is to occur now or in 10 minutes, then it is a continuous fear and enough for assault. *(Zanker v Vartzokas)*
   3. **The Act, not the Consequence** – The act must be intentional and voluntary – the consequences for assault are irrelevant – only that the defendant intended to do the act that caused the apprehension (*Rixon v Star City)*
      1. *Thomas v National Union of Mineworkers –* Mineworkers were on strike. Some miners still worked and were abused.
         1. *‘the capacity in question is present at the time the overt act is committed.’* Miners who worked were protected by police. Not assault as no reasonable fear of violence.
8. **The plaintiff had the requisite state of mind; that is, the act of interference was voluntary and intentional or voluntary and negligent**
   1. **Only need to anticipate apprehension -** Defendants Act must create an apprehension of immediate physical contact in the plaintiff; they need only anticipate the contact and not fear it.
   2. **Reasonable Apprehension** – The apprehension must be a reasonable apprehension (*Bartin v Armstrong)*.
      1. **Test of Reasonable Apprehension –** The test is an objectiveone
         1. It does not matter that the plaintiff did not *fear* the defendant’s act, only that they *reasonably apprehended immediate bodily contact*.
            1. *Exception* – when a defendant knowingly takes advantage of fear of an exceptionally timid plaintiff. In this instance, reasonableness towards fear is irrelevant.
   3. **Knowledge of the Act –** The plaintiff must have knowledge of the defendants act.
      1. **Unconscious or Unaware Person –** Silently waiving a first in an agreesive manner behind someones back to assaulting them in their sleep is not enough. (*R v Phillips)*
9. **No defense available to defendant**
   1. Defence must be proved by the plaintiff – *Marions Case*
   2. **REFER TO DEFENCES**

**False Imprisonment**

***1 What is False Imprisonment?***

1. Occurs when the defendant directly and intentionally (or possibly negligently) totally deprives the plaintiff of his or her liberty without lawful justification
   1. *Balmain New Ferry v Robertson*; *Bird v Jones*
2. Plaintiff bears of onus of establishing on the balance of probabilities the first two requirements below.
3. Defendant bears the onus of proving that the requisite state of mind was lacking.

***2 How to prove False Imprisonment?***

1. **There was a total deprivation of the plaintiffs liberty by their total restraint through a voluntary act**
2. False imprisonment requires a total restraint of the plaintiffs liberty by the defendant (*Bird v Jones)*
3. **Mere Partial Obstruction** – partial obstruction of the plaintiffs will or freedom of movement will not be enough to be false imprisonment.
   1. *Bird v Jones* – Defendant wanted to cross bridge blocked by police officer. Was free to go any other way. NOT false imprisonment as not a ‘total restraint’ of their freedom.
4. **If chance of injury, false imprisonment –** if the plaintiff can escape but would be injured in the process, then the plaintiff is in false imprisonment.
   1. *Burton v Davies –* Truck driver promised to take women home. Drove past her home. WAS false imprisonment as she could have jumped from the truck, but would have been injured.
5. **Reasonable means of escape** – Total restraint of the plaintiffs’ rights can be actuated by non-physical boundaries and does not require physical contact by the defendant.
   1. *Balmain New Ferry v Robertson –* Man entered wharf by own free will, and wanted to leave. Required to pay to leave. WAS NOT false imprisonment as his ‘contractual obligation overrides his freedom’.
   2. *Reasonable means of escape can be quite broad –* ‘could jump in the water’
6. **Plaintiff doesn’t have to know** – if plaintiff is unaware of false imprisonment then only less damages can be awarded once they are made aware (*Murray v Ministry of Defence 1988)*
   1. If plaintiff is drunk, asleep or a child and is imprisoned – can still amount to false imprisonment *(Murray v Ministry of Defence)*
7. **The defendants act was a positive act (although not always required)**
   1. **Positive Act –** the defendants act must be positive to the plaintiff for false imprison to occur.
      1. *Cowell v Corrective Services Commission* – a prisoner had been held in prison for longer that his sentenced allow. WAS false imprisonment as the omission was poor enough.
      2. *Symes v Mahon* – Plaintiff was detained mistakenly by police officer. WAS falsely imprisonment as there was a complete submission based on no evidence.
   2. **Words can amount to be a positive act –** 
      1. **Complete submission** - by the plaintiff by control of D. More so when plaintiffs words are a threat – Symes v Mahon
      2. **Embarrassment -** Failure to submit which subsequently causes embarrassment – *Con v David Spencer*
      3. **Future Acts** *- ‘Take back to my place and give it to you’ –* *Burton v Davies*
8. **The defendant had the requisite state of mind**
   1. Act must be intentional or negligent (but doesnt have to coincide)
      1. **Not Intentional** – If the act is not intentional, it must be negligent to amount to an false imprisonment.
         1. *Williams v Milotin* **–** Truck driver seriously injured a cyclist – wasn’t intentional.
            1. *Decision -* HCA ruled negligent.
      2. **Not Negligent** – If the act is not negligent, then the act must have been deliberate and wilful – ‘the defendant meant to do it’
         1. *MacNamara v Duncan* – Plaintiff received punch in the head when playing football. Argued not intentional.
            1. *Decision -* Irrelevant that the defendant did not intend the consequences, act was intentional.
   2. **Act and Intention don’t have to coincide –** *Cowell* case supports view that where a prisoner is held for a term and unlawfully held longer than that term – then act and intention need not coincide.
      1. If B consents, and proceeds, to be locked in a room by A – but then later revokes their consent, but A refuses to unlock the room, imprisoning B, there has been false imprisonment despite the fact that the act (locking the door) and the imprisonment (refusing to unlock the door) don’t coincide.
9. **Directness of Restraint**
   1. *Dickinson v Waters –* Policeman arrested woman for stealing celery stick on instruction from a store manager.
      1. *Dodgy –* As store owner ordered policeman and policeman should be liable
   2. **Without Legal Authority -***Myers v Soo* - Intentionally imposed restraint on P without legal authority when two officers and store detective imprisoned P.
10. **The plaintiffs state of mind**
    1. No binding authority on whether the plaintiff requires knowledge of their confinement for there to be false imprisonment.
       1. **Doesnt have to Know** - If plaintiff is drunk, asleep or a child and is imprisoned – can still amount to false imprisonment *(Murray v Ministry of Defence)*
11. **No defense available to defendant**
12. Defence must be proved by the plaintiff – *Marions Case*
13. **REFER TO DEFENCES**

**Action on the Case - Intentional Infliction of Injury (ON EXAM)**

***1 What is Intentional Infliction of Injury?***

1. An intentional act which had reasonably foreseeable consequences **OF HARM** that were apparently not in fact foreseen by the defendant in all their severity
2. **Intentional Harm caused INDIRECTLY**
   1. **Where you can't prove the “direct causation” you might have an action on the case if you can prove intention to cause harm, or reckless indifference**
3. Must prove that there was damage
4. **Indirect action – *Hutchins v Maughan***
   1. ‘where the injury is immediate, an action of trespass is available; where it is only consequential, it must be an action on the case’
   2. ‘give meat to a dog and its intentional, direct etc (trespass), leave meat for dog and its intentional but not direct so case’

***2 How to prove Intentional Infliction of Injury?***

1. **Negligently failing to exercise care to avoid causing damage**
   1. Take your victim as your find them
   2. Calculated and interpreted as foreseeable harm
   3. Includes emotional harm
      1. *Wilkinson v Downton* – *D played practical joke on P – telling D that husband had been seriously hurt in car crash. D suffered shock and physical illness. Ruled ‘action on the case’ as not trespass.*
2. **Implied from malice or reckless indifference**
   1. Wilfully done an act calculated to cause physical harm to the plaintiff
   2. The act is so plainly calculated to produce some effect of the kind which was done with an intention to produce it out to be imputed to the defendant
      1. *Carrier v Bonham*
   3. There was clear intention to cause injury or foresight that injury would occur (*Bunyan v Jordan)*
   4. There was some intent to scare (*Wilkinson v Downton)*
3. **Liable for such action**
   1. For foreseeable consequences (*Wilkinson v Downton)*
   2. Even if the tortfeasor is unable to meet the ordinary standards, they will still be held liable – objective test of reasonable foreseeability *(Carrier v Bonham)*
4. **Limited defense available to defendant**
5. Defence must be proved by the plaintiff – *Marions Case*
6. **Consent & Necessity ONLY**
7. **REFER TO DEFENCES**

**Defences to Trespass**

**Self Defense**

***1 Self Defence***

1. When the defendant acts to avert a threat of harm to their body where that threat has been caused by the plaintiff. (*Fontin v Katapodis)*

***2 How to prove self defense?***

1. **Act was reasonably neccessary**
   1. **Necessary and reasonable steps** - taken by defendant to protect from trespass *(Rosza v Samuels, Fontin v Katapodis)*
   2. **Escape** - If the defendant can retreat/escape, they must do so (*Rosza v Samuels)*
      1. *Fontin v Katapodis – D threw a glass shard at P attempting to defend himself and threw glass. D pleaded self-defense*
         1. *Reaction was ‘out of reasonable proportion to the emergency confronting D’* *as he could have moved away from him.*
2. **Act was proportionate to the threat against them**
   1. The less threatening the Act, the less forceful the defendants response should be.
      1. *Fontin v Katapodis* – D threw class at P attempting to defend himself and threw glass. Reaction was not proportionate as he could have used something else or moved away instead caused seriously damage to P
      2. *McCelland v Symons –* *D and P were farmers and had an argument. P produced a shotgun and said would shoot him. D raised metal bar and was shot by P. P’s action was disproportionate to Ds and D was provided was self defense.*
3. **Onus of Proof is on defendant to prove the reasonableness of their actions**
   1. *Pearce v Hallet –* reasonably proportioned to the degree of injury to be expected from the assault.
   2. *Goss v Nicholas* – P went to speak with D at house. Argument followed and P punched D. Argued self defense of others. Ruled ‘not reasonable to have intervened in this way’.
4. **Available to people who are being acted or reasonably believe they are subject of an imminent attack** – *Hall v Foneca*

**FALSE IMPRIOSNMENT**

1. **Albert v Lavin** – Person may use reasonable force to escape from false imprisonment.
   1. Includes is police officer arrests someone outside their authority

**Defense of Another**

***1 How to prove self defense of another?***

1. **Act was Reasonable to protect Third Person**
   1. **Steps must be necessary and reasonable** to protect a third person from trespass by the plaintiff (*Goss v Nicholas)*
   2. Must be in a close relationship with that person
      1. **Parents –** reasonable for man to defend a member of his household *(AG reference No 2)*
      2. **Children Defend Parents** – *Pearce v Hallet*
      3. **Can be a stranger** – provided that D has *reasonable grounds* to suspect the person being is threatened by another. (*Fonton v Katapodis)*
2. **Act was proportionate to the threat against them**
   1. The less threatening the Act, the less forceful the defendants response should be.
      1. *Fontin v Katapodis – D threw class at P attempting to defend himself and threw glass. Reaction was not proportionate as he could have used something else or moved away instead caused seriously damage to P*
      2. *McCelland v Symons – D and P were farmers and had an argument. P produced a shotgun and said would shoot him. D raised metal bar and was shot by P. P’s action was disproportionate to Ds and D was provided was self defense.*
3. **Onus of Proof is on defendant to prove the reasonableness of their actions**
   1. *Pearce v Hallet –* reasonably proportioned to the degree of injury to be expected from the assault.
   2. *Goss v Nicholas* – P went to speak with D at house. Argument followed and P punched D. Argued self defense of others. Ruled ‘not reasonable to have intervened in this way’.

**Defense of Property**

1. Battery/Assault: defendant may plead defence of property in an action of battery or assault, if acting in defence of:
   * 1. land (*Green v Goddard*)
     2. or chattels (*Norton v Hoare*)
     3. in their possession (*Dean v Hogg*)
     4. where plaintiff has actually threatened or is actually committing a trespass to those goods (*Haddrick v Lloyd*)
     5. Mistake: a mistaken belief that plaintiff is trespassing is no defence – *Haddrick v Lloyd*
   1. Reasonable force: defendant must show that and that no more force was used than was reasonably necessary – *Stroud v Bradbury*
      1. Dangerous weapons/deadly force: probably excessive – *Hackshaw v Shaw*
      2. Deadly mechanical weapons: cannot be used to defend property – *Bird v Holbrook*
   2. Peaceful entry: if plaintiff entered land peacefully, defendant must request plaintiff to leave before using force – *Long v Rawlins*

MAY BE APPLICABLE TO DEFENCE OF ANOTHER’S PROPERTY

* 1. Re-entry/Repossession: where defendant has immediate right to possession, may use reasonable force to:
     1. Land: re-enter land and expel intruder – *Hemmings v Stoke Poges Golf Club*
     2. Chattels: retake chattels wrongfully withheld – *Devoe v Long*
  2. but only if wrongfully dispossessed – *Toyota Finance Australia Ltd v Dennis*

**Necessity**

***1 Necessity***

1. The defence of necessity is available when a defendant is responding to a threat of imminent danger.
   1. Can only be used where action taken is to avert an imminent threat of grave harm if the harm caused by the defendant is not out of proportion to the harm sought to avoid. (*Re F)*
2. There must be a sense of urgency to require an immediate response by the defendant.
3. It is available when the threat of danger is not called by the plaintiff.

