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Anita Stuhmcke

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Foreword

This book is part of the Cavendish Essential Series. The books in the series constitute a unique publishing venture for Australia in that they are intended as a helpful revision aid for the hard-pressed student. They are not intended to be a substitute for the more detailed textbooks which are already listed in the current Cavendish catalogue.

Each book follows a prescribed format consisting of a checklist covering each of the areas in the chapter, and an expanded treatment of 'Essential' issues looking at examination topics in depth.

The authors are all Australian law academics who bring to their subjects a wealth of experience in academic and legal practice.

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This text is current as at January 2001.

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1 Introduction to Negligence

You should be familiar with the following areas:

- how to prove negligence
- the burden and standard of proof

Introduction

A tort exists to protect rights. The law of torts defines rights and obligations when an individual commits a wrong or injury against another. Torts have been defined as 'an injury other than breach of contract, which the law will redress with damages', a body of law which has been developed by the common law (Fleming, J, *The Law of Torts*). Tort liability is intended to compensate a victim/claimant by forcing the wrongdoer to pay for any damage done (although in some torts damage is not necessary, for example, a trespass to land).

There are different types of tort. There is some debate as to whether negligence is a tort or a basis of liability. Generally, negligence is referred to as a tort which, in the latter half of the 20th century, is rapidly subsuming other areas of tortious liability. The torts which are now part of a general category of negligence include: strict liability; occupiers' liability; and an employers' duty of care to employees. However, negligent acts do not come only within the tort of negligence. For example, it is possible for the torts of nuisance or trespass to be used for negligent acts.

Negligence is a tort which determines legal liability for careless actions or inactions which cause injury. Thus, the tort of negligence spans the whole range of human activity, since it is not concerned with the activity itself, but with the manner in which the activity is carried out. Negligent conduct is that which falls below an acceptable standard. This standard is established in order to protect others from an unreasonable risk of harm. However, not every type of careless

behaviour will constitute the legal action of negligence. The question is how does the law determine what is an unreasonable risk of harm?

How to prove negligence

To prove an action of negligence each of the following elements of the legal action must be established:

- *Duty*

  That the defendant owed the claimant a duty of care.

- *Breach*

  That the defendant breached that duty of care (that is, did not reach the required standard of care).

- *Causation*

  That the damage suffered by the claimant was caused by the defendant's breach of duty.

- *Damage*

  That the type of damage suffered is not too remote from the defendant's conduct.

If the claimant can prove that each of these elements exist, their action in negligence will succeed unless the defendant is able to establish one of the defences to the tort of negligence. For defences available, see Chapter 6.

It is important to note that there is no substantial measure of agreement between commentators or judges as to the limits of these elements which are needed to prove negligence. That is, these elements are often categorised as three elements (the third being a combination of causation and remoteness); or in judgments the elements are fused into one (*Roe v Minister of Health* (1954), *per* Denning LJ); often, decisions as to which element a case may turn upon seems arbitrary; often, the division between these elements is blurred. However, to divide negligence into elements is useful for analysis. This is because each element is used as a means to limit liability, in that, generally, if any element is missing, there can be no action in negligence.

The burden and standard of proof

Generally, the onus of proving negligence will rest upon the person alleging the action. As negligence is a civil action, a claimant will be compensated if it can be shown 'on the balance of probabilities' that the act or omission was negligent.

2 Element One – Duty of Care

You should be familiar with the following areas:

- the test to ascertain the existence of a duty: reasonable foreseeability and proximity
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Introduction

Duty of care

This element of negligence is the legal test which establishes a link between the parties. A defendant is only liable in negligence to a person to whom the defendant owes a duty of care. If this element is not present, the action in negligence will fail (*Heaven v Pender* (1883)).

The function of this element is therefore to limit or control the liability of a defendant. As negligence is a tort which covers every human association, its application could be limitless. It is therefore necessary to contain negligence claims within reasonable levels. Thus, even where a defendant has been careless and has caused harm to a

claimant, the tort of negligence may not be established, since a duty of care may not exist. For example, a defendant who sees an accident and fails to stop to help is not negligent, as there is no duty of care owed by the defendant in that situation. The issue then becomes: how does the law determine to whom a claimant will owe a duty of care?

Reasonable foreseeability

Historically, the tests for establishing a duty of care have altered. Before the case of *Donoghue v Stevenson* in 1932, there was no underlying rationale to establish a duty to take care. The law developed in an incremental manner establishing each situation as a duty situation. This meant that a duty of care did not arise in relation to all types of activity, but only in established duty situations. These established duty situations were often where persons shared a common calling, such as innkeepers, carriers and surgeons. If a claimant did not come within an established duty situation, it was likely that their action would fail.

Brett MR in *Heaven v Pender* (1883) was the first to attempt to establish a rationale for the duty of care and thus extend negligence to a general duty. He stated:

> [W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The other judges in the case (Cotton and Bowen LJJ) disagreed that this was the test to use to establish a duty of care. They were 'unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains'. Cotton and Bowen LJJ approached the case from the narrower empirical viewpoint – stating that a duty of care arose because the plaintiff and defendant were in the relationship of invitor and invitee.

The approach of Brett MR was not forgotten. Almost 50 years later, Brett MR's approach to creating a general test for the duty of care was reformulated in what is historically the most famous and influential case on negligence (*Donoghue v Stevenson* (1932)).

Donoghue v Stevenson

In *Donoghue v Stevenson* (1932), the plaintiff had consumed most of a bottle of ginger beer before discovering the remains of a partly decomposed snail at the bottom of the bottle. The plaintiff claimed that as a result of this, she suffered shock and severe gastroenteritis. She brought an action against the defendant manufacturer of the soft drink, alleging that they had been negligent. In response, the defendant argued that the plaintiff had no cause of action. The defendant manufacturer argued that they owed no such duty of care and that they were in a contractual relationship with the suppliers of the ginger beer, not the plaintiff and, therefore, owed her no duty of care. The court held that this argument was not applicable, that a defendant could be liable in negligence in addition to having contractual obligations and that the defendant manufacturer owed a duty to the plaintiff to take reasonable care in the manufacture of ginger beer.

Lord Atkin stated what has become known as the 'neighbour test':

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my acts that I ought to have had them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This test refers to the reasonable foreseeability of the risk of harm to the claimant. The test is objective, that is, what a reasonable person would have done in the claimant's position. There is a duty to take care to avoid damage to others where there is a foreseeable risk of injury to others if reasonable care is not taken. This test developed by Lord Atkin has been adopted in later decisions even though it is not the ratio of the case. The actual ratio of the case was much narrower – that a manufacturer of products owes a duty of care in the preparation of those products to the ultimate consumer of them. Lord Atkin held that the manufacturer should have foreseen injury to the plaintiff if it did not take care in the preparation of the merchandise.

The importance of Lord Atkin's formulation was that it:

- created a rationale for the duty of care;
- this rationale allowed a duty of care to arise in any circumstance;

- the duty of care was no longer confined to situations where the law had imposed a duty before;
- redefined the formulation of Brett MR in *Heaven v Pender* by adding a requirement of proximity as the necessary qualification on the test of foreseeability. That is, Lord Atkin stated that a duty of care is owed to those who are 'so closely and directly affected' that the defendant ought to have had them in contemplation when acting or omitting to act.

Post-*Donoghue v Stevenson*

The major difficulty for the courts following *Donoghue v Stevenson* (1932) was the breadth of the test of reasonable foreseeability.

This difficulty is one which still challenges the courts. The tension in the development of this test has between whether to establish duties of care from a general principle as suggested by Lord Atkin in *Donoghue v Stevenson* or whether to develop the duties incrementally from established duty relationships. Each approach has merit. For example, the general principle approach may be more theoretically certain, whereas the incremental approach may give more control over the development of negligence.

Australian courts have attempted to develop a test to work in every situation to determine the presence or the absence of a duty of care. The most recent attempt by Australian courts to find a unifying theory for determining the existence of a duty of care is seen in the development of the test of proximity. However, each time a unifying theory has been proposed, it has only existed for a short time before being rejected. Proximity is no exception to this pattern. The recent economic loss cases of *Hill v Van Erp* (1998) and *Perre v Apand* (1999) have exposed that not only is there no clear majority in the High Court on the issue of proximity, but that the application of proximity is out of favour with the current bench of the High Court and in a state of flux. This is explained in more detail below.

This question over the breadth and applicability of the test to establish a duty of care will of course only arise in novel cases. Where an established duty of care category applies to the factual situation in question, the issues which are discussed in this section will not apply, as the requirement of a duty of care will be established by the existing duty of care category. It has been estimated that '90 per cent and more of cases framed in negligence fall into well established categories where there will be no dispute about the existence of the duty of care'

(Kirby M, 'Foreword', Katter N, *Duty of Care in Australia*, 1999, Sydney: LBC).

The traditional approach to establishing a duty of care

Australian courts have sought to limit the expansionist possibilities of negligence. They have traditionally done this by developing two tests, based upon the principle laid down by Lord Atkin in *Donoghue v Stevenson* (1932), to establish the circumstances in which the defendant will owe the claimant a duty of care:

- reasonable foreseeability; and
- proximity.