***2 How to prove necessity?***

1. **Imminent danger of great harm**
   1. **Imminent Harm -** *Proudman v Allen* – *defendant sought to stop a car rolling down the hill. Turn wheel to avoid collision but went into the ocean. Ruled WAS self defense as he had attempted to avert through his actions.*
      1. **IF** **D contributed to situation of peril cant use necessity of defence** (*South Port Corp v Esso Petroleum)*
   2. **Not Imminent Harm –** *London Brough Council v Williams –* *homeless people squatted at a house. Said was ‘necessary as they would have been homeless’. Rejected as then ‘anyones house could be trespassed’.*
      1. Preserve Life ***-*** *If perverse life in human life or safety, can be a defence*
      2. Public or Private Interests – Allows to trespass on land (*Re F)* saving property etc
2. **Reasonably Necessary**
   1. The standard is, as expected, a higher standard to meet than that of self-defense, or defense of property, so as to protect against an innocent third parties property.
      1. *Proudman v Allen – less damage would have occurred had the defendant allowed the moving car to collide with the stationary car. But was still reasonably to try and avoid the crash.*
3. **More Damaged cause by Acting**
   1. If D makes things worse than they otherwise would have been – its irrelevant – what matters is that D believed at the *time of acting* he was going to avoid more harm than inflict (*Proudman v Allen)*
4. **Special Cases**
   1. **Medical –**
      1. Patients are entitled to withhold consent to treatment, if consent is withheld, defence of necessity is NOT available. *(s5 Medical Treatment Act)*
      2. Defence of necessity not available if doctor goes ahead and proves that treatment anyway (*s6 – Medical Treatment Act)*
   2. **If P is incapable of providing consent:**
      1. **Allowed if**: *(1,2,3 - In Re F, 4 - Murray v McMurchy)*
         1. The treatment of P was in their best interests
         2. Not contrary to their known wishes (to the extend that they can make a rational decision)
         3. No one more appropriate and more willing to act
         4. Must be *absolutely necessary* as opposed to convenient
   3. **Suicide –**
      1. If trying to stop someone committing suicide – allowed to use as much force as reasonably necessary or any act which you reasonably believe to amount to suicide
         1. **S463B Crimes Act 1958**

**Consent**

***1 Consent***

1. Consent occurs where a plaintiff has consented to the *interference of their rights* by the defendant.

***2 How to prove consent?***

1. **Express or Implied**
   1. **Express Intent** – Express consent is given when the plaintiff gives permission for their rights, personal or property, to be interfered with by the defendant.
      1. i.e. person opens the door and says please come in etc
   2. **Implied Intent –** Evidenced by implication through the plaintiffs conduct.
      1. Conduct will suggest consent as opposed to the plaintiff expressly giving consent through their words
         1. *Halliday v Nevill - Disqualified driver backing out of driveway. Saw police and drove back in. Argued trespass. Police officers had implied consent to enter the driveway as ‘barriers or signs expressly prohibited them’.*
      2. ***Everyday Life* -** *Rixon v Star City* ***–*** *Tapping person on shoulder is within everyday life and is not deemed hostile*
2. **Must be freely and validly given**
   1. Thus, consent obtained by duress or fraud is not a defence to trespass (*Symes v Mahon)*
3. **Must not have been revoked or expired**
   1. **Notice & Reasonable Time -** If a defendant interferes with the rights of a plaintiff with the plaintiffs consent, but the plaintiff revokes this consent – the defendant will have a reasonable amount of time to cease the interference.
      1. *Cowell v Rosehill Racecourse –**Held –* ***‘****If permission is terminated, further continuance of the acts it authorised become unlawful. D does not become a trespasser until he has received notice and a reasonable time has elapsed’*
   2. **Loss Right** – If revoke consent, then the defence of consent is not longer available (*Balmain New Ferry v Robertson)*
   3. **Duress** – Cant consent if under duress (*Warner v Riddiford*)
   4. **Consent Expires** – *Konskier v Goodman* – *D left building rubble on P land. Rubble was left on after demolition completed. Consent expired and rubble was trespass.*
   5. ***Pro Tanto*** – where consent is provided for one reason to a person, but that person does another separate thing with that consent.
      1. *Barker v R ­– consent was provided to enter the property for purposes of looking after it. D entered and took all furniture and items instead.*
   6. **Cannot consent to serious physical injury –**
      1. Such consent is INVALID unless sporting/medical (refer below)
         1. *(Pellante case)*
4. **Specific Circumstances**
   1. **Medical***–* general principle that medical treatment involving a direct touching of the patient without the patients consent is battery.
      1. *Rogers v Whitaker* ***–*** *Risks of a medical procedure which have not been disclosed can only be found in an action of negligence and not in trespass.*
      2. **Different Treatment** - Trespass is the appropriate action in a case where a different treatment is performed to that which was consented. (*Chatterton v Gerson)*
      3. **Refusal of Consent –** Must uphold the autonomy of an individual if they refuse treatment. (*Re T)*
         1. For refusal of treatment to be effective Doctor must:
            1. **Capacity -** Be satisfied that the patients capacity to decide has not been diminished by illness or medication or by false assumptions or misinformation
            2. **Influence -** Patients will had not been overborne by another’s influence and that the decision had been directed to the situation in which it was relevant
            3. **Lack of Capacity to Decide** – doctor must provide treatment in the best clinical judgement at the patient’s interests. *(Malette v Shulman – Doctor provided blood transfusion but found card in her wallet which stated she was Jehovahs Witness)*
         2. Medical Treatment Act – s6 – ‘a doctor who administers treatment against a patients recorded wishes commits an offence of medical trespass’ –s6.
   2. **Sporting Consents** – consent to receive contact within the rules *(McNamara v Duncan)*
      1. ***Invalidated*** – if intention/recklessness to causing injury *(Giumelli v Johnston)*

**Lawful Justification**

***1 Lawful Justification***

1. A defence to trespass exists if the defendant can prove they had lawful justification to commit the act that is alleged to be a trespass. There are two types of lawful justification:
   1. Common Law Acts
   2. Statutory Acts

***2 How to prove law justification?***

1. **Common Law Acts**
   1. **Entry onto Premises** – by a police officer or citizen to prevent a murder – *Plently v Dillion*
   2. **During an Act** – if an offender is committing an act, then a police officer or citizen may arrest during the committing of the offence – *Nolan v Clifford*
   3. **Must have power to arrest & execute properly** – (*Christie)*
2. **Statutory Act**
   1. **Arrest –** by police officers
      1. **Crimes Act s458 –** Citizens Arrest
      2. **Crimes Act s459 –** Powers of Police
      3. **Crimes Act s461 –** Arrest valid even if no offence was committed
      4. **Listening Powers** – HCA ruled in *Coco v R* that listening devices did not permit police to trespass onto the land. The statutory act ‘use the device’ does not encompass trespassing on another person’s land to install/use it.
   2. **Mode of Arrest**
      1. **Reasonable force**
         1. *Reasonable force to resist an unlawful arrest is lawful*
      2. **Informed** - Person arrest to be informed of the charge (*Christie v Leachinsky)*
      3. **Reasonable Time** - Person arrest to be bought before court or released in a reasonable time (*Dallison v Caffery)*
      4. **Reasonable Force** - S462A CA –may be used where *necessary* and *reasonable* (proportional) to prevent the commission, continuance or completion of an indictable offence or to aid a lawful arrest of a person committing or suspected of committing an offence.
   3. **Power of Arrest** –
      1. **Has a warrant**? – then not actionable under tort. MUST not be defective and must be against correct person.
      2. **No Warrant** - If D does not have a warrant – must point specifically to some statutory right to make the arrest. *(Christie)*

**Mistake**

***1 Mistake***

1. Mistake is not a defence to trespass.
2. This is because all that is required to make out the cause of action of trespass is that the defendant intended the act and not the consequences of their act.
   1. *Symes v Mahon* – No defence that the police officer mistakenly believed the plaintiff to be the person the subject of an arrest warrant.

**Inevitable accident**

1. **Must be a positive Act in Battery** –
   1. For accident defense in battery, D must show it was a positive act.
2. **Lack of Voluntariness -** If the defendant succeeds in proving a lack of voluntariness, intent or negligence this is the defence of inevitable accident.
   1. If P can establish that D committed an act of interference, the onus of proof then falls to D to prove that the act was not voluntary and intentional or voluntary and negligent. *(McHale v Waston)*
      1. *i.e. it was the defendant who fell onto the plaintiff and caused their injury but later it was proved that the defendant was pushed by a third person and involuntarily fell on the plaintiff*
3. **Could not avoid consequences –** 
   1. D must prove that they did not intend the consequences and that the outcome could not have been avoided by taking due care *(Balkin & Davis)*

**Remedies**

**Damages**

***1 What are damages?***

1. Monetary sum awarded to the plaintiff.

***2 What type of damages?***

1. **Nominal Damages** – Do not compensate the plaintiff for any damage suffered but merely record that there has been an infringement of the plaintiffs rights
   1. **Trespass is actionable per se –** Without proof of damage, a plaintiff will still be entitled to a remedy as there rights have been infringed – no matter how trivially.
      1. *Plenty v Dillon –* The defendants unlawfully entered the plaintiffs land for the purpose of serving a summons. WAS trespass and nominal damages awarded.
      2. *Stephens v Myers* – Chairman of parish suffered an assault by approach of a defendant. No damage suffered by awarded small nominal damages.
      3. *Murray v Ministry of Self-Defence* – false imprisonment where plaintiff was unaware of their deprivation of liberty at the time of their imprisonment.
2. **Compensatory Damages –**
   1. Calculated to compensate the plaintiff for any damage they have suffered as result of the tort committed by the defendant.
   2. *Restitutio in Integrum* - return the plaintiff to the position they would have been in had the tort not occurred *(Livingstrone v Rawyards)*
   3. Damages are measure in 2 ways: (*general use - diminution value)*
      1. **Diminution Value –** Amount that the property has depreciated in value *(Jones v Shire of Perth)*. It is the difference between the value of the property immediately before and after trespass.
      2. **Restoration Value –** The amount that it costs to restore the property to the condition it was in immediately before the trespass. (*Adams v Mayor of Brunswick)*
         1. Can be used as evidence of the diminution value, often the amount property has depreciated in value due to damage will be approximately equal to the cost of restoration *(useful is market value is not able to be ascertained)*
            1. *Jones v Shire of Perth* – D commenced a road widening project and trespassed on P land and excavated it – ruining plants and vegetation. Ruled – award of damages.
   4. **Compensatory Damages** – where property has not been damaged, but rather there has been unauthorised use, the correct measure of compensatory damages is to measure the reasonable rental value *(Sommerhalder v Burjan)*
   5. **Consequential Losses** – Consequential losses are also recoverable, and are losses suffered by the plaintiff subsequent to the plaintiffs immediate loss.
      1. **Natural and Probable –** consequential losses must be a ‘natural and probable’ outcome of the defendants act *(HCA - Palmer Bruyn v Parker)*
         1. *Svingos v Deacon Avenue Cartage & Storage* – D entered Ps land via closed gate (also trespass). D left gate open and cattle destroyed Ps land. WAS *consequential loss.*
   6. **Aggravated Damages** – Aggravated damages compensate for ‘injury to the plaintiffs feelings caused by insult, humiliation and the like’ and not for physical injury or damage *(Lamb v Cotogno)*
      1. **Not Available for Provocation** – if the defendant has provoked the tortuous action *(Fontin v Katapodis)*
         1. *Myer Stores v SOO –* D was accused of stealing by P. D was imprisoned and questioned and later exonerated. D sued for false imprisonment and won. Damages were Aggravated and awarded as *‘a vindication of the reputation of the plaintiff in an action for false imprisonment’.*
   7. **Exemplary Damages** – Designed to punish and deter defendants *(Lamb v Cotogno)*.
      1. Like aggravated damages, exemplary damages will not be available where the plaintiff has provoked the defendants tortuous action *(Fontin v Katapodis)*
      2. *XL Petroleum v Caltex Oil***–** D spiked a petrol stations tanks to render them usable for P. Trespass to land proven, and *exemplary damages* awarded to deter future conduct.

**Remedies**

**Injunctions**

Compels a defendant to do something.

1. **Prohibitory** – compels the defendant to refrain from doing the act
2. **Mandatory** – compels a defendant to do something to stop the act
3. Favour an injunction must prove that:
   1. **Damages are not Adequate** – if the damages are not an adequate remedy can request an injunction as well.
      1. *Lincoln Hunt* – damage suffered to reputation if D was allowed to air footage recorded about him.
   2. **Trespass is continuing** – if there is a chance that the trespass will be repeated. *(Graham v KD Morris)*
   3. **Defendants Attitude –** if the attitude of the defendant is such that they refuse to admit trespass. *(Graham v KD Morris)*

**Tresspass to Goods**

**Bailment**

***1 What is Bailment?***

1. A *bailor* (deliveror) delivers goods to a *bailee* (deliveree)
2. Must be a delivery
3. Must be a transfer of possession from the bailor to the bailee *(Ashbury v Tolhurst)*
4. **If the bailee does something repugnant to the terms of the bailment – then the immediate right to possession reverts back to the bailor**
5. ***If bailor gives goods to bailee, and then a third party damages them – action on the case (unless terminal at will then can also sue in conversion)***

***2 What are the duties of a bailee?***

1. **Types of bailments**
2. **Fixed Term** – No right to immediate right to possession until term expires OR bailee does something repugnant to the interests the bailor (*Penfolds)*
   1. **Action on the case -** only open for bailor where bailment is a fixed term and has not expired.
3. **Terminable at will** – Bailor has right to immediate possession at all times. *(Wilson v Lombank)*
   1. Does bailor have immediate right to possession at all times?
4. **Duties owed by the bailee**
5. **Duty of Care -** The bailor gives goods to the bailee on the understanding that the goods will be return once the purpose for the bailee having the goods is fulfilled.
   1. **No Duty, No Bailment** – If a bailee enters a contract with the bailor that specifically excludes liability of reasonable care, then there is no bailment. (*Ashbury v Tolhurst)*
6. **Duty not to Convert** – bailee has duty not to do anything contrary to the interests of the bailor *(Morris)*
7. **Duty of Directness –** bailee must return goods or return in accordance with what bailor has directed.

***3 What types of possession is there?***

1. **Actual Possession** – The plaintiff has physical control and the intention to exercise that control
   1. *i.e. i own my sunglass and have them*
2. **Constructive Possession –** The plaintiff had actual possession, but lost physical control. They have the intention to possess the goods and no one else is yet in possession.
   1. *i.e. i own my sunglass and have lost them, and no one else has them*
3. **Right to Immediate Possession –** The plaintiff has a right to demand the goods from the person who is in wrongful possession.
   1. *i.e. i own my sunglass and have lost them, and someone else has them and I want them back.*
   2. **Possession Restored** – Right to immediate possession only allows possession to be restored to the person with right to possession. (*Penfolds)*
      1. *A gives sunglasses to B, and B losses them but C finds them. A can only demand that C return glasses to B – NOT to A.*

**Trespass to Goods**

* 1. **If prove that P had actual possession and action in trespass – then also action in conversion as had an immediate right to possession.**

***1 What is Trespass to Goods?***

1. Protects interests in retaining possession of the goods in the physical condition of the goods and in their current state.
2. It is a wrong to possession, not ownership *(Penfolds)*

***2 How to prove Trespass to Goods?***

1. **Possession –** Must have actual or constructive possession *(Wilson v Lombank)*
   1. *Right to Immediate Possession –* Only available where actual or constructive possession of Plaintiffs agent/employee/bailee of P’s goods is interfered with *(Penfolds)*
   2. *Wrong to Possession, not Ownership* – Can have a right when a wrong to possession, not ownership.
2. **Voluntary and Direct Act –** Trespass cannot occur through an omission.
   1. **Voluntary** – Consciously performed act, no unconsciously (such as sleep walking *Beals v Hayward)*
   2. **Act of defendant must directly interfere** – a consequential act is not enough to prove direct interference with the goods but will give rise to action on the case *(Hutchins v Maughan)*
      1. **Must be Direct** – i.e. Smashing windscreen of a car *(Creswell v Sirl)*
      2. Even if you believe you are entitled to take possession you commit trespass (*Wilson v Lombank)*
      3. **Wrongful Possession -** Even if you have wrongful possession which is actual possession – then can sue anyone except the true owner who interferes with possession in trespass
   3. **\*\*\*\*Direct act which sets off an unbroken chain of inevitable events** **IS DIRECT** – Scott v Shepperd
      1. *i.e. A puts ups hands to defend baseball from B and deflects and hits C*
3. **Interference –** if another person interferes with a parties possessory right.
   1. Dispossession – if goods are dispossessed without damage then have an action *(Wilson v Lombank*)
   2. Moving or Appropriation - *(Wilson v Lombank*)
   3. Damage or Destruction – *(Everitt v Martin)*
   4. Mere Touching –
      1. Can be trespass if intentional *(Penfolds)*
      2. In ordinary conduct of life, not trespass (*Everitt v Martin)*
      3. If damage is so minimal that not even nominal damages are required - (*Everitt v Martin)*
4. **Fault** – Liable if the act that constitutes trespass was done with intention or negligence.
   1. ***Recklessness –*** Where it was substantially certain the inference would result, fault will be satisfied.

***3 DEFENCES to Trespass to Goods?***

1. **Rightful owner** – If D is the rightful owner of the goods, will have a valid a defence to any trespass of goods action where they have actual possession
   1. Must Have:
      1. **Sufficient Title to the Goods**
      2. **Must be reasonable –**
         1. *Hackshaw v Shaw – D shot at mans car when man was stealing fuel from petrol bowser and hit P who was sitting in car.* 
            1. *Ruled that although D intended to scare off man, went too far to protect his property by shooting at car.*
   2. Third Party Right – if D is not true owner, they must show that the rightful owner gave permission *(Penfolds)* or that the true owner retrospectively authorised Ds act
2. **Ownership not a defence** – Trespass of goods protects possession not ownership
3. **Mistake not a defence**  - Mistaking the goods will not affect the voluntary or intentional nature of the act and therefore is not a defence.
4. **Necessity, Consent etc** (*refer to Defences notes)*

***4 REMEDIES to Trespass to Goods?***

1. **Self-Help** 
   1. Taking back own goods can only use reasonable force following a reasonable request *(R v Mitton)*
      1. Must be done as soon as you realise someone else has your goods
2. **Damages**
   1. **If goods are damaged** – damages for the cost of repair or value of difference in value before vs. After damage (P must show which is more reasonable)
   2. **Nominal** – if no legally recognised form of damage suffered
   3. **Exemplary/aggravated –** if you are insulted on or after trespass, or malice
   4. **Economic –** if goods are damaged can claim lost profits (Volker v Frizzell)
3. **Injunction**
   1. Discretionary and up to the court

**Detinue**

1. **If prove that P had immediate right to possession and a request is made for the goods but denied – then have detinue and conversion.**
2. *Why use detinue? If want good back, sue in detinue – otherwise sue in conversion as detinue requires market value whereas conversion can revert to time of conversion and put value at this time.*

***1 What is Detinue?***

1. Where a person who is or has been in possession of goods refuses to return the goods after a proper demand has been made for return of the goods by a person in immediate right to possession.
2. Protects people with a possessory interest against people with an actual possession
3. England has abolished detinue in place of conversion
4. **CANNOT BE IN ACTUAL POSSESSION**

***2 How to prove Detinue?***

1. **Plaintiff must have an immediate right to possession**
2. **P must show that D has taken possession of the goods** 
   1. i.e. D is in actual possession
   2. i.e. D was in actual possession
3. **P must make a proper demand for the goods to be returned** *(Lloyd v Osborne)*
   1. Must be specific as to who it is to be delivered to and where it is to be delivered *(Lloyd v Osborne)*
   2. Does not have to be in writing
4. **Proper demand must be refused**
   1. Failure to reply to a demand may also constitute a refusal *(Lloyd v Osborne)*
   2. Failure to return the goods based on reasonable grounds will not constitute a refusal (*Ming Kuei Property Investments)*
   3. If D is unable to return goods (lost or destroyed) the courts will look at whether D took reasonable skill and care in looking after the goods. *(Houghland v RR Luxury)*
      1. It is up to D to show she or he did, if reasonable skill and care was not taken failure to return through inability to comply is due to Ds intentional or careless act & failure to return WILL constitute a refusal.

***3 What is the burden of proof?***

1. **P bears onus of proof** *(Lloyd v Osborne)*
   1. D took possession of Ps goods
   2. P had immediate right to possession
   3. P made a proper demand for the return of the goods
   4. That proper demand was refused

***4 What defences are available?***

1. **Necessity, Consent etc** (*refer to Defences notes)*
2. Third Party owner (Jus Tertii):
   1. **Generally:** if defendant can prove someone else has better title than the plaintiff, this is a full defence – Henry Berry v Rashton
   2. Bailee: bailee can only plead Jus Tertii against bailor on the right and authority of the true owner – Wilson v Lombank

***5 Remedies to Detinue?***

1. **Specific Restitution**
   1. The plaintiff can ask for specific restitution which is a court order to have the goods returned
   2. Only if goods are rare or damages are insufficient *(General Finance v Cooks Cars)*
2. **Detinue Unique –** court can order the return of the goods as well as damages
   1. **Ordinary Articles -** Depends on whether the goods or chattels are ‘ordinary’ articles in commerce (*General Finance Facilities v Cook Cars)*
      1. **Ordinary** – court will only award damages based on standard cost of item
      2. **Rare -** Not “ordinary” if particularly rare or those which have sentimental value court may order return of goods.
   2. **Value at time of judgement –** 
      * 1. Detinue is ongoing (*Greenwood v Bennet)*
      1. **Value Increase** - If the values increases between initial detention and judgement from work done on goods, by D, damages = value of chattel before work done, i.e. at time of initial detention

**Conversion**

***1 What is Conversion?***

1. **If prove that P had actual possession and action in trespass – then also action in conversion as had an immediate right to possession.**
2. ***IF Value have DECREASED since act, use CONVERSION and not detinue***
3. **Assumes a possessory right to the goods when don’t have such right**
   1. D by intentional conduct deals with goods in a manner repugnant to Ps actual or constructive possession of the goods or his immediate right to possession of the goods to such an extent that P’s possession or immediate right to possession is denied.

***2 How to prove Conversion?***

1. **Conduct Amounting to Conversion**
   1. **Taking Possession of Goods –** is conversion.
      1. Merely taking/moving is not sufficient. Must assert *dominion over the goods either temporarily or permanently* (*Fouldes v Willoughby)*
   2. **Depriving Ps possession of Ps goods** is conversion.
      1. *Forsdick v Collins* – D move stone to a distance, and was found liable in conversion.
   3. **Withholding goods from P** is conversion.
      1. Need a positive Act by D similar to Detinue
   4. **Using goods inconsistently with rights –** 
      1. B allowed to take 1 photo with camera, takes 10 – inconsistent use
   5. **Deals with goods and asserts a proprietary right** –
      1. Even if D doesn’t take possession, can still amount to conversion (*Oakley v Lister)*
   6. **Transferring of right or title to possession from P to Third Party**
      1. i.e. where bailee sells goods to a Third Party, sale is transfer of title of possession of the goods *(Willis v British Car Auctions)*
   7. **Changing Nature of the Goods –** 
      1. Any utility which is lost which was previously apparent *(Willis v British Car)*
      2. Pouring water into wine *(Penfolds)*
   8. **Destroying the Goods –** 
      1. Substantial harm must be done *(scratching not enough*) fundamentally altering the nature of the goods intentionally *(Penfolds)*
   9. **Use of the Goods –** 
      1. If sufficiently repugnant to P’s possession depends on the fact on each case *(Penfolds)*
   10. **Alteration –**
       1. Mixing of goods and not being able to separate them changes the nature of the goods
2. **State of Mind of D**
   1. **Intention -** D must have acted intentionally
   2. **Deny Possession -** D must have intended to deny Ps right to possession of the goods, or assert an inconsistent right *(Willis v British Car)*
      1. Not required if it is a natural consequence of Ds intentional action that Ps possession or immediate right to possession was interfered with
      2. Court may choose not to require above
   3. **Interest in Goods** – P must have actual/constructive possession at time act occurred or an immediate right to possession *(Flack v Chairperson)*
3. **Is possession SUFFICENT ?**
   1. **Possession of goods by contractual right –** 
      1. Contractual right is not sufficient *(Jarvis v Williams)*
      2. If P has ‘something more than a mere contractual right’ *(International factors v Rodriguez)* then may be able to sue
   2. **Bailment –**
      1. If terminal at will
      2. **Fixed Term** – provided bailee does something sufficiently repugnant to terms of bailment
   3. **Hold Goods until Debt Paid – (lein)**
      1. Right of creditor to retain goods until debt is paid
      2. If limited interest in those goods that is sufficient interest to sue in conversion *(Standard Electronics Apparatus v Stenner)*
      3. Lienor cant sell goods, that would be repugnant to owners interest and would break the lien
         1. Right to immediate possession would revert to owner, who can then sue lieor
   4. **Mortgage**
      1. Mortgagor may be able to sue in conversion against Third Party or mortgagee if mortgagee becomes a wrongdoer by entering and taking goods without having given proper notice *(Brierly v Kendall)*
      2. Mortgagee cant sue in conversion if never had possession of mortgaged goods
   5. **Sale –** 
      1. Has property been transferred to buyers possession? (*Healing v Inglis*)
         1. If given 60 days to repay, seller cannot seize goods before then as buyer has right to possession (if stated in terms of contract)
      2. **Not Required -** Delivery may not be required to be made for property in the goods to pass to buyer (*Chinery v Viall)*
      3. **Required –** If goods are taken from person in immediate right to possession, and goods are sold and delivered then both buyer and seller have committed conversion.
   6. **Contract**
      1. Contractual right to possession to have goods handed to you does not give right to sue in conversion (*Jarvis v Williams)*
   7. **Co-Owners**
      1. Cannot sue a co-owner *(Parr v Ash)*
4. **Fault**
   1. **Intention –**
      1. Act constituting conversion must be intended, even if the tortfeasor has no knowledge that it is conversion *(Willis v British Car Auctions)*
         1. **Deny Owner Right** - To deny the owners right or assert inconsistent rights (*Lancashire v MacNicholl)*
         2. **Natural Consequences** *–* are taken to be intended (*Morgate Mercantile v Finch)*
   2. **Negligence –** 
      1. Mere inaction or negligence will not amount to conversion *(Ashbury v Tolhurst)*

***3 DEFENCES to Conversion ?***

1. **All but contributory negligence**

***4 DAMAGES of Conversion ?***

1. **Damages**
   1. D to pay P for the value of the goods that have been lost and further damages for consequential losses
2. **Value at time of judgement –** 
   1. Value of the chattel assessed at the time of the act of Conversion *(Greenwood v Bennett)*
3. **IF Value have DECREASED since act, use CONVERSION and not detinue**
   1. *Sachs v Niklos*
   2. Any increase in market from date of conversion
      1. BUT if the market value has decreased then the plaintiff can claim the value of goods at time of the act
4. **A successful action in conversion transfers the title of the good to defendant (*Moorgate Mercantile v Finch and Read)***

**Action on the case for Goods (ON EXAM)**

***1 What is action on the case?***

1. If unable to make out other torts first, then look to action on the case
   1. **Advantages – no directness, no possessory requirements**
      1. Only open for bailor where bailment is a fixed term and has not expired.
      2. **Must have damage**
   2. **Property** - If you own the good, **and someone damages it** while you don't have possession or an immediate right to possession you can't sue in trespass, conversion or detinue, but you can sue in action on the case, but you have to prove damage.
      1. **(e.g. you bailed the goods to someone, and the goods were damaged by a third party during the bailment period),**

***2 How to prove Action on the Case?***

1. **Reversionary interest:**
   1. In the goods, often will if own goods *(Hall v Pickard)*
2. **Destruction or damage**
   1. Wilful or negligent to the goods (*Hall, Mears v South Western Railway)*
   2. For foreseeable consequences (*Wilkinson v Downton)*
   3. Even if the tortfeasor is unable to meet the ordinary standards, they will still be held liable – objective test of reasonable foreseeability *(Carrier v Bonham)*
3. **If damaged, must be “permanent”:**
   1. P’s interest in the goods must be affected by the time good gets back to them *(Penfolds)*
      1. Merely using bottles is not ‘permanent’ damage
      2. *Mears* – notwithstanding P’s barge repairable, damage inflicted was sufficient
      3. Writing on licence rendered licence worthless to P as it had precluded him from employment *(Hurrell v Ellis)*

***3 How to prove Action on the Case?***

1. **Consent and Necessity** – REFER DEFENCES

***3 Remedies?***

1. **Substantial damages**
   1. For the harm or loss caused by the intentional unlawful act for permanent injury to the goods or damage to reversionary interest
2. **Exemplary/Aggravated Damages**
   1. If appropriate, malice etc
3. **Injunctions** – where damages aren’t appropriate
   1. *i.e. likely to reoffend*

**Trespass to Land**

***1 What is Trespass to Land?***

1. Direct voluntary interference by D with P’s exclusive possession of land (actionable per se) that may be intentional or (careless)

***2 What is land?***

1. **Definition of Land:**
   1. Includes:
      1. Surface (soil) and anything growing on surface (Tress, grass)
      2. Ground underneath the surface (& minerals)
      3. The airspace above the ground
2. **Above land –** Intrusion above land can constitute Tresspass *(Davies v Bennison)*
   1. **Right to airspace** – can only continue extend as far as necessary for owns use and enjoyment of the land *(Bernstien v Skyviews)*
      1. **Test**: whether incursion in airspace impacts on occupiers ‘ordinary use’ of the land *(LJP Investments v Howard Chia Investments)*
         1. **‘Ordinary Use’** – Generally liberal approach, ‘proper use and enjoyment of the land’
   2. **s30 Wrongs Act –**
      1. Airplanes flying over land, NO actions lies by reason only of flight of aircraft at height above land.