The Australian courts adopted the requirement of proximity through application of *Donoghue v Stevenson*. The main proponent of proximity in the High Court was Justice Deane. In *Jaensch v Coffey* (1984), Deane J stated that Lord Atkin's reference to proximity did not indicate reasonable foreseeability alone. Deane J's approach was accepted by Australian courts (see, for example, *Sutherland Shire Council v Heyman* (1985); *Gala v Preston* (1991)).

Since Deane J left the High Court, there has been movement away from the notion of proximity as a unifying concept/general principle. In two recent High Court cases, *Hill v Van Erp* (1998) and *Perre v Apand* (1999), concerning economic loss, several members of the High Court have indicated that proximity should not be viewed as the unifying element which underlies all cases in which liability in negligence has been held to exist. As there is no clear view on proximity expressed in *Hill v Van Erp* (1998) and *Perre v Apand* (1999), these cases highlight that the High Court is re-conceptualising the correct approach to take in relation to proximity. This re-conceptualisation has also taken place in a recent High Court case on the duty of care owed by public authorities such as councils (*Pyrenees Shire Council v Day* (1998)). The current approach of the High Court is discussed more fully below.

Proximity and reasonable foreseeability are different tests. While both tests focus on the relationship between the parties, they look at different aspects of this relationship:

- foreseeability – should the defendant have foreseen that the claimant may be injured?;
- proximity – examines the circumstances surrounding the injury, including questions of closeness and nearness.

Trinidade and Cane see the distinction as being one between moral judgments (foreseeability) and social policy (proximity), stating that

both concepts are general, vague and may be viewed as 'merely organising concepts that courts use to express value judgments about whether liability ought to be imposed in particular circumstances' (Trinidade and Cane, *Law of Torts in Australia*, 3rd edn, 1999, OUP: Melbourne).

Proximity

Justice Deane and proximity

Proximity was emphasised and explained by Deane J in *Jaensch v Coffey* (1984). In that case, Mr Coffey was seriously injured when his motorcycle was hit by a car driven by Mr Jaensch. Mrs Coffey was brought to the hospital and saw her husband in casualty, in obvious pain. For several weeks, she did not know if he would survive. As a result of this, she suffered a psychiatric condition which, in turn, caused gynaecological problems resulting in a hysterectomy. Mr Jaensch was held to owe a duty of care to Mrs Coffey. This was because Mrs Coffey was considered by the court to be caught up in the immediate aftermath of the accident and was therefore in physical proximity with the conduct of Mr Jaensch.

Deane J stated:

> [Proximity] involves a notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer or employee or of a professional man and his client and causal proximity in the sense of closeness or directness of the relationship between the particular act or cause of action and the injury sustained.

Justice Deane's view was endorsed by a majority of the High Court in *Cook v Cook* (1986); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning Act 1979* (1986); *Hawkins v Clayton* (1988); *Gala v Preston* (1991); and *Bryan v Maloney* (1995). These cases established that proximity is an essential element in determining whether a duty of care exists. However, there has been no specific endorsement as to what proximity exactly is; the most that can be said is that the exact nature of these proximity factors and their importance will vary from case to case. In essence, the application of proximity factors is done with regard to public policy and having regard to what is fair and reasonable (*Jaensch v Coffey* (1984)).

Proximity, as described by Deane J in *Jaensch v Coffey* (1984), may be physical, circumstantial or causal:

- physical proximity refers to physical closeness. It is not difficult, but it is not always present, as, for example, in *Donoghue v Stevenson* (1932), where Mrs Donoghue, the consumer of the ginger beer, was not in physical proximity to the manufacturer;
- circumstantial proximity depends upon a pre-existing relationship between the defendant and the claimant. For example, the relationship between an employer and employee or a professional person towards their clients;
- causal proximity refers to the link between the act or omission and the harm which follows from it. The scope of this has not yet been determined.

The death of proximity?

For many years, the majority of the High Court supported the above views of Deane J on proximity. However, that version of proximity has increasingly become the subject of re-conceptualisation.

This re-conceptualisation of the traditional application of proximity is most clearly seen in the recent revaluation by the High Court in the two economic loss cases of *Hill v Van Erp* (1998) and *Perre v Apand* (1999). Following these two cases, it is clear that the overriding acceptance of Deane J's approach to proximity has been questioned by the current bench of the High Court. The difficulty with this statement, however, is that there is no clear majority in the High Court in relation to proximity. The most that can be said with accuracy is that the concept and application of proximity is in a state of flux. This leaves a number of possibilities.

Proximity lives

The High Court decisions which have adopted and followed Deane J's approach have not been overruled or qualified. Given this, it may be argued that this existing approach to proximity must be followed by lower courts. That is, proximity is a general determinate of whether a duty of care exists.

Proximity is dead

Alternatively, while there is no clear majority on proximity in the High Court, it may be argued that a clear majority of the bench does not agree with a formulation of proximity as a legal 'rule'. Indeed, it could

further be argued that a majority of the bench is not required as proximity is not a rule which needs to be formally overruled. Proximity should therefore not automatically apply as a general determinant to establish or limit a duty of care.

Proximity mutates

Proximity in terms of 'additional factors' to the foreseeability of a plaintiff's loss may apply to determine if a duty of care exists in novel cases; however, the version/nature of proximity which will apply is not clear. Proximity as a general determinant of a duty of care suggested by the Deane J approach will not be applied by the current High Court. However, the concepts of physical, causal and circumstantial proximity may still be used (see, for example, Kirby J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000)).

In order to illustrate the reason why there is no clear majority High Court opinion on proximity, a very brief summary on this point of each judgment in *Perre v Apand* (1999) follows.

Gleeson CJ and Gummow J: The approach to determine a duty of care is to identify the 'salient features' which combine to constitute a sufficiently close relationship to give rise to a duty of care. Did not agree with the incremental approach and held that there is no general formula for determining liability in economic loss cases.

Gaudron J: Notes that doubt has been cast on proximity as a universal signifier of a duty of care. Used the concept of imposing a duty of care on individuals to take reasonable steps to avoid a foreseeable risk of economic loss when they know that their acts/omissions may impact upon someone and that person is in no position to protect their interests.

Kirby J: Uses the UK approach in *Caparo Industries plc v Dickman* (1990), which is a three-tiered approach where reasonable foreseeability, proximity and the requirement that it be fair and reasonable operate concurrently.

McHugh J: Discusses the general demise of proximity as a general determinant of the duty of care. Rejects Gaudron and Kirby JJ's approaches. Emphasised vulnerability of the claimant as a key factor for determining a duty of care.

Hayne J: Agreed with McHugh that the search for a single unifying principle (that is, proximity) was a search for something that could not be discovered. Does not specifically adopt an incremental approach. Here it was relevant to establishing a duty of care that the defendants

knew of the claimants as particular persons and not as members of an unascertained class.

Callinan J: The area of pure economic loss is one where the courts should move incrementally. His Honour applied factors of the case to the determine that a duty of care was established because of a 'sufficient degree of proximity, foreseeability, a special relationship, determinancy of a relatively small class, a large measure of control on the part of [the defendant]'.

In summary?

The High Court is unified on the aspect of foreseeability of harm, that is, foreseeability is essential and, without it, there can be no duty. But here consensus ends. The issue of what more is needed after foreseeability is unsettled. *Hill v Van Erp* (1998) and *Perre v Apand* (1999) highlight that there is no majority view in the High Court on proximity. It has generally been assumed by commentators that the application of *Hill v Van Erp* (1998) and *Perre v Apand* (1999) is not restricted to cases or pure economic loss. Perhaps the most that can be said is that the High Court is re-conceptualising the concept of proximity, moving away from a unifying approach. For an overview of the issues raised, see Des Butler, 'Once more into the mire, dear friends: determining the existence of a duty of care in negligence' (2000) National Law Rev 3 (<www.nlr.com.au>); also see Katter, N, *Duty of Care in Australia*, 1999, Sydney: LBC.

The role of policy

Policy has always had a role to play in establishing whether a duty of care exists. Policy refers to factors which are relevant to society generally which courts bear in mind when deciding cases, for example, matters of policy include social and economic considerations.

Currently, it is unclear whether policy issues play an independent role in establishing a duty of care. For example, Deane J in *Jaensch v Coffey* (1984) did not clearly define the manner in which policy works in conjunction with proximity. However, due to the current undefined nature of proximity, it may be argued that a finding of proximity between a claimant and a defendant is based upon policy factors.

It is clear that public policy will negate the existence of a duty of care in a number of areas:

- immunity of legal practitioners in the performance of court work, since, if there was no immunity, a conflict may arise between a

practitioner's duty to the court and duty to the client (*Giannarelli v Wraith* (1988));

- military personnel owe no duty of care to civilians or military personnel at times of war (*Shaw Savill & Albion Co Ltd v Commonwealth* (1940); *Mulcahy v Ministry of Defence* (1996));
- police are not liable for harm caused to victims of crime. For example, police have been held not to owe a duty of care to a victim of crime even where they know the identity of the criminal and have failed to apprehend them (*Osman v Ferguson* (1993));
- a parent does not owe a general duty of supervision to a child (*Robertson v Swinar* (1989)).