***3 How to prove Trespass to Land?***

1. **Conduct amounting to ‘interference’**
   1. **Interference –** slightest physical crossing of boundary of land in question *(Lavender v Betts)*
      1. *Perera v Vandiyar –* landlord cut off gas/electricity to flat, Romer LJ held D did not ‘physically interfere with property’ therefore no Trespass.
2. **Voluntariness of Ds Act**
   1. **Act must be voluntary**
      1. Act done in automatism is not voluntary (*Roberts v Ramsbottom)*
      2. *Weaver v Ward -* If A takes B hands and strikes C with it, B is not liable for battery to C because B act was not voluntary.
         1. A would be liable for battery on C as A’s act is both voluntary and intentional.
   2. Intentional or Negligent
   3. Act must be intentional or negligent
      1. **Not Intentional** – If the act is not intentional, it must be negligent to amount to an assault.
         1. *Williams v Milotin* **–** Truck driver seriously injured a cyclist – wasn’t intentional.
            1. *Decision -* HCA ruled negligent.
      2. **Not Negligent** – If the act is not negligent, then the act must have been deliberate and wilful – ‘the defendant meant to do it’
         1. *MacNamara v Duncan* – Plaintiff received punch in the head when playing football. Argued not intentional.
            1. *Decision -* Irrelevant that the defendant did not intend the consequences, act was intentional.
   4. **Reasonable Fear –** If the plaintiffs is at the mercy of defendant and has no idea if the harm is to occur now or in 10 minutes, then it is a continuous fear and enough for assault. *(Zanker v Vartzokas)*
3. **Directness**
   1. direct result where that interference can be characterised as being part of D’s act *(Southport v Esso)*
      1. *Southport v Esso* – Lord Denning held no Trespass as interference from oil only occurred due to the action of the tide washing it up on P’s property.
   2. **Not Direct -** 
      1. Run off onto other prosperities is not direct as its consequential -
         1. (*Huchins v Maughan)*
      2. In *Hutchins v Maughan* - a case where the plaintiff’s sheep dog ate poisonous bait and died - the Court ruled that in order for trespass of goods to be established, there must be direct intention and physical control.
         1. the dog consumed the bait independently of anyone else’s interference.
4. **Fault –** 
   1. Act may be done either *intentionally or carelessly* (*League Against Cruel Sports v Scott)*
5. **Notion of continuing trespass** – after initial trespass committed, person/object remains on land, personal responsible is liable *(Konskier v B Goodman Ltd)*
6. **Interest** – P must be entitled to exclusive possession of land when the trespass occurred & P must have been in actual/constructive possession
   1. Mere licence to be on the land is not sufficient *(Vaughan v Shire of Benalla)*

***4 Defences against Trespass to Land?***

1. **Consent**
   1. **Implied consent** – to enter property by pathway/drive leading to the ordinary entrance of normal suburban dwelling if unobstructed – e.g. gate unlocked, legitimate reason for being there *(Halliday v Nevill)*
      1. Must be an authorised act *(Lincoln Hunt v Willesee)*
   2. **Can remove implied consent at any time by express consent** – ‘sign which says keep out’
      1. *Presume there is a licence but what do the facts say ?*
   3. **Revocation of consent** –
      1. If a revoked person remains after a reasonable amount of time – trespass pursuant to revocation (*Cowell v Rosehill Racecourse)*
      2. Only effective – if bought to D’s attention, ineffective if P decides to change his or her mind.
2. **Inevitable accident** 
   1. D neither intended, nor could act have been avoided by taking due care (*McHale v Watson)*
3. **Contributory Negligence**
   1. Defence available to instances of negligence
   2. Has been rejected for instances of intentional battery/assault (*Horkin)*, open whether would apply in cases of negligent battery/assault
4. **Necessity**
   1. *Balkin v Davis* suggested this test:
      1. There was an actual situation of imminent danger, or at least, to what a reasonable person seems to be so; and
      2. Steps taken were reasonably necessary in the circumstances
   2. Balance harm D seeking to prevent VS harm D imposes. If D preventing at the very least the same amount of harm, probably ok.
5. **Re-entry on land**
   1. Can use reasonable force to eject someone from land who no longer has a right to remain there – i.e. a licensee who has been asked and given a reasonable opportunity to leave (*Cowell v Racecourse)*
      1. A landlord cannot enforce right of re-entry against a tenant without judicial proceeding
6. **Executing a Lawful Arrest**
   1. With a warrant or under statutory authority
7. **Statutory Authorisation**
   1. D has power to be on land pursuant to some statute

***5 Remedies against Trespass to Land?***

1. **Injunction** – provided at the courts discretion
   1. Injunction only granted if P can show that:
      1. **Subsequent Damages Insufficient** – (*Rinsale v ABC)*
      2. **Irreparable Harm** – if a injunction is not granted *(Lincoln Hunt v Willesee)*
      3. **Trespass Continuing** – *Graham v KD Morris)*
      4. **Refusal to stop –** if it’s clear that D is not going to stop
2. **Damages**
   1. **Restitution -** P entitled to full restitution for any loss, generally; depreciation in selling value or cost to reinstate are good measures where physical damage.
   2. **Wrongful occupation** - is reasonable rental that would have been due.
   3. **Exemplary Damages –** only if D’s conduct is malicious, high-handed would these result.

**Private Nuisance**

***1 What is Private Nuisance?***

1. Public Nuisance exists but concern is with activity affecting public at large.
2. 2 Forms are Recognised:
   1. Interference with Ps use and enjoyment as a result of *physical damage*
   2. Interference with exclusive possession of use and enjoyment as a result of *discomfort* to P or *damage to P’s sensibilities* (*Hargrave v Goldman)*

***2 What is needed to bring an action in Private Nuisance?***

* 1. There has been an unreasonable interference
  2. The interference is with a proprietary right
  3. The plaintiff has title to sue
  4. The defendant is the appropriate defendant

***3 What can sue and be sued?***

1. **Right to sue**
   1. **Exclusive Possession *–*** to land = right to sue. Someone with mere license to be on that land cannot *(Hunter v Canary Wharf)*
      1. **Oldham v Lawson –** *girl lived with parents and a guy was harassing her and calling her. She tried to sue in nuisance. Parents can sue, but you cannot – as you don’t have exclusive possession of the land.*
2. **Who can be sued**
   1. **Creator of nuisance-** *(Fennel v Robson Excavations)*
   2. **Occupier of Land where nuisance emanates –** 
      1. If occupier is aware of nuisance and fails to take reasonable steps to bring nuisance to an end, occupier may be liable *(Sedleigh v O’callaghan – incorrect pipe laid and D knew about it so liable)*
         1. **Must take reasonable steps to end nuisance –** as per *(Hargrave v Goldman, City of Richmond v Scantelbury)*
   3. *Allowing animals to enter – (League against Cruel Sports v*

***4 When is an interference unreasonable?***

1. **Physical Damage to Land -**
   1. As long as damage is not ‘trivial’ *(St Helens Smelting Co. v. Tipping)*
2. **Damages to P’s *sensibilities***
   1. **Appropriateness ­**– must consider the appropriateness of the circumstances – including:
      1. **Location/locality –** where interference occurs. If less appropriate more likely inference – *unreasonable (Sturges v Brigman – pestles and morts creating too much noise in residential area)*
      2. **Intensity –** greater insanity of discomfort suffered by P, more likely interference = unreasonable (*Feiner v Domochuk – mushroom compost emitting foul, intense smell)*
      3. **Time/duration/frequency–** Greater frequency/duration of act, more likly interference as its unreasonable *(Seidler v Luna Park – stopping roller coaster ride)*
      4. **Practicability of avoiding –** *the interference, if D can easily avoid doing the act causing the interference, more likely interference and unreasonable (Clarey v Womens College)*
      5. **Malice –** where interfering act attended to by malice, more likely interference = unreasonable (*Hollywood Silver Fox v Emmett – killing foxes on farm)*
      6. **Social utility/benefit –** wont justify what otherwise would be a nuisance if it is affecting someones utility of the land *(Munroe v Southern Dairies, Hunter v Canary Wharf)*
      7. **P’s abnormal sensitivity –** of P or P’s property does not matter (*Robinson v Kilvert).* Cannot be relied on by P for cause of but can still be argued.
         1. *‘A man who carries on an exceptionally delicate trade cannot complain against someone who is doing some lawful on their property’ -* (*Robinson v Kilvert)*
3. **Proprietary Rights**
   1. **Interests in Free Access to Property –** P has right to have free access to their property
      1. *Animal Liberation v Gasser* – picketing protestors amounted to a nuisance as Circus could not run.
   2. **NOT covered by Nuisance**
   3. **Freedom from VIEW**
      1. A cannot bring an action against B if B has caused interference to the use and enjoyment of A’s land by way of merely looking at it *(Victoria Park Racing v Taylor)*
   4. **Interference from PHYSICAL PRESENCE of a building nearby**
      * 1. i.e. Such that P’s view spoiled, increased light through windows, view blocked, extra wind comes across property or television reception is affected.
      1. No Action – In nuisance against those responsible for the building (*Hunter v Canary Wharf)* but may have cause action if something other tahn the actual building causes interference (i.e. generator inside – *Nor-Video Services v Ontario Hydro)*

***5 What defences are available?***

1. **Going to the Nuisance?**
   1. It is NOT a defense that P effectively exposed themselves to nuisance by moving nearby to where D was already doing an act *(Miller v Jackson)*
2. **Statutory Authorisation (SA)**
   1. **SA will be a valid defence when:**
      1. Leglisation imposed on D the doing of a particular act (*Lester-Travers v City of Frankston)*
         1. *i.e. council workers repairing road with SA and must specifically authorise*
   2. **Couldnt be avoided** = inevitable consequence on the doing of that act in accordance with the SA and could not be reasonably avoided (*Manchester Corporation v Farnworth)*
3. **Contributory Negligence**
   1. Can argue that P contributed to nuisance as per DEFENCES

***6 What REMEDIES are available?***

1. **Abatement of Self-Help**
   1. Right of P to take action to put nuisance to end regardless of the fact that taking such action may constitute a leg wrong (*Lemmon v Webb)*
      1. If P (abater) in order to abate the nuisance, must enter property of tortfeasor, abater must give notice.
      2. **Notice -** NOT required if:
         1. Abatement can be affected without entering tortfeasors land
         2. Tortfeasor was the original creator of the nuisance
         3. There is an immediate danger to health and safety *(Burton v Winters)*
         4. Nuisance has result as a consequence of failure on part of D to perform a legal duty
      3. **Damages Lost** - Once exercised, right to damages is lost
2. **Injunction –**
   1. Order by court that D not do a particular thing (negative injunction) or sometimes that D do a particular thing (positive injunction)
      1. **Discretionary –** 
         1. If D has trespassed and appears to do so again *(Lincoln v Willesee)*
         2. Damages are not adequate
         3. P will suffer irreparable damage if injunction is not granted
         4. Behaviour of D suggests one should be granted
   2. **Quiet Time Injunction –** Stop an activity before it has even commenced. P must show that real probability exists in Ds actions will cause substantial damages. (*Seidler v Luna Park)*
3. **Damages –**
   1. Interference with Ps use and enjoyment of the land that occurred, must have been reasonably foreseeable as a consequence of D’s act and were not too remote. *(Cambridge Water v Easter Counties Leather)*
   2. **Material Damage –** 
      1. Full restitution of loss and *restituto in integrum*
      2. Measure of Damage is diminution value (amount property has decreased in value) as opposed to restoration value (the amount it would cost to replace)
         1. *Restoration Value –* If damage is extreme, then restoration value should be awarded *(Evans v Balog – vibrations caused house to collapse, awarded restoration value as damage was extreme)*
   3. **Damages instead of Injunction, Nuisance Continues** - In some circumstances the court will allow damages instead of an injunction (*Munroe v Southern Diaries)*
   4. **Utility Damage –** Where damage to utility is suffered the plaintiff is entitled to the diminution value of the land for the duration of the nuisance *(Hunter case)*

**Negligence: Duty of Care**

***1 What is negligence?***

1. Allows a plaintiff to recover compensation for a loss or injury caused by another person’s failure to take reasonable care.
2. Three essential elements:
   1. The defendant must owe the plaintiff a duty of care;
   2. The defendant must have breached their duty of care;
   3. The defendants breach must have caused the plaintiffs loss or injury

***2 What is a duty of care?***

1. A duty of care is an obligation imposed on a person to take reasonable care to ensure that they do not, through their conduct, cause another person to suffer harm.
2. **Wrong Act 1958 – s48**
   1. *Not negligent in failing to take precautions against a risk of harm unless –* 
      1. *The risk was foreseeable (risk should or ought to have been known)*
      2. *The risk was not insignificant*
      3. *A reasonable person would have taken precautions*

***3 What type of injury has occurred?***

1. What type of injury has been suffered?
2. How was the injury suffered?

***4 Who caused the injury and/or what are the causes?***

1. How did the injury occur?
2. Who caused the injury?
   1. Single persons fault
   2. Multiple people

*(IF SUING BUSINESS GOTO VICARIOUS LIABILITY)*

***5 Did the person(s) who cause the injury owe a duty owed to P?***

1. **If it’s an established category:**
   1. Generally: if plaintiff falls into any of following categories, duty of care automatically arises:
      1. **Driver and passenger** – *Chapman v Hearse*
      2. **Road user** – *Chapman v Hearse*
      3. **Occupier and invitee (invite on property)** – *Australian Safeway Stores Pty Ltd v Zaluzna*
      4. **Employer and employee** – *Bankstown Foundry Pty Ltd v Braistina*
      5. **Bailor and bailee** – *Hobbs v Petersham Transport*
      6. **Exceptions – illegal activity**: policy considerations may override existence of duty in an established category – *Gala v Preston*
2. **General Test** – *Donoghue v Stevenson –* concept of reasonable foreseeability as to whether a duty of care is owed.
   1. **Reasonable Foreseeability –** the reasonably foreseeable consequences of a reasonable persons actions in the position of the plaintiff. *(Chapman v Hearse – doctor stopped to help car crash victim, was hit by third party – third party owed doctor duty)*
   2. **Must discuss:**

**1.** Injury of the KIND suffered: need not foresee that the specific injury would be suffered, but that an injury of that kind would be likely – ***Chapman v Hearse***

**2.** Likely to injure persons in the CLASS of which plaintiff was a member: again, no need for defendant to foresee injury to the plaintiff specifically – **Chapman v Hearse**

* 1. **Salient Features –** Is P a ‘neighbour’ of D such as to give rise to duty? ‘Mitigating Factors against liability’
     1. **Indeterminate Liability –** 
        1. Whether the imposition of a duty of care exposes the defendant to an indeterminate liability
           1. *‘D knows or ought to know an ascertainable class is affected by its conduct, and the nature of the liability is not indeterminate’* – *Perre*
        2. **Unreasonable Interference with Autonomy –** 
           1. Whether the imposition of a duty of care would unreasonably interfere with defendants autonomy.