The unforeseeable plaintiff

Whether a duty of care exists is a matter of law, not fact (*Chester v Waverley Corp* (1939) *per* Starke J). In contrast, the test of reasonable foreseeability is a question of fact – it looks to whether the defendant ought to have foreseen that any negligence may create a real risk that harm would occur to the claimant. In other words, the court looks to see whether the claimant falls within the description of persons likely to be 'closely and directly' affected by the acts of the defendant. In some cases, it has been held that the claimant could not succeed, as the claimant was outside the class to whom a duty was owed. This is known as the 'unforeseeable plaintiff rule'.

For example, in the American case of *Palsgraf v Long Island Railroad Co* (1928), there was held to be no duty of care owed to the plaintiff. The facts of the case were that the plaintiff was standing on the platform of a station waiting for a train to arrive. Another train stopped at the station and two men ran to catch it, one of whom was carrying a package. The guards attempted to assist the man with the package onto the moving train and he dropped the package. The package contained fireworks which exploded. The shock of the explosion threw down scales at the other end of the platform which struck the plaintiff, causing her injury. The court held that a reasonable person could not have foreseen that the actions of the guards would have endangered the plaintiff.

The courts in the UK have reached similar conclusions. For example, in *Bourhill (Hay) v Young* (1943), the pregnant plaintiff heard an accident between a car and a cyclist from a distance of about 50 feet and suffered shock and a stillbirth as a result. The court was asked to decide whether the driver of the motor car owed a duty of care to the

plaintiff. The court held that the defendant did not owe a duty, as he could not have foreseen that the plaintiff could have been affected by his negligence.

In Australia, similar issues have been discussed in cases such as *Chester v The Council of the Municipality of Waverley* (1939). In *Chester v The Council of the Municipality of Waverley* (1939), a seven year old boy drowned in a trench excavated by the defendant council. The boy's mother, the plaintiff, was present when his body was found and claimed damages against the council for severe shock and health problems caused by the experience. The court held that the council did not owe the mother a duty of care; she was outside the class of persons to whom a duty would be owed by the defendant.

Summary

- Australian courts use established duty situations when confronted with similar circumstances. For example, precedent has established that a manufacturer owes a duty of care to a consumer.
- When confronted with a new potential duty situation, the courts may use the test of reasonable foreseeability to establish whether the defendant owes the claimant a duty of care. This is when the general principle established in *Donoghue v Stevenson* (1932) is applied by the courts.
- While foreseeability of harm is essential to establish a duty of care in a novel situation, the concept of proximity as formulated by Deane J is under question and is being re-conceptualised by the current bench of the High Court.

There is no absolute determinant of the basis upon which the courts will establish a duty of care. It is generally agreed that the duty must arise out of a link between the parties, but, to date, there is no precise judicial formulation of what that relation must be. In Australia, reasonable foreseeability is not a *prima facie* determinant of whether a duty of care exists; rather, the test of reasonable foreseeability and requirements of policy are two factors which the court will take into account to determine whether a duty of care is owed.

Particular duty areas

Occupiers' liability

Occupiers' liability is concerned with the liability of an occupier towards persons who come onto their land. An occupier of land generally owes a duty of care to a person who comes onto that land. The liability may be toward an invitee, a licensee, an entrant as of right or a trespasser. Whether a person occupies the land depends upon control or occupation, rather than ownership of an interest in land. It is a question of fact, not of legal title nor of possession – the defendant must exercise some form of control over the premises.

Prior to 1987, the duty of care which an occupier owed an entrant was graded according to what type of entrant the plaintiff was – for example, a trespasser was protected only when intentionally harmed, and invitees when the danger was unusual. In 1987, the High Court subsumed the six different sub-categories of occupiers' liability under the general concept of a duty of care in *Australian Safeway Stores v Zaluzna* (1987). The facts of that case were that Mrs Zaluzna went to a supermarket on a rainy Saturday morning to buy some cheese, and slipped on the floor in the entrance to the supermarket, which had become damp. Mrs Zaluzna suffered damage as a result of the fall. The High Court established that:

> ... in an action of negligence against an occupier ... all that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of the premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. The prerequisite of any such duty is there by the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk.

The rule established in *Australian Safeway Stores v Zaluzna* (1987) applied to both nonfeasance and misfeasance of occupiers.

Circumstances of entry

The circumstances in which a person enters on land may be relevant to the court's determination of negligence:

- if a person is a lawful entrant onto land occupied by a defendant, this is sufficient to establish a duty of care, as the defendant should reasonably foresee a real risk of personal injury to the visitor or the class of persons of which the visitor is a member (*Australian Safeway Stores v Zaluzna* (1987));
- if a person is a trespasser, then more than a physical presence is required to establish that the defendant owes the claimant a duty of care (*Wilmot v South Australia* (1993)). This will require at least a knowledge by the occupier of the presence or the likely presence of a trespasser or the reasonable foreseeability of a real risk of such a presence. Other factors the court may consider is the identity of the trespasser and the reason for the visit. For example, in *Hackshaw v Shaw* (1984), H was in a car which had been driven by C onto S's land in order to steal petrol. H had no prior knowledge of C's intent. S was lying in wait and, without warning, fired at the vehicle after C alighted in order to immobilise it, and accidentally shot H. The High Court held that S should have reasonably foreseen that there were passengers in the car and that they might have been injured. H's damages were reduced by 40% to reflect her own negligence;
- an occupier of land (in the absence of a contract or a special relationship) will not have a duty to take reasonable care to prevent harm, to somebody lawfully upon the land, from the criminal behaviour of a third party who comes onto the land (*Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000));
- a contractual entrant is not subsumed under this general test of duty of care (*Xalin v Greater Union* (1991)). The existence of a contract may impact upon negligence. A contractual entrant is a person who has paid for admission to enter premises.

The skill of the visitor may also be relevant to determining whether a duty of care is owed. For example, in *Christmas v General Cleaning Contractors Ltd and Caledonian Club Trust Ltd* (1952), an employee of a window cleaning company fell and was injured while cleaning the windows of the Caledonian Club. The court held that independent contractors (and thus their employers) were held not to be owed a duty of care when they were injured by risks which were incidental to their job.

Some States have introduced legislation to deal with when a duty of care arises with respect to liability of occupiers (Pt 11A of the Wrongs Act 1958, Vic; s 4 of the Occupiers' Liability Act 1985, WA;

s 17C(6) of the Wrongs Act 1936, SA). As to the scope of a landlord's duty to a person who resides on premises, see *Jones v Bartlett* (2000).

Who is an occupier?

At common law, the occupier of premises (the defendant in occupier's liability) does not have to be the owner of the premises. If a person has some control over the premises such that they can prevent injury to visitors they will be an occupier (*Wheat v E Lacon & Co Ltd* (1966)). So, for example, a claimant may look to the tenant for relief, rather than to the landlord.

Economic loss

Where a defendant has injured the property or person of a claimant and consequential economic loss occurs, the law of torts will allow compensation. An example of economic loss is where a claimant is injured in a car accident and thereby suffers a loss of earning capacity.

Historically, compensation has not been recoverable where only pure economic loss has occurred. This refers to pure economic loss caused by a negligent act, statement or omission which has not occurred because of any injury or damage to the claimant's person or property. Courts have generally been reluctant to allow recovery for economic loss. The reason for this seems to be a reticence to make a defendant liable to an indeterminate class of people for an indeterminate time for an indeterminate amount (*Ultramares Corp v Touche, Niven & Co* (1931), *per* Cardozo CJ).

Reasonable foreseeability is not perceived as a sufficient limitation to control a defendant's possible excessive liability which may arise from economic loss. For example, a car accident occurs on the Sydney Harbour Bridge, blocking traffic for four hours. Hundreds of commuters are affected. If the only limitation is foreseeability of harm, the list of potential claimants is limitless. The white collar worker who missed their 9 am meeting which could have clinched a million dollar deal; the year 12 student who missed their last Higher School Certificate exam; the shareholder who missed an opportunity to sell shares at a higher price than has been available all year; the stockbroker who did not get the fee from that shareholder, etc.

It was not until the middle of this century that a claimant has been able to recover for pure economic loss. A claimant was able to recover for negligent misstatement only after the 1963 case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963) and, for negligent acts and

omissions, only after the 1976 case of *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976).

Thus, there are three situations where economic loss is recoverable:

- economic loss which is a consequence of physical damage or personal injury;
- pure economic loss for negligent misstatements; and
- pure economic loss for negligent acts or omissions.

Negligent acts or omissions

Liability for economic loss will be imposed where a defendant has knowledge or the means of knowledge that the claimant is likely to suffer loss as a result of the defendant's act or omission. This was established in *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976). The facts of that case were that the plaintiff, Caltex, supplied oil through a pipeline owned by Australian Oil Refining Pty Ltd. The pipeline was damaged by the defendant's dredge and the plaintiff suffered damage as they had to use a more expensive means of transporting the oil. The plaintiff had not suffered any damage to its property (indeed, it had bare contractual rights in respect of the damaged property), but the court upheld its claim to recover for the economic loss of the more expensive transportation costs.