*i.e. duty of care should not conflict with what would otherwise be a legitimate pursuit of its own personal or social interests (Perre v Arpand)*

* + - 1. **Consistency with other obligations**
         1. Whether the imposition of a duty of care is consistent with some pre-existing obligation on the defendant.

*i.e. Hill v Van Erp – solicitor already owed the testator duty of care in having will correctly executed.*

* + - 1. **Vulnerability –** 
         1. Whether the plaintiff is in a position of vulnerability – was there no way they could take steps to protect themselves against loss.

*Perre v Apand – no way P could have known D was planting experimental seed exposing D’s crop.*

*‘If the plaintiff, has or could have, taken reasonable steps to protect themselves and was not induced by Ds conduct – then no duty’ - Perre*

Steps:

Was there reliance by P on D ?

Was there an assumption of responsibility by D towards P ?

Knowledge or means of knowledge available to P of potential harm?

Any evidence of P to avoid the risk?

Cost burden to avoid the risk ?

* + - * 1. **Insurance is irrelevant –** *McHugh* J in *Perre* and Stephen J in *Caltex*
      1. **Knowledge of Risk** –
         1. Whether the defendant has actual knowledge of the risk of loss
         2. *Does D have actual knowledge of P’s vulnerability?*
      2. **Control –** 
         1. Whether the defendant has a significant measure of control in a legal or practical sense over the situation which brings about the loss.
         2. *i.e. if the defendant does not have a significant degree of control over the relevant risk, that objective is not advanced by imposing a duty of care*
      3. **Proximate Casual Relationship –**
         1. Is D’s act the primary cause of the loss or only secondary ? If secondary, no duty of care.

Is there any intervening negligence? *(novus actus intervenes)*

* + - 1. **Coherency in Law or Other Obligations –** 
         1. Will the imposition of a duty of care operate to complete and vindicate a duty ?

*Hill v Van Erp – by imposing a duty, obligation to settle will correctly was enforced.*

* + - 1. **\*\*\*Policy Considerations –**
         1. Would it be good public policy to hold a duty liable?

*Gala v Preston – is it a good decision to hold a duty for criminal activity? No, not good to allow illegal activity.*

1. **Individual Circumstances:**
2. **Illegal Activity** –
   1. cannot sue for negligence if the plaintiff was engaged in illegal activity *‘which was integral to the commission of the crime’* at the time that they sustained injury or loss
      1. *Gala v Preston – drank 40 beers and stole car. D fell asleep in back seat and P then drove off road and hit a tree. No negligence allowed for illegal activities.*
      2. **Wrongs Act 1958** – s14G(2)(b) requires the court to consider an action in negligence
   2. **MUST be integral to the crime – i.e. WILL owe a duty if not integral**
      1. i.e. A and B are dealing drugs on sidewalk, C is drink driving and hits them. C still owes a duty regardless of what A and B are doing.
   3. **Rescuers** – Will owe a duty of care from a person who created the dangerous situation OR who had a sufficient degree of control over the situation when the danger occurred. *(Also refer to Voluntary Assumption of Risk Defence)*
      1. **Property** – duty may be owed to a person who attempts to rescue property although the degree of risk that a rescuer may reasonably incur in attempting to save property would less than involving an attempt to save a persons life
      2. **Voluntary Assumption of Risk –** Moral obligation to assist another in danger creates sufficient pressure to take the rescuers act outside the category of truly voluntary conduct *(Chapman v Hearse)*
         1. *Chapman v Hearse – Doctor pulled over to assist accident. Was killed by D. Ruled D owed a duty of care.*
         2. *Haynes v Harwood* – *horse ran away and police officer saved it but it fell on him.* 
            1. *‘It would be absurd to say that if a man deliberately incurs a risk he is entitled to less protection than if he acts on a sudden impulse without thinking’*
         3. *Also refer to Voluntary Assumption of Risk Dfence\*
      3. **No Immunity** – immunity does not apply if the rescuer:
         1. **Created the situation** – in which the person was injured or endangered
         2. **Was Influenced by Alcohol** – or a drug that impaired their ability to exercise reasonable care and skill
         3. **Reasonable Care** – failed to exercise reasonable care and skill in the rescue attempt
         4. **Impersonated a Professional** – falsely represented their skills or expertise that enabled them to provide emergency assistance
   4. **The Disabled** – If P is a disabled person injured in a situation where another person without the disability could have avoided injury a duty of care will probably be owed.
      1. *Haley v London Electricity Board* – *P was blind, fell on warning tool and hit his head becoming deaf. Duty Owed? Yes, as reasonably foreseeable blind person could not see tool.*
   5. **Occupiers –** Any person who has significant control over an area that they out to realise that a failure to make that area safe may injure those who come into that area – *Wheat v E Lacon & Co Ltd*
      1. **Duty Owed -** Occupier of land can be held liable for injuries sustained by a person who enters an area over which the occupier has control
      2. **Refer to non-delegable duties**
   6. **Unborn Children –**
      1. Unborn child who sustains an injury and who is subsequently born alive can sue a person whose negligence cause the injury *(Watt v Rama)*
         1. **Include the parents** – of a child who was injured in the womb *(Lynch v Lynch)*
         2. **Cannot sue for injuries** – while they were in the womb they cannot sue a defendant on the grounds that the only reason that they are alive is due to the negligence of the defendant. (*Harriton v Stephens)*
            1. **(Cheat book page 27)**
   7. **Recreational Activities –** A duty of care can be owed to people involved in sport and other recreational activities
      1. **Not Liable –** in negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity which is risky by nature
   8. **Intoxication** – P cannot sue D for negligence if P was intoxicated at the time that they sustained their injury.
      1. ***Does Not -*** *Cole v South Tweed Heads Rugby Club – P attended a function and consumer large amount of alcohol, then left and hit by car – sue rugby club. ‘No reasonable care owed to self-induced intoxication’.*
      2. ***Does –*** *Bannervich v Verkavich*
      3. *Also refer to Voluntary Assumption of Risk Defence*
   9. **‘The Sober Passenger’**
      1. If P is sober and enters a car with D who is drunk, negligence may fail because:
         1. Standard of care is lowered such that there is no breach. The passenger can only reasonable expect the standard of care of a drunk driver.
         2. Elements of Volenti can be made out

**6 Has P breached the duty that they owed?**

1. **Standard of Care**
   1. **Definition** - Breach their duty of care if they fail to meet the standard of care that would have been shown by a reasonable person in avoiding or reducing a risk of injury to the plaintiff.
      1. A Court will only determine whether the defendant has breached their duty of care in light of what the defendant knew or should have known before the injury was sustained.
         1. ***Know about it and doing nothing -*** *Knowledge about the ‘risk of injury’ and the precautions that could have been taken against the risk discovered after the injury are not relevant to determining whether there has been a breach – (Roe v Minister for Health)*
      2. **Wrongs Act – s56 –**
         1. *P must prove they were not aware of the risk or information*
   2. ***Assessed at the date of the negligence conduct*** (i.e. must know of the conduct at the time – *Roe v Minister of Health)*
   3. **Reasonableness –** *‘Whether a reasonable man in the defendants position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff’*
      * 1. **IS** **REASONSBLE PERSON MODIFIED ?** i.e. professional etc – if yes, refer below to “modified person**”**
      1. **S48(2)** – *A Court considers a reasonable person would take precautions again a risk of harm when:*
         1. *The probability that the harm would occur if care was not taken;*
         2. *The likely seriousness of the harm;*
         3. *The burden of taking precautions to avoid the risk;*
         4. *The social utility of the activity that creates the risk of harm.*
      2. **Modifying Reasonable Person -**
      3. **Wrongs Act –** 
         1. **s58 -** *If a person makes out they are a possessing a particular skill, then standard applied is:*
            1. *What would reasonably be expected of a person possessing that skill;*
            2. *The date of the circumstance and not a later date*
         2. ***S59 –*** *A professional is not negligent if the manner in which they acted is widely accepted as the competent manner.*

*3) If the court considers another professionals opinion*

*unacceptable, it can discard it.*

* + - 1. ***S60*** *– Has a duty to warn of the risk*
    1. **Children –** Standard of care is lowered when D is a child as children have a reduced ability to understand the risk of harm associated with the acts due to age and experience.
       1. *McHale v Watson* – *D was 12-yr old who threw sharp metal pole at P causing serious facial injuries*. *Standard lowered to 12-year old – no breach.*
       2. **Consensual Relationships (disability) –** (*Cook v Cook)*
          1. Special and exception facts may transfer the relevant relation such that the standard of care to be observed by D will be determined by reference to the relevant relationship which is created.
          2. P cannot expect D to observe reasonable standard care:

If P knows that D has some incapacity or attribute that precludes him/her from meeting that standard;

Consensually enters into a relationship with the D on that basis.

* + - * 1. *Cook v Cook –*

*D knew that the driver didn’t know how to drive, and P crashed the car. So standard was lowered to that of a shit driver as D knew.*

* + 1. **Mentally Ill** – Standard of Care is not modified for defendants suffering from a mental illness.
       1. *Adamson v Motor Vehicle Trust – D ran over innocent man as was suffering from schizophrenia. Mental illness not a defense.*
       2. **‘The Sober Passenger’**
       3. If P is sober and enters a car with D who is drunk, negligence may fail because:
          1. Standard of care is lowered such that there is no breach. The passenger can only reasonable expect the standard of care of a drunk driver.
          2. Elements of Volenti can be made out
    2. **Professionals –** Court determines standard of care relevant to profession. *(Rogers v Whitaker) (s58 Wrongs Act)*
       1. *Rogers v Whitaker –* *D had eye surgery which went wrong. P did not adequately warn of risks and so was held liable. Duty to provide risk*
       2. *D’Orta-Ekenaike v Legal Aid* – *solicators are provided immunity for in-court work.*
       3. **Not Negligent –** if acts in accordance with common practice accepted in that profession unless the court determines that unreasonable **(***Bolam*) - s59 Wrong Acts

**Doesnt apply if didn’t warn of risk –** s50 & s60 of Wrongs Act

* + 1. **Consenting Plaintiffs –** If P knows that D is limited in their ability, standard of care can be lowered.
       1. *Cook v Cook* – *D let P drive even though P had never driven before. P suffered serious injuries from crash. Standard lowered as D knew of P’s inability*
       2. **\*\*\*\*Negligence by others –** 
          1. **Possibility of others -** Standard of care expected of a reasonable person requires him or her to take account of the possibility of inadvertent and negligent conduct on the part of others.
          2. **Duty of care of people protecting other people from their own stupidity -** **Risk of Injury** - In determining whether a risk of injury is reasonably foreseeable, a reasonable person has regard to the possibility of inadvertent and negligent conduct on the part of others. *(Mclean v Tedman)*
  1. **Foreseen Perception – ‘negligence calculus’ -** ‘Perception of the reasonable man calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence. It must be judged in prospect and not in retrospect’ (*Wyong Shire Council v Shirt)*
     + 1. ***Probability* –** Unlikely that a defendant will be found to have been negligent in failing to take precautions against a risk of harm when the probability of being injured by that risk is low. *(Bolton v Stone – D was injured by cricket ball outside her house after P hit it over 17ft fence. No breach as ‘extremely small risk’)*
       2. ***Gravity* –** D is more likely to be found to have breached their duty if it can be shown their conduct placed others at risk of sustaining serious injuries.