There is no liability of pure economic loss when the claimant is a member of an unascertained class (*Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976)). A class is unascertained when the defendant is unable to identify them as individuals or as a class. For example, in *Ball v Consolidated Rutile Ltd* (1991), the plaintiffs were the owners of prawn fishing boats who suffered economic loss through the defendant's negligence in allowing a byproduct sand dune to slip and destroy prawn feeding grounds. The court held that the defendant did not owe the plaintiffs a duty of care, as the plaintiffs could not establish that they were members of an ascertainable class of fishermen. All they could establish was that the defendant knew that some professional fishermen fished in the area who may suffer financial loss as a result of the sand dune slipping. This was held to be insufficient to establish a duty of care. As to the question of whether the test of proximity is required, there is no clear High Court majority (see *Perre v Apand* (1999)).

Negligent misstatement

Apart from negligent acts and omissions, the law has also imposed liability for economic loss flowing from a negligent misstatement. Thus,

a defendant's liability may extend to statements of fact, advice or opinion which a defendant makes. While negligent misstatements may cause personal injury or damage to property, they will usually cause economic loss. Economic loss flowing from negligent misstatements differs from negligent acts due to the concept that the claimant must have relied upon the statement in some way. Such reliance is not necessary when the economic loss results from a negligent act or omission.

Until 1963, there was believed to be no liability for negligent advice or a negligent opinion unless there was a contract, fraud or a breach of a fiduciary duty. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963) rejected this view. The plaintiff, Hedley Byrne, were advertising agents who placed some small orders for advertising space on behalf of a customer, Easipower Ltd. On receiving a favourable trading report from the customer's bank, the plaintiff placed substantial orders for advertising time on television and space in the newspapers on a credit basis, so that the plaintiffs became personally liable for the orders. The plaintiffs became uneasy about the financial position of Easipower and sought a banker's report through their own bank, National Provincial. Advice was obtained by telephone from the defendant merchant bankers with whom Easipower had an account. The advice expressly given in confidence indicated that the company was good for normal business relations and would not undertake commitments it could not fulfil. The advice was confirmed in writing. In its reply, the defendant had disclaimed responsibility for its statement. The court held that a duty of care could arise in circumstances such as these, although the action failed and the plaintiff was unable to recover the amount paid for the advertisement, because the defendant bank had effectively disclaimed responsibility.

The court stated:

> It should now be regarded that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise.

Hedley Byrne & Co Ltd v Heller & Partners Ltd (1963) established that a duty of care arose when the defendant was in a special relationship with the plaintiff. As negligent statements have the capacity for indeterminate liability, courts subsequently sought to restrict the scope of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963). In *MLC Assurance Co Ltd v Evatt* (1968), an English case, a 'special relationship'

was held to arise only when the defendant had or claimed to have skill and competence with respect to the statement.

This narrower approach has been rejected in Australia. The High Court of Australia considered the issue of negligent misstatement in *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981), where the plaintiff land developer went ahead with the purchase of a property after obtaining a certificate from the defendant council which indicated that there were no road widening proposals relevant to the property. This information was incorrect and, as a result, the plaintiff suffered loss. The High Court held that the defendant council was liable for the loss caused by their failure to take reasonable care in the supply of the information. This case established that the defendants do not have to be in the business of giving advice – they can be liable if the claimants relied upon the information given. Thus, there was no distinction between information and advice.

A duty of care in negligent misstatement is established when there is a relationship which is proximate. Generally, the maker of a statement will only owe a duty of care to the immediate recipient (*Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997)). Such a relationship is based on the keystone factors of reliance and proximity (note, though, the current approach of the High Court is to question the usefulness of proximity). In *San Sebastian Pty Ltd v The Minister* (1986), the court stated that when 'economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant, and therefore in the ascertainment of a duty of care'. Proximity is related to the concept of reliance. Generally, the courts will look to establish:

- whether, given the circumstances, the speaker should have realised or did realise that the inquirer was relying upon him or her (this is most obvious when the defendant is being asked for advice);
- it was reasonable for the inquirer to act or seek or rely upon the speaker. Generally, it will be reasonable to rely upon the speaker when they have a special skill or judgment which they have used in making the statement. In *San Sebastian Pty Ltd v The Minister* (1986), a developer's reliance upon the council's planning proposal was held not to be reasonable, as such proposals are subject to 'alteration, variation and revocation';
- the subject nature of the information was serious.

Generally, a duty of care will not arise where the defendant disclaims responsibility for the accuracy of the information given to the claimant (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)). However, a disclaimer will not be effective where the circumstances are such that it is reasonable for the claimant to rely upon the defendant's advice (*Burke v Forbes Shire Council* (1987)).

Section 52 of the Trade Practices Act 1975, Cth, which governs misleading or deceptive statements made in the course of trade or commerce (together with the Fair Trading Act equivalents of the States and Territories), will apply to the same fact situations.

The difference between negligence and a negligent misstatement

- Negligence refers to conduct whereas negligent misstatement refers to written or spoken words.
- Damage caused by negligent misstatement is mainly economic loss and not physical damage to persons or property as in negligence.
- The test to establish a duty of care in negligent misstatement is different from that required in negligence. In negligent misstatement, there must be a 'proximate relationship' between the claimant and the defendant for there to be a duty of care. In the UK, courts are concerned with establishing a 'special relationship' between the speaker and the person who relied upon the statement.

Nervous shock

Historically, courts have been reluctant to award damages for nervous shock which was not accompanied by a physical injury or caused by reasonable fear of immediate physical harm (*Victorian Railways Commissioners v Coultas* (1888)). However, the history of nervous shock has been one of expanding liability. For example, with respect to reasonable fear of immediate physical harm, the law initially allowed recovery only where the claimant was in fear of their own safety (*Dulieu v White* (1901)); recovery then expanded to include when the claimant feared for the safety of a close relative (*Hambrook v Stokes* (1925)); and now the law allows recovery for fear for the life of a workmate (*Dooley v Cammell Laird & Co Ltd* (1951)).

Nature of nervous shock

Grief or sorrow or anxiety or depression – feelings which normal people experience following the death or injury of a loved one – do not create an entitlement to damages in nervous shock (*Jaensch v Coffey*

(1984)). The law maintains a distinction between this 'normal' type of sorrow and nervous shock. To recover in nervous shock a person must have manifested psychiatric symptoms or suffered a recognisable psychiatric illness or suffered physical injury such as a miscarriage or a heart attack (*Mount Isa Mines Ltd v Pusey* (1970); *Jaensch v Coffey* (1984)). Shock has been defined by Brennan J in *Jaensch v Coffey* as:

> … the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognisable psychiatric illness …

Legal tests

Reasonable foreseeability and proximity are the legal tests used to establish a duty of care in nervous shock. Note, though, the High Court's current attitude towards proximity raises questions over its applicability to nervous shock cases. Given the current ambiguity surrounding the application of proximity, this section covers proximity:

- *Reasonable foreseeability*

  The courts ask whether it is reasonably foreseeable that an accident of the kind which occurred might result in the shock to the claimant. The claimant is judged objectively so that a person who is more susceptible to nervous shock may only recover when the shock would be a reasonably foreseeable outcome for a normal person. If the shock is foreseeable, the exact nature of the claimant's illness need not be foreseeable (*Mount Isa Mines Ltd v Pusey* (1970)).

  There is no requirement that the claimant has to be related to the victim, although a pre-existing relationship may assist in establishing foreseeability. However, the absence of such a relationship does not negate foreseeability. For example, rescuers who do not know the accident victims they assist have been able to recover damages for nervous shock (*Chadwick v British Transport Commission* (1967)). Casual spectators, who have no relationship to victims of the accident, even when they are on board a rescue vessel, have to date been excluded from recovery for nervous shock (*McFarlane v EE Caledonia Ltd* (1994)).

- *Proximity*

  Initially, it was necessary to be at the scene of an accident to recover for nervous shock (*Hinz v Berry* (1970)). This limitation is no longer applicable. Today, the general rule is that the shock must arise from the event or from its immediate aftermath. The test established by Deane J is physical proximity in time and space to the event; causal proximity is also important. The shock must be sudden rather than cumulative. A claimant may recover from a defendant when they suffer shock through nursing an accident victim at the accident scene, but may be precluded from recovering where their injury is caused from accumulative nursing for such a victim over a period of time (*Anderson v Smith* (1990)). Liability for nervous shock follows only when there is a sudden sensory perception which affects the claimant's mind.

  In *Jaensch v Coffey* (1984), the plaintiff's husband was injured in a road accident due to the careless driving of the defendant. The plaintiff developed a psychiatric illness because of what she saw and heard in the hours following the accident at the hospital to which her husband was admitted. The plaintiff was able to recover for nervous shock, as her injury from the shock was foreseeable to a person of normal fortitude. Further, she was in causal proximity with the defendant's act. In other words, her injury arose from the event and its immediate aftermath. Mrs Coffey was at the hospital and involved in the immediate aftermath of the accident and thus was sufficiently proximate to the defendant's conduct. In other cases, such as *Spence v Percy* (1992), the claim for nervous shock failed where nervous shock developed three years after the accident.

  The position is uncertain when the shock arises from hearing about an event or its consequences as distinct from physically perceiving the event or its aftermath. In *Alcock v Chief Constable of South Yorkshire Police* (1992), the plaintiffs who witnessed the disaster of the overcrowding of the Hillsborough football stadium on television were held not to be in a relationship of sufficient physical proximity in space or time to the accident, as the broadcast did not show pictures of recognisable individuals. This decision was based on the notion of proximity – that the immediate and horrifying impact of the accident must cause the shock.