1. The more serious the injury as a result of D, the higher the standard of care owed. *(Paris v Stepney Borough Council – P was blind in one eye, used tool at work and became blind in other – no protection supplied. Gravity implied greater duty)*
   * + 1. ***Practicability*** - D will not breach their duty of care unless it can be shown that a reasonable person in the position of the defendant would have taken specific precautions against the risk that causes P injuries.
          1. *Caledonian Collieries v Speirs – P was in car and killed by runaway railway truck as did not have auto-catch points to stop it. Did breach duty as should have had them.*
       2. ***Social Utility* –** D less likely to breach duty if their activities provide a significant benefit to members of the community.
          1. *E v Red Cross – P contracted AIDS from blood supplied by D. D did not breach duty as social utility of their function was so important & if did breach, whole community would suffer.*
       3. **Common Practice –** *(Mercer v Road Transport)*
          1. D less likely to breach if their activities show that general public sentiment is related to fairness
   1. **Foreseeable Risk –** If the defendant knew of the risk that caused the plaintiffs injuries then the requirement that the risk was foreseeable is clearly satisfied.
      * 1. *Doubleday v Kelly –* *P jumped on trampoline in roller-skates, and injured her arm. P had never been on one before. Risk of injury was foreseeable.*
        2. **Wrongs Act – s53 – Obvious Risk**
           1. *Risk that would have been obvious to a reasonable person in that position*
           2. *Includes risks that are patent or a matter of common knowledge*
           3. *Can be an obvious risk even though it has a low probability of occurring*
      1. **Not Foreseeable/Obviousness –** If the defendant is unaware of the risk, then the issue will be whether a reasonable person in the position of the defendant would have foreseen the risk.
         1. *Mulligan v Coffs Harbour* – *D suffered spinal injuries when jumped into water head first and no warning signs. No duty owed as obvious and inherent risk*.
            1. *Did P request info about risk?*
            2. *If yes, did D warn P of risk ? If no, liable. If yes, not.*
            3. *Inherent Risk* – *Body surfing, diving into sea, medical operations*
   2. **Risk NOT Insignificant –** 
      1. **Risk –** a risk which is not ‘far-fetched or fanciful’ is real and therefore foreseeable. (*Wyong Shire Council v Shirt , Drinkwater v Howarth)*
         1. **Insignificant Risk** – risks which are ‘far-fetched and fanciful’
   3. **Failure to warn (MEDICAL)**
      1. D must warn P of risks otherwise failure to warn adequately – *s50 Wrongs Act, Rogers v Whittaker*
         1. **Medical -** Doctor must warn patient of a material risk of injury – *Rogers v Whittaker*
      2. Material Risk –
         1. A reasonable person in the plaintiffs shoes would attach significance to it; OR
         2. Doctor is or should have reasonably aware that the patient would attach significant to it. (*Rogers v Whittaker)*
2. **If D Fails to meet the standard of care that a reasonable owed – D breaches duty** (*Blyth v Birmingham Waterworks Co).* P owes duty of proof *(Holloway v McFeeters)*

**7 Did D CAUSE P to SUFFER HARM?**

1. **Harm –** 
   1. ‘Loss of life, personal injury, damage to property, economic loss and loss of any other kind’
2. **Causation**
   1. There MUST BE a ‘factual link’ between Ds breach and Ps injury
   2. **But For Test (factual causation) –** would Pstill have suffered their harm ‘but for’ the defendants negligence. Apply in ‘common sense way’.
      1. ***Would P have suffered injury regardless of what D did?***
         1. **Yes -** *Barnett v Chelsea Kensington Hospital – P went to hospital sick. Wasn’t examined by doctor. Died from Arsenic Poisoning. No causation owed as would have died anyway.*
         2. **No -** *March v Stramare* – *P parked vehicle in middle of road to load it. D was drunk and driving and hit car. Causation satisfied as it was not reasonable to park a car in middle of road – despite D being drunk.*
      2. **If factual causation can be established – what is most ‘common sense’ causation?**
         1. i.e. if there are two causations to an accident, court will apply the ‘most common sense’ causation to the incident
            1. *March v Stramare*
         2. **Wrongs Act – s51** – must prove the following elements:
            1. *That the negligence was a necessary condition of the occurrence of the harm*
            2. *That it is appropriate for the scope the negligent persons liability to extend to the harm so caused.*
         3. s52 – Burden of Proof
            1. *P bear the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.*
3. **Lack of Proof –**
   * 1. D has breached duty of care and P has suffered harm but P cannot establish that D was cause of harm
        1. *McGhee v National Coal Board –* 
           1. *P developed dermatitis as result of work. P argued if had showers wouldn’t have developed. Proof showed could result from work, but couldn’t show whether showers would prevent it.*
           2. ***Ruled -*** *D was liable as ‘increased risk of injury occuring’*
4. **Take P as you find them** – any action must take P in the current state they are in
   * 1. *Performance Cars v Abraham* – *Car was hit by D. Car was hit 2 weeks earlier by another and damages had not been repaired. Ruled that must ‘take car as you find it’ as car was already being repaired, cannot expected D to pay for all damage – ‘the necessity already existed for repair’*
5. **Increased Risk**
   * 1. P will be successful in their action if they can satisfy that they would have avoided the injury if the defendant had not been negligent.
        1. ***Medical -*** *Chappel v Hart* – *D operated on P without informing of risk. Held liable as should have informed as P would not have done surgery.*
        2. ***REFER FAILURE TO WARN***
   1. ***Successive Injuries***
      1. *Baker v Willoughby* ***–*** ‘a man is not compensated for physical injury, he is compensated for the loss which he suffers as a result of that injury. A wrongdoer must take a plaintiff as he finds them.’
      2. ‘A wrongdoer is only responsibly for the damage suffered which results from injury from this point forward’.
      3. **Damages** - are only offered to a future reduction of P’s utility, if that utility stops – then damages will not be offered
   2. **Vicissitudes Principles** –
      1. Vicissitudes: where injury caused by defendant’s negligence is superseded by an unrelated illness/injury to the plaintiff, this reduces liability for the damage caused by the plaintiff – *Jobling v Associated Dairy*
6. **Novus Actus Interveniens** – event chain of causation between D negligence and P’s injury has been broken by some event or third party.
   1. **Novus Actus Interveniens is NOT applicable where:**
      1. Subsequent act was likely to happen – *Chapman v Hearse*
      2. Intervening act would be expected to flow naturally from defendant’s act – *Chapman v Hearse*
      3. Defendant’s duty of care required him/her to protect plaintiff from subsequent act – *March v Strathmare*
      4. Defendant’s negligence set foundation for subsequent act – *Bennett v Minister of Community Welfare*
   2. **Examples**
      1. **Suicide -** *Haber v Walker* – *D suffered serious injuries from P’s negligence. Subsequently committed suicide. P was liable – as chain of causation had not been broken as it was a truly voluntary act.*
      2. **Motor Collision** – *Chapman v Hearse – Doctor was killed when assist motor car accident where D was thrown onto the road by negligently driving. Held P partially responsible as causation satisified.*
      3. **Medical Treatment –** *Mahony v Kruschich Demolitions – P suffered injuries while building and need medical treatment. D argued that treatment was negligent. D was liable for treatment so long as medical treatment not ‘grossly negligent’*
7. **REMOTENESS**
   1. Must consider whether or not and why responsibility for the harm should be imposed on the negligent party
   2. **Remoteness –**
      1. **Test –** damage is reasonably foreseeabile if a reasonable man in Ds position would forsee a real risk of such damage occurring which he would not brush aside as far-fetched *(Wagon Mound (No. 2))*
      2. **Act, not Extent –** Only the kind of injury sustained by P needs to be reasonably foreseeable, not the manner in which it occurred.
         1. *Overseas Tankship v Morts Dock – Oil leaked from Ds ship due to negligent refuelling. Oil caught fire and damages P’s wharf.* ***Held*** *– too remote, oil leaking from ship was not a reasonably foreseeable outcome to burning wharf.*
            1. *(except if ‘manner of harm’ is so remote)*
   3. **Reasonable Foreseeability –** *(Wagon Mound (No. 2))*
      1. A defendant is not liable for harm of a different kind from that which was reasonably foreseeable.
      2. As long as the harm is classified as being of the same kind, it does not matter that the precise manner in which it has come about was unforeseeable *(Hughes v Lord Advocate)*
   4. **Manner of Harm –** The manner of the harm in which P is injured.
      1. If the chain of events leading up to the final event are reasonably foreseeable, then the final event should be reasonably foreseeable *(Versic v Connors)*
         1. *Hughes v Lord Advocate –* *P was a boy who picked up lamp and dropped lamp into manhole causing huge explosion in which he suffered serious burns.*
            1. **Held –** *D was liable as even though the manner and extent of the injury sustained was not reasonably foreseeable – being burnt by a lamp was..*
            2. *Doughty v Turner –* even if a damage of a particular kind is reasonable foreseeable, if the damage is caused in an unforeseeable manner it makes it a different kind

*Dropped something in a bath of sodium synoide heated to 800 degress – it reacted an caused an explosion. No one knew that would happen.*

* 1. **Egg-shell skull rule –** 
     1. **Test –** D will not be able to avoid liability for an injury on the basis that the plaintiff only suffered the extent of the juries that they did because they were different in some significant way from an average person.
        1. *Nader v Urban Transport – D jumped from bus and was injured then developed psychiatric injury. D was liable as reasonably foreseeable D would develop psychiatric injuries.*
           1. ***Egg Shell -*** *Unable to avoid liability by arguing that the average person would not have developed the psychiatric injury that the plaintiff sustained.*

1. **Res ipsa loquitor – RARE -** injury is sufficient proof that defendant was negligent
   * 1. *Schellenberg v Tunnel Holdings – Pressure hose broke and caused P injury while trying to avoid it. No cause was directly hoses fault.*
        1. **Must prove:**
           1. The instrument or agency that caused the injury was under the control of the defendant;
           2. The occurrence was of such a kind that it does not ordinarily occur without negligence;
           3. There is an **‘absence of explanation’** of the occurrence that caused the injury;
        2. **Onus still remains on the plaintiff**

**8 Does D have a DEFENCE to Negligence?**

1. **Defences**
   1. If a plaintiff has been able to prove negligence existed, D may be able to avoid or reduce liability for P injury through reliance on negligence.
      1. **Subsequent Action Irrelevant -** If D subsequently does an action to avoid an earlier risk, that does not itself give rise to affect liability of D
      2. **Contributory Negligence –** a plaintiff has failed to take reasonable care for their own safety and suffered harm a reasonably foreseeable risk of injury *(Nance v British Columbia Electric Railway)*
         1. ***Standard of Care*** – A plaintiff is required to show a reasonable level of care for their own safety on the basis of what they knew at the time. \*\*\*S62 below – objective test.
            1. **Wrongs Act -** S25 – *wrong means an act giving rise to a liability where a defence of contributory negligence is available or a breach of a contractual duty*
            2. **S26(1) – if contributory negligent, an action seeking compensation for losses suffered is not defeated on this basis but damages may be reduced by the court to account for P’s responsibility toward the damage**
            3. S23B – Entitlement to contribution
            4. S24 – Recovery of contribution
            5. S62 – **Standard of care:**

*The standard of care required of the person who suffered harm is that of a reasonable person in the position of that person;*

*The matter is to be determined on the basis of what that person knew or ought to have known at the time.*

* + - * 1. **Reduce Damages by 100% if necessary (s63)**
        2. **Children –** Standard of care is lowered when D is a child as children have a reduced ability to understand the risk of harm associated with the acts due to age and experience.

*McHale v Watson* – *D was 12-yr old who threw sharp metal pole at P causing serious facial injuries*. *Standard lowered to 12-year old – no breach.*

* + - * 1. **Employment** - Usually not found when the P failure to take care is

*Mclean v Tedman & Brambles* – *P ran out behind garbage truck and was hit. HCA found employer (D) was liable for not preventing possibility of inadvertent and negligent conduct.*

* + - * 1. **Intoxication –** If P sustained their harm from being intoxicated or from placing themselves in the care of another person who they knew or ought to have known.

*Joslyn v Berryman – P drove D home both drunk. D insisted she should drive as less drunk. D crashed and caused serious injury to P. P was contributory negligent.*

*‘P will be contributorily negligent if they are injured in a motor vechile accident when they knew, or should have known, that D was intoxicated on the basis that the P knew or should have known’*

* + - * 1. **Causation –** If P failed to take reasonable care for their own safety, they must then demonstrate that this failure was actually a cause of the plaintiffs harm.

P negligence must contribute to their injuries and not to the incident that caused their injuries.

*Froom v Butcher – P collided with D and was Ds negligent driving. P was not wearing a seatbelt and injuries would have been reduced. P was contributory negligent.*

* 1. ***Apportionment of Damage*** – Need to consider conduct of P and of D. *[Wrongs Act s63]*
     + 1. *Podrebersek v Australian Iron and Steel – P was employee of D and injured in gas expolsion. P didn’t correctly fit pins in gas pipe, D supplied incorrect pins.*
       2. *HCA said ‘the whole conduct of each negligent party in relation to the circumstances of the accident which must be considered’*

1. **Voluntary Assumption of Risk *–*** *If* P freely consents to risk that they fully understand D may be able to rely on the defence of voluntary assumption of risk *(volenti non fit injuria)*
   * + - 1. D has no liability for Ps injuries and no apportionment
         2. Must prove:

**Freely consented to that risk (truly voluntary)**

* + - * 1. P must assume risk of injury by reason of D’s negligence (*Roots v Shelton, Kent v Scattini)*
        2. **Pressure Submission** – risk which is bought by any form of pressure – whether physical, social or economic will not be voluntary (*Imperial Chemicals v Shatwell*) and;

*Scanlon v American Ciagrette – P started smoking when 15 and had 20 a day for 22 years. D could not rely on defence of voluntary assumption of risk as risk was unknown to plaintiff.*

**P knew of the facts constituting the risk**

* + - * 1. D must prove that P fully appreciated the risk.
        2. Evidentiary presumption to obvious risk

**P fully appreciated that risk**

* + - * 1. P who suffers harm is now presumed to be aware of obvious risks unless he proves on the balance of probabilities that he was not aware (s54 Wrongs)
        2. Obvious Risk – is that would have been obvious to a reasonable person in the circumstances – s55
        3. **Wrongs Act – s54 – obvious risk**

1. *The risk of harm must be an obvious risk, the person who suffered the harm is presumed to have been aware of the risk, unless P can prove otherwise.*
2. ***S55*** *–* ***Inherent Risk***

*No liability exists for harm suffered by another person as a result of the materialisation of an inherent risk*

***2)*** *An inherent risk is a risk of something occurring which cannot be avoided by the exercise of reasonable care.*

*3)* ***s60 – Duty to warn of risk if a Professional***

* + - * 1. **Intoxication –** If P is so intoxicated that they cannot assess or consent to a risk then cannot rely on it. *(Joslyn v Berryman)*
        2. **Rescuers** – Free consent also prevents the defence from being used against rescuers as their actions have been held to not be ‘truly free’ but rather performed under moral coercion *(Haynes v Harwood)*
        3. **Employment –** Must prove (very hard) that P has genuinely consent to the risk *(Smith v Charles Barker)*

**Allowed** – *Imperial Chemical v Shatwell – P set of explosives using procedure prohibited by employers and government – but known to them and regularly used. D was not liable as P clearly consent to risk.*

1. **Illegal Activity** –
   1. cannot sue for negligence if the plaintiff was engaged in illegal activity *‘which was integral to the commission of the crime’* at the time that they sustained injury or loss
      1. *Gala v Preston – drank 40 beers and stole car. D fell asleep in back seat and P then drove off road and hit a tree. No negligence allowed for illegal activities.*
      2. **Wrongs Act 1958** – s14G(2)(b) requires the court to consider an action in negligence
   2. **If in breach of law, may still owe duty -** *Henwood v. Municipal Tramways Trust – whether illegal activity precludes duty of care depends on the degree of illegality; e.g. breach of regulation may not preclude duty*
   3. If P is acting unlawfully, then this may preclude a duty from arising as:
      1. The injury was not reasonably foreseeable
      2. Policy considerations
2. **Joint illegal Enterprise –** 
   1. Mere fact that P is involved in joint illegal enterprise does not preclude a duty
   2. **Must examine:**
      1. Relationship between the act of negligence complained of and the illegality with a view to ascertain whether it is appropriate or feasible to set an appropriate standard of care.
      2. If not feasible then not appropriate
   3. If act occurs in furtherance of the joint illegal enterprise:
      1. The ordinary standard of care cannot be applied because the parties have transformed their relationship such that P cannot expect an ordinary standard of care
   4. It will not be feasible or appropriate to set a lower or different standard of care because to do so would require the court having regard to and in effect facilitating the criminal enterprise. (*Gala v Preston, Italiano v Barbaro)*
   5. **Defenses** – can still rely on volenti and contributory negligence
3. **Limitations of Action –**
   1. **S5(1) –** Cannot take an action after 6 years
   2. **Personal Injuries - S23A –** can extend any action for damages against an individual person.