  However, in *Reeve v Brisbane City Council* (1995), the plaintiff was able to recover for nervous shock even though she did not witness the accident. Proximity was established through the close relationship of husband and wife. In that case, the plaintiff was

bringing an action of nervous shock which she alleged was brought on by the death of her husband through the defendant's negligence. Her husband was killed when run over by a Brisbane City Council bus at a bus depot where he worked as a cleaner. The court held that the close relationship between the plaintiff and the victim (which was alluded to be closer than 'normal') was enough to supply a proximate relationship, even though there was no physical connection or independent perception of the accident or its aftermath by the plaintiff.

Property damage

The courts have allowed damages for nervous shock when a claimant has suffered the shock as a result of witnessing damage to their own property (*Attia v British Gas* (1988)).

Legislation

Statute has modified common law claims for nervous shock. In some jurisdictions, legislation allows the parent or spouse of a person killed or injured by a defendant's wrongful act to claim damages for nervous shock (Law Reform (Miscellaneous Provisions) Act 1944, NSW; see, also, *Quayle v NSW* (1995); Law Reform (Miscellaneous Provisions) Act 1955, ACT; Law Reform (Miscellaneous Provisions) Act 1956, NT; Wrongs Act 1936, SA; Wrongs Act, Vic).

Rescuers

The common law does not impose a duty upon individuals to go to the aid of an injured person. However, once an individual embarks upon a rescue attempt, they will owe a duty of care to those they assist.

Further, in order to encourage rescuers, the courts have established that an independent duty of care is owed to rescuers not to create the situation where there is a need to be rescued. The rescuer therefore normally sues the person who has created the situation that necessitates the rescue. This duty of care allows rescuers to recover damages if they are injured during the course of a rescue. The courts have held that it is not possible for the defendant to argue that the rescuer is *volenti non fit injuria* or that the rescue constitutes a *novus actus interveniens* (*Haynes v Harwood* (1935); *Baker v TE Hopkins & Son Ltd* (1958)).

To be a rescuer, the act has to have occurred in an emergency, such as a doctor stopping to help at the scene of an accident (*Chapman v*

Hearse (1961)) or a motorist running to phone for help (*Corothers v Slobodian* (1975)). In other words, there must be a real threat of danger (*Cutler v United Dairies (London) Ltd* (1933)). The threat may be to the person or to property. An attempt to rescue property may result in a duty of care being owed to the rescuer (*Hyett v Great Western Railway Co* (1948)).

The injury to the rescuer must be a reasonably foreseeable consequence of the negligence. This is a two step process:

- it was reasonably foreseeable that someone would help, seeing the predicament of the person in danger (generally the predicament of the person in danger is sufficient to establish a duty of care); and
- it was reasonably foreseeable that the rescuer in making the attempt at rescue would be injured. For example, injury to a rescuer was held not to be reasonably foreseeable when the rescuer tripped in a hole obscured by grass while running with a fire extinguisher towards a burning truck (*Crossley v Rawlinson* (1981)).

A rescuer is not automatically free from legal liability by embarking upon a rescue attempt:

- the rescue must be reasonable given the circumstances. In *Harrison v British Railways Board* (1981), the courts reduced damages by 20% where the rescuer pulled an employee onto a moving train, disregarding the rule that the safety lever be used on the train in such circumstances;
- if the rescuer has worsened the position of the accident victim, the rescuer may be sued (*Horsley v Maclaren (The Ogopogo)* (1971)).

The unborn claimant

This refers to the situation where a child is born injured and alleges that the injury was caused by another's negligence prior to birth. This may occur *ex utero* (during *in vitro* fertilisation) or *in utero* (including during birth). This is complicated by the fact that an action at law cannot be brought until birth has taken place. Thus, if a claimant is injured prior to birth, they can only sue for harm once born.

Duty owed to unborn child

Watt v Rama (1972) established that a car driver owes a duty of care to a fetus. In that case, a pregnant woman was involved in a car accident which was caused by the negligence of the defendant. The fetus she was carrying was injured in the accident and was born with brain damage, epilepsy and paralysis from the neck down. The court held

that pregnancy can reasonably be foreseen by members of the community, therefore, drivers owe a duty of care to unborn children.

Duty owed to unconceived child

This principle has been extended in *X v Pal* (1991) where an obstetrician failed to do a routine test on a pregnant woman for syphilis. The court held that the obstetrician owed a duty of care not only to her and the fetus she was then carrying, but also to a future unborn child who became infected with syphilis during a subsequent pregnancy.

Duty owed by pregnant woman to unborn child

In *Lynch v Lynch* (1991), a child who was born with cerebral palsy, caused while in her mother's womb by a car accident attributable to her mother's negligence was able to recover damages from her mother. While this case is confined to car accidents and the court made an attempt to confine its decision to a compulsory insurance scheme, the case does tend towards laying a general duty of care by a pregnant woman towards her fetus.

There is also the possibility of wrongful birth actions where it is alleged that, if the defendant had not been negligent, the child would not have been born at all. For example, this may include the situation where the defendant has not performed a sterilisation operation properly or failed to diagnose a pregnancy to allow an abortion to take place (*Veivers v Connolly* (1994)). Wrongful life actions or unwanted birth actions are where a claimant claims that, due to the defendant's negligence, the child would have been better off not being born at all. For example, a child which is born with a genetic disease where the parents were not advised prior to conception of the risk of that occurring.

Statutory authorities

A statutory authority, such as a council, may be subject to a duty of care in the exercise of its statutory powers. No such duty of care will exist where Parliament has totally excluded liability for negligent acts. A statutory body may also be liable for breach of any statutory duty which is imposed upon it (*Read v Croydon Corp* (1938)). This liability may arise as an action for breach of statutory duty or as a common law action in negligence. These actions are distinct. The following material

deals with the action which may arise in negligence where the defendant's duty is imposed by the common law.

Policy v operational

Courts have recognised that they may not be the most suitable arena within which to consider the appropriateness of some decision making powers which Parliament has delegated to government agencies. This has resulted in the courts dealing with decisions made by statutory authorities as falling within either of two classes – policy or operational.

Policy decisions can not be judged negligent by the courts. This approach has been endorsed by the High Court of Australia (*Sutherland Shire Council v Heyman* (1985)), rejecting the UK approach adopted in *Anns v London Borough of Merton* (1978). As Mason J in *Sutherland Shire Council v Heyman* (1985)) stated:

> … a public authority is under no duty of care in relation to decisions which involve or are directed by financial, economic, social or political factors or constraints ... But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative discretion, expert or professional opinion, technical standards or general standards of reasonableness.

The difficulty arises as to which decisions are operational and which are policy. Policy decisions are often an exercise of a statutory authority's discretion and may be dictated by social, political or financial considerations. Operational decisions are the conduct of the statutory authority which implements the policy. In practice, this distinction may be difficult and the courts look to the nature of the decision. An example of the distinction was made in *South Australia v Wilmot* (1993). In that case, the plaintiff was injured while riding her trailbike through a government reserve. The defendant argued that the decision not to turn the reserve into a managed area for trail bikes was a policy decision based upon financial and economic considerations. Thus, the plaintiff could not recover.

Misfeasance v nonfeasance

Courts have drawn a further distinction between misfeasance (acting wrongly) and nonfeasance (failing to act) by statutory authorities. Traditionally, there was no claim that could be made for nonfeasance. For example, in *Sheppard v Glossop Corp* (1921), the plaintiff who was injured while walking down an unlit road was unable to recover

against a council who turned their street lighting off at 9 pm to economise.

The High Court in *Sutherland Shire Council v Heyman* (1985) retained the distinction between nonfeasance and misfeasance, stating that foreseeability of harm is not enough to establish a duty of care in the case of a nonfeasance. If there is no parliamentary requirement that a statutory authority exercise its powers so as to prevent injury to a member of the public, the authority must have itself created or increased the risk of injury through its own conduct. As Mason J in *Sutherland Shire Council v Heyman* (1985) stated:

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

In *Sutherland Shire Council v Heyman* (1985), the plaintiffs had purchased a house – a year later, structural defects appeared which were caused by land subsidence. The house had been inspected during construction by the defendant council. The plaintiffs had not asked the council at the time of purchase for a building certificate. Such a certificate would have confirmed whether the house complied with all building requirements. The majority judges agreed that a duty of care arose for a nonfeasance if a statutory authority acts in a way that the plaintiff had come to rely on to exercise its statutory powers. However, in *Sutherland Shire Council v Heyman* (1985), the court held that no duty of care was owed, as there was no relationship of dependence between the plaintiff and the defendant council which gave rise to reliance. However, if a building certificate had been obtained from the defendant council by the plaintiff, reliance would have been proven.

This requirement that a duty of care may arise when a plaintiff relies upon the statutory authority has been applied sporadically in subsequent cases. It was reiterated by Kirby P in *Parramatta City Council v Lutz* (1988), although the other judges in that case based their decisions upon different considerations. Reliance has also been ignored in subsequent decisions such as *Nagle v Rottnest Island Authority* (1993). Where an authority actually exercises its operational statutory powers so as to constitute a misfeasance reliance is irrelevant.

The High Court is currently divided on the concept of general reliance as determined by Mason J in *Sutherland Shire Council v Heyman* (1985). In *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998), the court divided upon its approval of reliance.