**Vicarious Liability**

1. **Vicarious Liability (VL)**
   1. VL is liability for the negligence of another person which arises from the relationship between two people.
2. **Employee/Employer**
   1. Employer is liable regardless of its own acts or omissions (no fault) and that such liability flows from the relationship it has with another person.
   2. **Need to prove –** 
      1. Is there an employer-employee relationship?
         1. **Control ‘Indicia’ Test – The employer (A) has a level of control over what the employee (B) does. If A has more control, more likely employee.**

*Duties* – A control ? Then B

*Hours of work* - A control ? Then B

*Holidays* - A control ? Then B

*Skill Level* – If yes, less likely B

*Employer ID* - A control ? Then B

*Supply of equipment* - A control ? Then B

*Manner of payment* - A control ? Then B

*Ability to negotiation payment* - A control ? Then B

*Power of dissimal* - A control ? Then B

*Hollis v Vabu – P was walking along street and hit by person, A, in D company clothing on bike but they didn’t stop. A was held to be employee of D as was wearing D’s clothes – generally employee in company clothing is employee.*

* + - 1. **If no employer relationship, then worker is a independent contractor**
         1. *Stevens v Brodribb Sawmilling – D owner of a sawmill retained a number of people*. *P was injured when another employee, Gray, hurt him*.

*Ruled – Neither P or Gray were employees as didn’t satisfy above tests of control.*

* + - * 1. **Representation -** *Sweeney v Boylan Nominees – P was injured by milkbar refrigerator who was repaired by repairman, A, from D sent to fix it. A owned his own company and contracted to D and ruled independent contract as ‘representing D’ but not a ‘representative’*
        2. Representative – act on behalf of another. ‘Represent’ conveying of information or inducing of a belief in another’
    1. If there is an employer-employee relationships is the employee acting the course of their employment.
       - 1. Tests whether the employee’s wrongful conduct is within the scope of the employer’s enterprise.
         2. **Need to Prove –**

Was an opportunity given to the employee to abuse power?

*Express Authority*

*Implied authority from the role they had been employed to do*

Were employers aims furthered by wrongful act?

Extend of power employee had in relation to victim?

Potential victim vulnerability to abuse power by employee?

Illegaility – employer can still be liable for employees acts if employee does them illegally *(Morris v C. W. Martin & Sons)*

* + - 1. **Enterprise Risk Test from *Hollis v Vubu* –**
      2. Were the risks created by the employers enterprise sufficiently connected to the employees acts of misconduct?

*Hollis v Vabu – P was hit by person in D company clothing on a bycle – D’s enterprise was in ‘delivery goods by bike’ – so sufficient connection established.*

**Acting in scope –**

*Authorised act in an unauthorised manner, acting in scope (Deatons v Flew)*

**Not acting in scope of employment -** *NSW v Lepore – Sexual and Common assault against students by two defendants in NSW.*

*Ruled that ‘acts were not within a sufficient connection of the employers enterprise’ as they were ‘not done in intended performance of the contract AND in intentional abuse of students’*

*Deatons v Flew – D was a barmaid who threw a glass in mans face allegding self-defence. Not ‘acting within scope of employment’*

**NON-DELEGABLE DUTIES**

1. **Non-Delegable Duties – PERONS ONLY**
   1. Personal duties owed by an employer or organisation that cannot be delegated to someone else.
      1. If a duty exists, the resultant legal liability attaches to employer or organisation itself.
   2. **Wrongs Act – s61**
      1. *Breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or entrusted by D is determined as if D were vicariously liable for the negligence of P in connection with the work.*
2. **General -**
   1. Party A will have a duty to ensure that reasonable care is taken towards Party B and Partys B property
      1. *Third Party –* If third party (C) does not take reasonable care towards B and Bs property, there will be recovery against A by virtue of the fact that A has failed in his or her duty to B
   2. **Where A has undertaken:**
      1. Care or control of B; OR
      2. Is so placed as to assume a particularly responsibility towards B;
   3. **A will have a duty to ensure reasonable care is taken towards B, and Bs property *(Burnie Port Authority v General Jones)***
      1. A cannot divest itself of that duty (*Burbie Port Authority)*
      2. A is not liable if B is harmed an intentional tort act by a Third Party as its beyond scope of A’s liability
3. **Employer/Employee**
   1. The employer or organisation must take a duty of care for the negligence of another to whom the employer or organisation has delegated the performance of some task within the ambit of duty.
      1. **Employer must provide reasonably safe place of work -**
         1. *Kondis v State Transport Company –*
            1. *D employed P as part of a team to dismantle railway. D hired independent crane and driver (Third Party) who subsequently injured P while operating it.*

*Held – an employer’s duty to provide a safe system of work was non-delegable duty, and this encompassed liability for negligence by its independent contractor.*

*This extends to ensuring that employees as well as independent contracts do not injure others who are employee in the course of employment.*

* + 1. **Cannot be too broad liability-**
       1. *NSW v Lepore –* A non-delegable duty cannot be too broad. To impose liability on a school for any injury inflicted at the school upon a pupil by a teacher would be too broad.

1. **Occupier of Land & neighbours –** 
   1. Occupier bought on or caused to be brought on dangerous substance onto land owes non-delegable duty to neighbour to ensure that reasonable care is taken towards neighbour in respect of that substance
      1. *(Burnie Port Authority v General Jones)*
2. **School Authority/Student Relationship –** 
   1. School authorities have non-delegable duty to ensure that students are protected from harm as a result of carelessness/negligence that occurs in school grounds by another person
      1. *(Commonwealth of Australia v Introvigne)*
      2. This duty resided with the relevant federal body and it was not possible to delegate it to a state authority (even though power to run schools could be)
3. **Occupiers/Landlords**
   1. Jones v Bartlett –
      1. *P’s parent leased a property from D. P’s son walked into a glass door which should have been replaced with tougher glass and sustained serious injury. Ruled – did owe duty, but reduced through contributory negligence.*
   2. Established:
      1. A landlord owes a duty of care not solely under the contract of lease and not only to tenants but also to third parties, including visitors, injured as a result of a patent defect in the tenanted premises;
         1. A landlord may discharge such duty of care by:
            1. understanding an inspection of the premises prior to each lease or renewal of lease,
            2. Responding reasonably to defects drawn to notice
            3. Ensuring that any repairs are made with such inspection or notice as reasonably necessary;
            4. Larndlord may ordinarily discharge duty by delegating such inspection and repair to a completion person
4. **Hospital/Patient**
   1. Ro v Minister of Health
      1. If a doctor is negligent, the hospital can be liable

**Negligence: Economic loss**

**What is it ?**

Pure economic loss occurs where the loss is suffered by the owner when the building itself, although undamaged, requires rectification or is less valuable by reason of some defect (*Sutherland Shire Council v Heyman)* and may be recoverable depending on the circumstances.

**Types of Loss**

**Consequential Economic Loss** – This is economic loss sustained as a consequence of negligently inflicted personal injury or property damage

* + - * + *i.e. inability to earn an income after being injured by a defendants negligent act*
        + Damages – Standard negligence action

**Pure Economic Loss** – This is economic loss unaccompanied by personal injury or property damage **(100% this will be in exam)**

* + - * + *i.e. economic loss unaccompanied by personal injury after relying on professional financial advice*
        + Damages – Limited Circumstances as otherwise too much liability could result from such action.

**Is there a duty of care ? (REFER OTHER NOTES AS WELL!!!!!)**

It has been held that five fundamental matters are relevant in determining whether a duty exists at all in cases of a liability for pure economic loss, being (*Perre v Apand)*

* (a) reasonable foreseeability of loss;
* (b) indeterminacy of liability;
* (c) autonomy of the individual;
* (d) vulnerability to risk; and
* (e) knowledge of the risk and its magnitude.
* **(GO THROUGH ALL ELEMENTS IN DUTY)**

The **existence of a duty of care normally involves:**

* the proof of known reliance or dependence by the plaintiff upon the exercise by the defendant of due care or the assumption of responsibility by the defendant or a combination of these, *[(Bryan v Maloney)](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/frame.do?tokenKey=rsh-20.842449.3675980924&target=results_DocumentContent&reloadEntirePage=true&rand=1227685757380&returnToKey=20_T5229281819&parent=docview" \l "65-1905.12)* and
* the defendant induced this reliance, or at least, that the defendant was or should have been aware of the plaintiff’s reliance. *(Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad)*

**Date of Action** –

* Where a plaintiff suffers pure economic loss (*Hawkins v Clayton)* the date at which the cause of action accrues depends upon what economic interest is said to be infringed.
* Where the economic loss is a claim made against the plaintiff by a third party, the plaintiff’s economic loss is not suffered until the claim is made. *(Wardley Australia Ltd v Western Australia* )

**Did D breach the duty owed?**

1. **Standard of Care**
   1. **Definition** - Breach their duty of care if they fail to meet the standard of care that would have been shown by a reasonable person in avoiding or reducing a risk of injury to the plaintiff.
      1. A Court will only determine whether the defendant has breached their duty of care in light of what the defendant knew or should have known before the injury was sustained.
         1. ***Know about it and doing nothing -*** *Knowledge about the ‘risk of injury’ and the precautions that could have been taken against the risk discovered after the injury are not relevant to determining whether there has been a breach – (Roe v Minister for Health)*
      2. **Wrongs Act – s56 –**
         1. *P must prove they were not aware of the risk or information*
   2. ***Assessed at the date of the negligence conduct*** (i.e. must know of the conduct at the time – *Roe v Minister of Health)*
   3. **Reasonableness –** *‘Whether a reasonable man in the defendants position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff’*
      * 1. **IS** **REASONSBLE PERSON MODIFIED ?** i.e. professional etc – if yes, refer below to “modified person**”**
      1. **S48(2)** – *A Court considers a reasonable person would take precautions again a risk of harm when:*
         1. *The probability that the harm would occur if care was not taken;*
         2. *The likely seriousness of the harm;*
         3. *The burden of taking precautions to avoid the risk;*
         4. *The social utility of the activity that creates the risk of harm.*
      2. **Modifying Reasonable Person -**
      3. **Wrongs Act –** 
         1. **s58 -** *If a person makes out they are a possessing a particular skill, then standard applied is:*
            1. *What would reasonably be expected of a person possessing that skill;*
            2. *The date of the circumstance and not a later date*
         2. ***S59 –*** *A professional is not negligent if the manner in which they acted is widely accepted as the competent manner.*

*3) If the court considers another professionals opinion*

*unacceptable, it can discard it.*

* + - 1. ***S60*** *– Has a duty to warn of the risk*
    1. **Children –** Standard of care is lowered when D is a child as children have a reduced ability to understand the risk of harm associated with the acts due to age and experience.
       1. *McHale v Watson* – *D was 12-yr old who threw sharp metal pole at P causing serious facial injuries*. *Standard lowered to 12-year old – no breach.*
       2. **Consensual Relationships (disability) –** (*Cook v Cook)*
          1. Special and exception facts may transfer the relevant relation such that the standard of care to be observed by D will be determined by reference to the relevant relationship which is created.
          2. P cannot expect D to observe reasonable standard care:

If P knows that D has some incapacity or attribute that precludes him/her from meeting that standard;

Consensually enters into a relationship with the D on that basis.

* + - * 1. *Cook v Cook –*

*D knew that the driver didn’t know how to drive, and P crashed the car. So standard was lowered to that of a shit driver as D knew.*

* + 1. **Mentally Ill** – Standard of Care is not modified for defendants suffering from a mental illness.
       1. *Adamson v Motor Vehicle Trust – D ran over innocent man as was suffering from schizophrenia. Mental illness not a defense.*
    2. **Professionals –** Court determines standard of care relevant to profession. *(Rogers v Whitaker) (s58 Wrongs Act)*
       1. *Rogers v Whitaker –* *D had eye surgery which went wrong. P did not adequately warn of risks and so was held liable. Duty to provide risk*
       2. *D’Orta-Ekenaike v Legal Aid* – *solicators are provided immunity for in-court work.*
       3. **Not Negligent –** if acts in accordance with common practice accepted in that profession unless the court determines that unreasonable **(***Bolam*) - s59 Wrong Acts

**Doesnt apply if didn’t warn of risk –** s50 & s60 of Wrongs Act

* + 1. **Consenting Plaintiffs –** If P knows that D is limited in their ability, standard of care can be lowered.
       1. *Cook v Cook* – *D let P drive even though P had never driven before. P suffered serious injuries from crash. Standard lowered as D knew of P’s inability*
       2. **\*\*\*\*Negligence by others –** 
          1. **Possibility of others -** Standard of care expected of a reasonable person requires him or her to take account of the possibility of inadvertent and negligent conduct on the part of others.
          2. **Duty of care of people protecting other people from their own stupidity -** **Risk of Injury** - In determining whether a risk of injury is reasonably foreseeable, a reasonable person has regard to the possibility of inadvertent and negligent conduct on the part of others. *(Mclean v Tedman)*
  1. **Foreseen Perception – ‘negligence calculus’ -** ‘Perception of the reasonable man calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence. It must be judged in prospect and not in retrospect’ (*Wyong Shire Council v Shirt)*
     + 1. ***Probability* *of Economic Loss* –** Unlikely that a defendant will be found to have been negligent in failing to take precautions against a risk of harm when the probability of being injured by that risk is low. *(Bolton v Stone – D was injured by cricket ball outside her house after P hit it over 17ft fence. No breach as ‘extremely small risk’)*
       2. ***Gravity* *of Economic Loss* –** D is more likely to be found to have breached their duty if it can be shown their conduct placed others at risk of sustaining serious injuries.

1. The more serious the injury as a result of D, the higher the standard of care owed. *(Paris v Stepney Borough Council – P was blind in one eye, used tool at work and became blind in other – no protection supplied. Gravity implied greater duty)*
   * + 1. ***Practicability*** ***of Economic Loss*** - D will not breach their duty of care unless it can be shown that a reasonable person in the position of the defendant would have taken specific precautions against the risk that causes P injuries.
          1. *Caledonian Collieries v Speirs – P was in car and killed by runaway railway truck as did not have auto-catch points to stop it. Did breach duty as should have had them.*
       2. ***Social Utility of Economic Loss* –** D less likely to breach duty if their activities provide a significant benefit to members of the community.
          1. *E v Red Cross – P contracted AIDS from blood supplied by D. D did not breach duty as social utility of their function was so important & if did breach, whole community would suffer.*
       3. **Common Practice –** *(Mercer v Road Transport)*
          1. D less likely to breach if their activities show that general public sentiment is related to fairness
   1. **Foreseeable Risk *of Economic Loss* –** If the defendant knew of the risk that caused the plaintiffs injuries then the requirement that the risk was foreseeable is clearly satisfied.
      * 1. *Caltex v The Dredge - ‘if D should have had those interests in mind, then the law will impose a duty of care. If not, the law will not impose a duty’*
        2. *Doubleday v Kelly –* *P jumped on trampoline in roller-skates, and injured her arm. P had never been on one before. Risk of injury was foreseeable.*
        3. **Wrongs Act – s53 – Obvious Risk**
           1. *Risk that would have been obvious to a reasonable person in that position*
           2. *Includes risks that are patent or a matter of common knowledge*
           3. *Can be an obvious risk even though it has a low probability of occurring*
      1. **Not Foreseeable/Obviousness *of Economic Loss* –** If the defendant is unaware of the risk, then the issue will be whether a reasonable person in the position of the defendant would have foreseen the risk.
         1. *Mulligan v Coffs Harbour* – *D suffered spinal injuries when jumped into water head first and no warning signs. No duty owed as obvious and inherent risk*.
            1. *Did P request info about risk?*
            2. *If yes, did D warn P of risk ? If no, liable. If yes, not.*
            3. *Inherent Risk* – *Body surfing, diving into sea, medical operations*
   2. **Risk NOT Insignificant –** 
      1. **Risk –** a risk which is not ‘far-fetched or fanciful’ is real and therefore foreseeable. (*Wyong Shire Council v Shirt , Drinkwater v Howarth)*
         1. **Insignificant Risk** – risks which are ‘far-fetched and fanciful’
   3. **Failure to warn (MEDICAL)**
      1. D must warn P of risks otherwise failure to warn adequately – *s50 Wrongs Act, Rogers v Whittaker*
         1. **Medical -** Doctor must warn patient of a material risk of injury – *Rogers v Whittaker*
      2. Material Risk –
         1. A reasonable person in the plaintiffs shoes would attach significance to it; OR
         2. Doctor is or should have reasonably aware that the patient would attach significant to it. (*Rogers v Whittaker)*
2. **If D Fails to meet the standard of care that a reasonable owed – D breaches duty** (*Blyth v Birmingham Waterworks Co).* P owes duty of proof *(Holloway v McFeeters)*

**Did the Breach cause the Economic Loss? (other refer other tests below)**

1. **Third Party Liability (refer next page for contractual)**
   * + 1. Negligent acts which cause economic loss can enforce an action
          1. *Caltex Oil v The Dredge ‘Willemstad’* – Dredge hit oil pipeline. P could recover damages through pure economic loss.

*‘D has knowledge or means of knowledge that the plaintiff individually, and not mere as a member of an unascertained class, will likely to suffer economic loss as a result of negligence’*

*‘some control mechanism based upon notions of proximity between tortuous act and the resultant detriment’*

*‘if D should have had those interests in mind, then the law will impose a duty of care. If not, the law will not impose a duty’*

* 1. *Perre v Apand –* no way P could have known D was planting experimental seed exposing D’s crop.
     1. D had the knowledge that P would suffer loss as a result of their negligence, or risk of negligence
        1. **P’s Vulnerability –** 
           1. Critical factor is P’s vulnerability

Were vulnerable –

*Perre v Apand –* no way P could have known D was planting experimental seed exposing D’s crop.

*Bryan v Maloney* – Negligent construction of a house requiring P to pay for repairs. Held yes.

Were NOT vulnerable - *Woolcock Street Investments v CGD Pty Ltd* – D design a faulty building for P. P were sophisticated investors –

so not vulnerable.

* + - 1. **THIRD PARTY Contractual Obligations –** 
         1. *May be liable in contract and tort –*

Contract may support the existence of a duty of care to avoid pure economic loss because it contributes to Ps vulnerability as it establishes an assumption of responsibility by D and reliance by P.

**Exclusion or limitation clause** - which limits Ds liability to the plaintiff for pure economic loss.

**Third Party (TP) Duty** – imposition of a duty of care in favour of a TP may be inconsistent with the contractual task which the defendant has agreed to undertake under the contract. *(Hill v Van Erp)*

* + - 1. **Hill v Van Erp**
      2. *the contract limited his liability to the client, but the contract couldn't limit liability to the beneficiary, because the beneficiary wasn't party to the contract*
         1. *Ruled - a duty of care arises between contracting parties, the same duty may arise for third parties HOWEVER*
         2. the duty as between the contracting parties can be limited by the contract, however the contract can't limit the duty as it applies to third parties because they are not party to the contract

**Chain of contracts** – which allocates the risk of loss which may be suffered are typically dealt with under contract law as opposed to torts.

**Contractual Obligation** - A duty of care in relation to the performance or non-performance of certain acts may coexist with a contractual obligation to perform or not perform those acts. *MacPherson v Kevin J Prunty*

**Work in a careful manner** - The existence of a tortious duty of care may be a reason for not implying a term in a contract that the work be carried out in a careful manner. *(Hawkins v Clayton)*

On the other hand, the existence of a qualified contractual duty may warrant the imposition of a similar qualification upon the co-existent tortious duty. *(Voli v Inglewood Shire Council* )

The relationship between the parties to a building project typically lasts for some time. Accordingly, the duty to warn of defective work or to rectify it may continue up to the completion of the work. *(Surrey Heath Borough Council v Lovell Construction )*

**Has P caused the loss?**

1. **Harm –** 
   1. ‘Loss of life, personal injury, damage to property, economic loss and loss of any other kind’
2. **Causation**
   1. **But For Test (factual causation) –** This test determines the issue of causation by enquiring whether the plaintiff would still have suffered their harm ‘but for’ the defendants negligence. Apply in ‘common sense way’.
      1. ***Would P have suffered their harm regardless of what D did?***
         1. **Yes -** *Barnett v Chelsea Kensington Hospital – P went to hospital sick. Wasn’t examined by doctor. Died from Arsenic Poisoning. No causation owed as would have died anyway.*
         2. **No -** *March v Stramare* – *P parked vehicle in middle of road to load it. D was drunk and driving and hit car. Causation satisfied as it was not reasonable to park a car in middle of road – despite D being drunk.*
      2. **If factual causation can be established – then can you allocate ‘legal liability’ for that causation in a common sense way?**
         1. i.e. if there are two causations to an accident, court will apply the ‘most common sense’ causation to the incident
            1. *March v Stramare*
         2. Wrongs Act – s51 – must prove the following elements:
            1. *That the negligence was a necessary condition of the occurrence of the harm*
            2. *That it is appropriate for the scope the negligent persons liability to extend to the harm so caused.*
         3. Wrongs Act – s52 – Burden of Proof
            1. *P bear the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.*
3. **Lack of Proof –**
   * 1. D has breached duty of care and P has suffered harm but P cannot establish that D was cause of harm
        1. *McGhee v National Coal Board –* 
           1. *P developed dermatitis as result of work. P argued if had showers wouldn’t have developed. Proof showed could result from work, but couldn’t show whether showers would prevent it.*
           2. ***Ruled -*** *D was liable as ‘increased risk of injury occuring’*
4. **Take P as you find them** – any action must take P in the current state they are in
   * 1. *Performance Cars v Abraham* – *Car was hit by D. Car was hit 2 weeks earlier by another and damages had not been repaired. Ruled that must ‘take car as you find it’ as car was already being repaired, cannot expected D to pay for all damage – ‘the necessity already existed for repair’*
5. **Increased Risk**
   * 1. **Medical -** Only be successful in their action if they can satisfy that they would have avoided the injury if the defendant had not been negligent.
        1. *Chappel v Hart* – *D operated on P without informing of risk. Held liable as should have informed as P would not have done surgery.\*
   1. **Vicissitudes Principles** –
      1. Vicissitudes: where injury caused by defendant’s negligence is superseded by an unrelated illness/injury to the plaintiff, this reduces liability for the damage caused by the plaintiff – Jobling v Associated Dairy
6. **Novus Actus Interveniens** – event chain of causation between D negligence and P’s injury has been broken by some event or third party.
   1. **Novus Actus Interveniens is NOT applicable where:**
      1. Intervening act would be expected to flow naturally from defendant’s act – Chapman v Hearse
      2. Defendant’s duty of care required him/her to protect plaintiff from subsequent act – March v Strathmare
      3. Defendant’s negligence set foundation for subsequent act – Bennett v Minister of Community Welfare
   2. **Examples**
      1. **Suicide -** *Haber v Walker* – *D suffered serious injuries from P’s negligence. Subsequently committed suicide. P was liable – as chain of causation had not been broken as it was a truly voluntary act.*
      2. **Motor Collision** – *Chapman v Hearse – Doctor was killed when assist motor car accident where D was thrown onto the road by negligently driving. Held P partially responsible as causation satisified.*
      3. **Medical Treatment –** *Mahony v Kruschich Demolitions – P suffered injuries while building and need medical treatment. D argued that treatment was negligent. D was liable for treatment so long as medical treatment not ‘grossly negligent’*
7. **REMOTENESS**
   1. Must consider whether or not and why responsibility for the harm should be imposed on the negligent party
   2. **Remoteness –**
      1. **Test -** The test for determining whether the plaintiffs injuries were a reasonably foreseeable consequence of the defendants negligence.
      2. **Act, not Extent –** Only the kind of injury sustained by P needs to be reasonably foreseeable, not the manner in which it occurred.
         1. *Overseas Tankship v Morts Dock – Oil leaked from Ds ship due to negligent refuelling. Oil caught fire and damages P’s wharf.* ***Held*** *– too remote, oil leaking from ship was not a reasonably foreseeable outcome to burning wharf.*
            1. *(except if ‘manner of harm’ is so remote)*
   3. **Manner of Harm –** The manner of the harm in which P is injured.
      1. If the chain of events leading up to the final event are reasonably foreseeable, then the final event should be reasonably foreseeable *(Versic v Connors)*
         1. *Hughes v Lord Advocate –* *P was a boy who picked up lamp and dropped lamp into manhole causing huge explosion in which he suffered serious burns.*
            1. **Held –** *D was liable as even though the manner and extent of the injury sustained was not reasonably foreseeable – being burnt by a lamp was..*
            2. *Doughty v Turner –* even if a damage of a particular kind is reasonable foreseeable, if the damage is caused in an unforeseeable manner it makes it a different kind

*Dropped something in a bath of sodium synoide heated to 800 degress – it reacted an caused an explosion. No one knew that would happen.*

* 1. **Egg-shell skull rule –** 
     1. **Test –** D will not be able to avoid liability for an injury on the basis that the plaintiff only suffered the extent of the juries that they did because they were different in some significant way from an average person.
        1. *Nader v Urban Transport – D jumped from bus and was injured then developed psychiatric injury. D was liable as reasonably foreseeable D would develop psychiatric injuries.*
           1. ***Egg Shell -*** *Unable to avoid liability by arguing that the average person would not have developed the psychiatric injury that the plaintiff sustained.*

1. **Res ipsa loquitor –** injury is sufficient proof that defendant was negligent
   * 1. *Schellenberg v Tunnel Holdings – Pressure hose broke and caused P injury while trying to avoid it. No cause was directly hoses fault.*
        1. Must prove:
           1. There is an ‘absence of explanation’ of the occurrence that caused the injury;
           2. The occurrence was of such a kind that it does not ordinarily occur without negligence;
           3. The instrument or agency that caused the injury was under the control of the defendant;

**Special Cases**

**Construction Cases**

Given the interdependence of the functions of the various parties to a building project, it is possible to find the existence of a duty of care in the performance of those functions by the designer, the contractor, the superintendent and a subcontractor or supplier. (*Multiplex Constructions Pty Ltd v Amdel)*

**Does D have a DEFENCE to the Economic Loss?**

**Refer to negligence defences (contrib, volenti)**