Each member of the court gave their own decision, meaning that the case is not conclusive on the question of reliance. Reliance was endorsed by Toohey J and McHugh J and used in reaching their decision, whereas Brennan CJ, Kirby J and Gummow J rejected reliance. This division has been entrenched in the subsequent case *Crimmins v Stevedoring Industry Finance Committee* (1999). Instead of clarifying the position on reliance again, each judge gave separate judgment, with the result that no uniform principle has emerged to guide the court.

Highway authorities

A highway authority is liable only for damages which may arise through their own misfeasance. Such authorities are immune from actions in nonfeasance (*Gorringe v The Transport Commission* (1950)).

Omissions, the duty to act and duty to control third parties

The distinction between misfeasance and nonfeasance is a real one in the context of establishing a duty of care. There is liability for misfeasance, but not for nonfeasance.

Omissions

Generally, a defendant will not owe a duty to take positive steps to protect a potential claimant from a risk of injury. The law does not require that a person take positive action to assist someone else. For example, there is no duty to effect a rescue – courts have held that there is no duty to shout a warning (*Marc Rich & Co AG v Bishop Rock Marine Co Ltd* (1994)).

Duty to act

A duty of care may arise where the omission is not 'pure'. A duty of care will arise where:

- it forms part of a positive act.
  For example, a duty to act may arise where a driver fails to apply the breaks while driving a car (the positive act is driving the vehicle) or a solicitor fails to disclose the existence of a will to a testator while holding custody of the will (*Hawkins v Clayton* (1988));
- the omission forms part of the general practice of the defendant and the claimant is justified in relying upon that general practice.

For example, in *Mercer v South Eastern Railway Companies' Managing Committee* (1992), a plaintiff was injured when the defendant railway company did not close the gates of a level crossing when a train approached. It had been normal practice for the defendant company to close the gates and the plaintiff was aware of this practice;

- the defendant is in a pre-existing relationship with the claimant. This arises in cases where the defendant is in an existing protective relationship with the claimant, normally a duty arising in such a situation will be non-delegable (*Kondis v State Transport Authority* (1984)). Examples of such relationships include:
  (a) schoolteacher, school authorities and pupils. *Richards v State of Victoria* (1969) established that school authorities and school teachers owe their pupils a duty of care while they are on school grounds. In *Richards v State of Victoria* (1969), a schoolboy suffered spastic paralysis as a result of a classroom fight which the teacher made no attempt to stop;
  (b) employer and employee. An employer has a duty to take reasonable care for the safety of employees. This is normally divided into three duty areas: the duty to provide safe tools and equipment; the duty to provide a safe workplace and the duty to provide a safe system of work (*Wilson & Clyde Coal Co v English* (1938)). This area has been eroded by workers compensation legislation;
  (c) prison authorities, gaoler and prisoner. In *Howard v Jarvis* (1958), a prisoner died as a result of a fire in his cell. The court held that the gaoler owed a duty to the prisoner which had been breached through the gaoler's failure to take the prisoner's cigarettes and matches from him. In the case of a gaoler and prisoner, the duty owed to a prisoner is less than that of a schoolteacher to a pupil as the prisoners are adults. Prison authorities have been held liable for failing to keep remand prisoners away from convicted prisoners, exposing them to physical and sexual assault (*L v Commonwealth* (1976));
  (d) parent and child may also fall into this category, although Australian courts have warned that a blood relationship will not automatically result in legal liability or, in other words, there is no duty of care of general supervision owed by a parent to a child (*Hahn v Conley* (1971), *per* Barwick J; *Robertson v Swinar* (1989));

(e) hospitals, doctors and patients. Hospitals and doctors owe a duty of care to their patients; a hospital ward has a duty to treat persons who attend that ward (*Barnett v Chelsea & Kensington Hospital Management Committee* (1969)). This duty may arise in situations where there was no pre-existing relationship – a medical practitioner has a duty to treat a member of the public not previously treated by the practitioner (*Lowns v Woods* (1996)).

Duty to control third parties

As a general rule, there is no legal duty imposed upon one individual to control the acts of another. No duty is created simply because a person can reasonably foresee a risk of injury to another and could have prevented it through controlling a third party. For example, in *Bohdal v Streets* (1984), the defendant parked a car on a sloping driveway, the car was left unlocked, the handbrake was on, the automatic transmission was in 'park' and the keys had been removed. During the night, a third party interfered with the car, causing it to roll up a hill, then down a hill to crash into the plaintiff's house. The court held that the defendants were not responsible for the third party's actions, as the third party had to take a number of distinct steps to cause the damage. In other words, more than a minor amount of interference was required. However, there are exceptions to this rule in circumstances where the special nature of the relationship between the defendant and another person gives rise to a duty of care. For example:

- parental control must be exercised with due care in order to prevent a child exposing the person or property of others to unreasonable danger. The degree of control required depends upon the circumstances, such as the age of the child. For example, in *Smith v Leurs* (1945), a 13 year old boy fired a stone from a shanghai which hit the plaintiff in the eye. The court held that the defendants (the parents of the boy who shot the shanghai) had a duty to control their son, although they were found not to have breached their duty, as they had sought assurances from the boy that the shanghai would not be used outside the house;
- schools and teachers may also be held to be responsible for negligent control of a child where the child causes damage to a third party. For example, in *Carmarthenshire County Council v Lewis* (1955), the Council was held liable for failing to take reasonable care to prevent a four year old attending a nursery school straying

onto a highway, causing the death of a truck driver who swerved to miss the child and hit a pole;

- prison authorities may be held liable for failing to control prisoners. In *Dorset Yacht Ltd v Home Office* (1970), the authorities were held liable for damage done to a yacht by seven boys who had escaped from supervision;
- occupiers of places which sell alcohol have been held to owe a duty of care to protect their patrons. In *Chordas v Bryant* (1988), the plaintiff was assaulted by another hotel patron and he claimed damages for personal injuries against the defendant hotel proprietor. The court held that the defendant had breached its statutory duty not to sell liquor to intoxicated persons under s 79 of the Liquor Ordinance. However, this breach could not be causally linked to the plaintiff's injury, as the proximate act causing the injury to the plaintiff was the blow of the patron, not the defendant's breach of the ordinance.

In all of the above situations, there is a controlling, protective or reliance relationship between the defendant and the third party. This has been termed a 'special relationship'. Where there is no such relationship, a duty of care is more difficult to establish. *Smith v Littlewoods Organisation Ltd* (1987), an English case, established that a duty may arise in the absence of a special relationship between the defendant and the third party who caused the damage. In that case, vandals deliberately started a fire in an abandoned cinema belonging to the defendants, which caused damage to the plaintiff's property. This point of law has not been decided in Australian case law.

'Abnormal' claimants

Defendants must take their claimants as they find them. Where a claimant who is unusually sensitive is injured, they may recover where the injury was reasonably foreseeable to an ordinary person (*Levi v Colgate-Palmolive Pty Ltd* (1941)).

The duty to take reasonable care may include measures to remove unreasonable hazards from the path of the 'abnormal' claimant. For example, in *Haley v London Electricity Board* (1964), the defendant's employees had excavated a trench and erected signs and placed some barriers which afforded no warning for the plaintiff, who was blind. The plaintiff tripped over the barriers and, as a result of the fall, became deaf. The court held that it was reasonably foreseeable that a

blind person may come across the trench and it was not onerous for the defendant to take proper precautions for such an event.

Product liability

Liability for a defective product may arise in contract, tort or under statute. Increasingly, statute is becoming important in this area with the introduction of the 1992 amendments to the Trade Practices Act 1974, Cth. Other statutes which may be relevant include the Fair Trading legislation which exists in each jurisdiction and the Sale of Goods legislation.

Donoghue v Stevenson (1932) is the basis for tortious claims at common law by a consumer against a manufacturer of a product. The principle that a manufacturer owes a duty of care to those whom it is reasonably foreseeable will use the manufacturer's products has been extended to various commodities, such as underwear (*Grant v Australian Knitting Mills Ltd* (1936)); and various individuals in the chain of supply such as repairers (*Jull v Wilson & Horton* (1968)) and distributors and advertisers (*Watson v Buckley, Osborne, Garrett & Co Ltd & Wyrovoys Products Ltd* (1940)).

Defective structures

Historically, builders were treated with immunity from legal liability. Currently, they are exposed fully to the principles of duty of care. A builder has a duty to take reasonable care to avoid injury to the person or property of those persons who may be foreseeably affected through defects in the premises (*M & DJ Bossie Pty Ltd v Blackman* (1967)). This duty extends to architects (*Voli v Inglewood Shire Council* (1963)).

3 Element Two – Breach of Duty

You should be familiar with the following areas:

- the test used to determine the standard of care
- relevant factors courts look to in order to establish the standard of care
- the impact of special skills, beginners and other characteristics on the standard of care

Introduction

It is not sufficient that the claimant establishes that the defendant owed a duty of care. The claimant must also show that the defendant breached that duty. The issue then becomes how do we know when the duty to take care has been breached? How careful does a defendant have to be?

The test

In general, the answer to this question is that the law has adopted the test or standard of what a 'reasonable person of ordinary prudence' would have done in the same circumstances. The claimant must prove, on the balance of probabilities, that the defendant omitted to do something which a reasonable person 'guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do' (*Blyth v Birmingham Waterworks Co* (1856)).

The test is objective. To determine whether the behaviour of the defendant breached the duty of care, the court asks whether the defendant took the same amount of care that a reasonable person would have taken. This fictitious person is a reasonable person and not a perfect person. It follows that this person will use ordinary care and skill to guard against careless or negligent actions. If the defendant's conduct falls below the standard of care required, then the defendant is found

to have breached the duty of care. Generally, the same objective standard is applied to all members of the community with the possible exception of children and persons with skills. An individual's idiosyncrasies will not be taken into account.

It will not be relevant to the courts that the defendant has performed to the best of their abilities where that best falls beneath the standard expected of a reasonable person. Conversely, where a defendant has higher than average abilities, they will not be held liable if they do not utilise those abilities.

Determining the standard of care

To determine the standard of care the court attempts to resolve the question as to whether:

- a reasonable person in the defendant's position would have foreseen that their conduct posed a risk of injury to the claimant; and
- the reasonableness of the defendant's response to the risk.

For example, in *Wyong Shire Council v Shirt* (1980), the defendant council dredged a deep channel in a lake which was otherwise shallow and erected four signs in the bed of the lake adjacent to the channel, each sign saying 'DEEP WATER'. The plaintiff waterskier fell off in shallow water near the signs, he struck his head on the bottom of the lake and became a quadriplegic. The plaintiff sued the Council, alleging negligence by erecting misleading signs. The High Court found the defendant negligent even though the risk of someone misunderstanding the signs was small. Further, it was held that the Council had not taken reasonable precautions against this risk. It would have been relatively easy for the Council to ensure that the signs were explicit as to where the deep water was located.

Risk is the essence of the breach of the standard of care. In *Ryan v Fisher* (1976), the High Court stated that relevant matters to be taken into account included 'the risks inherent in [the] conduct, the seriousness of the consequences should any of those risks eventuate and the opportunities reasonably available to the defendant of reducing or wholly eliminating those risks'.

Whether or not there has been a breach of the standard of care is a question of fact. Thus, similar fact situations may lead to different outcomes. This involves a factual inquiry into all the circumstances and a balancing of the relevant factors. In *Wyong Shire Council v Shirt*

(1980), Mason J explained the 'relevant factors' considered by the High Court in determining the standard of care as:

> The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard response to be ascribed to the reasonable man placed in the defendant's position.

Relevant factors

In determining the objective standard of care required by the parties, courts may have recourse to relevant factors such as:

- the likelihood of the harm;
- the seriousness of the risk and how serious the injury is likely to be;
- knowledge available;
- common practices;
- utility of defendant's acts;
- practicability of precautions (including expense).

The likelihood of harm

This factor refers to the likelihood or reasonable foreseeability of harm occurring. In *Nagle v Rottnest Island Board* (1993), the High Court stated that 'a risk may constitute a foreseeable risk even though it is unlikely to occur ... It is enough that the risk is not far-fetched or fanciful'. Thus, oil catching fire on Sydney Harbour has been held to be a reasonably foreseeable risk, as it is not far-fetched and fanciful (*The Wagon Mound (No 2)* (1951)).

In *Swinton v The China Mutual Steam Navigation Co Ltd* (1951), the High Court stated that '[T]he measure of care increases in proportion with the danger involved'. Thus, where harm is more likely, a higher degree of care is called for. For example, in *L v Commonwealth* (1976), prison authorities were held to be negligent for the sexual assault inflicted on a prisoner who was placed in a cell with other known violent prisoners.

On the other hand, where the risk of injury is slight, reasonable care may be taken by doing nothing at all to eliminate the risk. For example, in *Bolton v Stone* (1951), Miss Stone was hit by a cricket ball

which had travelled 90 metres out of the ground. Evidence was led to show that such a hit had previously occurred around six times in the past 30 years. The court held that the probability of a person being struck by a cricket ball outside the ground was so slight as to be almost negligible. In other words, while a ball may occasionally have been hit out of the ground, the court found that the risk of such a ball causing injury to a person was so small that a reasonable person would disregard it.

There have been other cases where courts have decided in favour of the claimant even though the risk of injury was small, for example, in *Commonwealth of Australia v Introvigne* (1982). In that case, a schoolboy was injured when part of a flagpole (on the halyard of which the boys had been swinging) fell on him. The Commonwealth was held to be in breach of duty in failing to adequately supervise the pupils and failing to ensure the halyard was padlocked to the pole. Each case depends on its facts. In *Thompson v Johnson & Johnson Pty Ltd* (1991), the court held that the defendants were not liable for injuries suffered by the plaintiff through toxic shock received from tampon usage. The court found that the defendants had not breached their duty of care through failing to warn of the dangers of tampon use. This was largely due to the lack of time available to the defendants to implement such warnings.

Seriousness

This factor takes into account the seriousness of the consequences of the risk to the claimant. The more serious the risk, the higher a defendant's standard of care. In *Paris v Stepney Borough Council* (1951), a plaintiff employee who was blind in one eye was totally blinded in a work accident where a chip from a rusty bolt flew into his one good eye. The plaintiff alleged that the employer was negligent in failing to supply him with goggles. The employer knew that he was blind in one eye and the court held that the employer was liable (even though none of the workmen were given goggles), as the employer had to take into consideration the fact that this workman was likely to sustain more serious injury than his fellow workman with sight in both eyes when the employer was taking precautions against accidents.

This extends to property. For example, the defendant was held liable for fire damage caused to the plaintiff's house in *Haileybury College v Emanuelli* (1983). In that case, the defendant was driving his car and towing a trailer on a very hot day and in strong winds. The back wheel of the trailer came off, throwing sparks onto the grass near

the highway, igniting it. The court held that the defendant should have foreseen that in such circumstances in rural Australia, a fire could start and cause damage to the plaintiff's property 12 kilometres away. As Murphy J stated, 'The risks were most serious. The cost of eliminating them were comparatively minimal'.

Cost may therefore be an important factor in determining whether the standard of care has been breached. McHugh JA in *Western Suburbs Hospital v Currie* (1987) stated:

> Negligence is not an economic cost/benefit equation. Immeasurable 'soft' values such as community concepts of justice, health, life and freedom of conduct have to be taken into account. Nonetheless, it is generally a powerful indication of negligence that the cost of a precaution is small compared with the consequences of a breach even when the risk of the occurrence is small.

Knowledge available

Knowledge does not remain static. The courts do not hold defendants liable for advances in knowledge which occur after their acts. For example, in *H v Royal Alexandra Hospital for Children* (1990), H, the plaintiff, was a haemophiliac and had been diagnosed as such in 1980 when he was six years old. He was given blood transfusions at the defendant hospital in March 1982 and September 1983. One of these transfusions infected the plaintiff with HIV. Some time later, as a result, the plaintiff contracted AIDS. The plaintiff sued the hospital, alleging it had been negligent by not adequately screening for HIV. Relevant dates included:

1982	AIDS appeared in the USA;
1982–83	the virus spread to Australia;
April 1983	the first case of AIDS was diagnosed in Australia;
Late 1984	a test for screening for HIV was developed in the USA. It was licensed for general use in May 1985.

The court held that the hospital was not liable for transfusions in 1982, but was liable for negligent conduct in 1983. The reasoning of the court was that, in 1982, there was no knowledge of the role of blood in the transmission of the virus, therefore, the hospital had not breached their duty of care. Once it was known that HIV could be transmitted through blood, the situation changed, so that in 1983, there was a duty to ensure that a patient was not exposed to an unreasonable risk of injury. This

could have been done through screening donors (for example, asking about donor behaviour in questionnaires).

A claimant's knowledge may discharge the defendant from liability. For example, in *Phillis v Daly* (1988), a plaintiff was injured when she slipped while walking over a log on the grounds of the defendant's property. The court found that the risk posed by the log was obvious and the defendant was not held liable for something which the plaintiff could have taken reasonable care to avoid.

Whether a plaintiff's knowledge discharges a defendant from liability may depend upon the degree of risk. For example, in *Kelly v Smith* (1986), the defendant left a bottle of liquid marked 'poison' on top of an ice machine in a hotel. Lodgers were permitted to obtain ice for cold drinks from the machine. A lodger having obtained ice added it to the liquid and drank it. The side of the container labelled 'poison' was facing inwards and was not seen by the lodger. The lodger drank the poison and became ill as a result. The court held that the injury was reasonably foreseeable. However, damages awarded to the plaintiff were decreased through contributory negligence.

Common practices

If a defendant fails to adopt common practice, this will generally provide strong support for the assertion of negligence. Conversely, adhering to a standard of care will usually be sufficient to show that a defendant was not negligent.

However, common practice may in itself be negligent. This is because the conduct of the defendant is measured against that of the objective reasonable person, rather than against that of other people in the community (*Cavanagh v Ulster Weaving Co Ltd* (1960)). For example, in *Thompson v Smiths Shiprepairers (Northshields) Ltd* (1984), the plaintiff shipyard workers suffered progressive hearing loss from working at the defendant employer shipyards over a period of 40 years. Hearing protection was not provided from the employer until the mid-1970s – this reflected common practice, which was to not supply hearing protection until 1975. The court held that the reasonable person would have provided protection earlier than the mid-1970s, as any reasonable shipyard employer would have been aware by 1963 that exposure to noise would cause hearing loss.

Statutory requirements or professional codes of conduct may be taken into account when determining if the defendant took reasonable precautions, but they will not necessarily be conclusive (*Mercer v*

Commissioner for Road Transport (1937)). For example, in *Tucker v McCann* (1948), the plaintiff was a pillion passenger on a motorcycle. The defendant who was driving a car collided with the plaintiff at an intersection. The plaintiff alleged that the defendant was negligent as he had breached the road safety regulations by approaching the intersection too fast. The court held that the breach of the road regulations was evidence of negligence, but was not conclusive and so was only one factor to be taken into account in determining whether the defendant's conduct breached the standard of care.

Similarly, in *Fox v Hack* (1984), the plaintiff injured his back lifting large blocks weighing 62 lbs (28 kg). He sued his employer, alleging that the employer was negligent in failing to provide a safe system of work. The industrial award stated that employees should lift only 45 lbs (20.45 kg) blocks. The court held that the employer was negligent, as the award provision was reasonable and evidenced the standard of care which should be adopted.

Utility of the defendant's acts

The utility of the act of the defendant may be relevant in determining whether the standard of care has been breached. The greater the social utility of the defendant's act, the more likely it is that the defendant's behaviour will be assessed as reasonable.

For example, in *Daborn v Bath Tramways Motor Co Ltd* (1946), a wartime driver of a left hand drive ambulance turned into a lane on the right hand side of the road without signalling. The driver of the ambulance was unaware that a motor omnibus was close behind her and that it was trying to overtake her. The ambulance driver signalled with her left hand that she was going to turn right. The ambulance driver had no mirror, the back of the van was shut and on the back of the ambulance was printed 'Caution – Left hand drive – No signals'. The ambulance collided with the motor bus. The court held that the ambulance driver had not breached her duty of care, as she owed a lesser duty of care due to the fact that only left hand drive emergency vehicles were available. In addition, she had given a hand signal and the back of the ambulance warned drivers that signals could not be given.

The necessity of emergency life saving measures has also excused what would otherwise be a negligent dangerous operation. For example, in *Watt v Hertfordshire County Council* (1954), the plaintiff fireman who was riding in a firetruck to rescue a woman trapped under a heavy vehicle was injured when the unsecured jack rolled forward in

the truck. The jack was unsecured, as no other firetruck which could secure the jack was available. The court found that there was no negligence due to the emergency nature of the situation.

Practicability of precautions

A risk of harm must be balanced against the precautions which may be taken to avert that harm. The court will take a number of factors into account when determining whether the defendant ought to have taken precautions to prevent the risk. For example, the courts may look to the gravity of the risk, the probability of its occurrence and the expense and inconvenience required to remove it. The court is concerned with the question as to whether a reasonable person would have taken steps to eliminate the risk.

Where the risk is easy to avert it is likely that the defendant will be found to have breached the standard of care. For example, in *Shepherd v SJ Banks and Son Pty Ltd* (1987), the defendant manufacturer of a tinning machine was held liable for failing to fit an inexpensive guard onto the machine. In *Caledonian Collieries Ltd v Speirs* (1957), the plaintiff's husband was killed when his car was hit by a train at a level crossing. The train was running out of control down a steep gradient. The High Court found that the defendant was negligent for not installing catch points on a railway line to prevent railway trucks escaping, even though the chance of this occurring was small. The court noted that the installation of such features would be inexpensive and easy.

Thus, a defendant is not required to take expensive precautions where a risk is unlikely to occur. However, the more likely the risk is to occur, then the more precautions a defendant must take.

There is also the opposite situation where the risk of injury is high, but the practicability of taking precautions is impossible. In that situation, the question is whether the reasonable person would have ceased the activity. For example, in *Latimer v AEC Ltd* (1953), the House of Lords considered the argument that a factory which had been flooded, resulting in the factory floor becoming very slippery, should have ceased operations. In that case, sawdust was spread onto the floor of the factory, but some areas were left untreated. A workman who was walking in a gangway which had not been treated with sawdust slipped and injured himself. He brought a negligence action against his employers. The court held that the employers were not negligent, as they had done all a reasonable employer could be

expected to do, having regard to the degree of risk, for the safety of their employees.

A defendant who knows that a claimant is particularly fragile must take greater care. For example, in *Glasgow Corp v Taylor* (1922), a seven year old boy died from eating the berries of a poisonous shrub growing in a public garden in Glasgow. The boy's father sued the authorities in negligence, alleging that such a shrub should not be growing in a public garden where the authorities were aware that small children played and would be attracted to the shrub. The court held that the defendant ought to have known how tempting the shrub was to children, 'there was fault in having such a shrub where it was without definite warning of its danger and definite protection against the danger being incurred'.

A defendant does not have a duty to take steps which would be required to protect a heedless person from danger. In *Romeo v Conservation Commission of the Northern Territory* (1998), a 16 year old girl fell 6.5 metres from the top of a cliff onto a beach and suffered high level paraplegia as a result. There was no fence except for a low log fence 3 metres from the cliff edge. The fall occurred at night and the plaintiff was intoxicated. The court held that while the Commission owed entrants to the reserve a duty of care to prevent foreseeable risks and that falling from a cliff was such a risk, the Commission was not in breach of its duty for failing to build a fence. The Commission did not have duty to protect the public from obvious dangers such as a cliff.

Special characteristics

To determine the standard at which a reasonable person would perform, the court must, at times, give the reasonable person some of the attributes of the defendant. For example, a surgeon performing surgery will be judged at the standard of a reasonable surgeon; however, a surgeon driving her car home from work will be judged at the standard of a reasonable driver.

Special skills

If you hold yourself out as holding special skills, then you must show the skill normally possessed by people having those skills. For example, a doctor is expected to display the skills of a reasonable doctor; a driver is expected to have the skills of a reasonable driver (*Cook v Cook* (1986)).

Australian courts have held that the question of what is reasonable for a medical practitioner is for the court to determine and not members of the defendant's profession. For example, in *Rogers v Whittaker* (1992), the plaintiff, who was almost totally blind in her right eye, underwent an operation which the specialist, an ophthalmic surgeon, claimed would restore her sight significantly and improve her appearance. The defendant did not tell the plaintiff that there was a one in 14,000 chance that she may lose her sight totally. The plaintiff had asked numerous questions about the operation and was concerned about danger to her left eye. The plaintiff lost sight in both eyes and sued the defendant. The court held the defendant liable, stating that the skill the defendant had to possess was that of an ophthalmic surgeon specialising in corneal and anterior segment surgery. This standard was determined by the court, not the medical profession.

This application of a higher standard of specialisation will only apply where the defendant has held themselves out to have those skills. For example, in *Wells v Cooper* (1958), a householder fitted a door handle using the incorrect sized screws. The plaintiff was injured while trying to shut the door and alleged that the defendant had been negligent. The court found in favour of the defendant, as the defendant's standard of care was the reasonable care and skill which a reasonably competent carpenter would apply, rather than that of a professional carpenter. It was also relevant that the work of fitting the door handle was 'a trifling domestic replacement well within the competence of a householder accustomed to doing small carpentering jobs about his home'.

Similarly, it may be negligent for an individual who has no special skills to undertake an activity which requires special skills. For example, in *Papatonakis v Australian Telecommunications Commission* (1985), a telephone linesman died when a cable gave way which had been installed by an unskilled householder. The court found that the householder had breached the duty of care owed to the linesman. As Deane J stated: 'A reasonably prudent occupier does not rely merely on his own judgment and skill in a situation where technical expertise which he does not possess is required.'

Beginners

In general, the law gives no special consideration to learners and beginners. For example, in *Collins v Hertfordshire County Council* (1947), a final year medical student was employed as a junior house surgeon,

although she was not so qualified. The surgeon in charge asked her by telephone to obtain procaine 1% from the pharmacy. She misheard the order as cocaine 1% and gave it to the patient, who died. The court held her liable, as she had opportunity to rectify her mistake and she had not acted with the level of care attributed to a junior house surgeon, even though this was the position she held.

Knowledge by the claimant of defendant's disability

Where parties have voluntarily entered into relationships with each other, the courts have held that one party has agreed to accept a substandard skill from the other. This is particularly the case with beginners. For example, in *Cook v Cook* (1986), the High Court held that although a learner driver owed the same standard of care to other users of the highway, the standard of care owed by the learner driver to the instructor was that which could reasonably be expected of an unqualified and inexperienced driver.

Children

Children may be liable for their negligent acts and omissions. However, a child is only expected to conform to the standard expected for normal children of a similar age and experience. For example, in *McHale v Watson* (1966), a 12 year old boy threw a piece of steel about 15 cm long and sharpened at one end at a wooden post forming a guard around a tree. The plaintiff, a nine year old girl, who was standing near him, was hit in the eye by the steel which either glanced off or missed the tree. She sued the boy and his parents. The court held that it could not disregard the fact that the boy was 12 years old at the time of the accident and that the boy's behaviour was to be judged according to the standard of other 12 year old boys.

Disability

It is unclear as to how the courts will adjust the standard of the reasonable person to people with disabilities. In *Adamson v Motor Vehicle Insurance Trust* (1957), the court suggested that insanity does not vary the reasonable person test. In that case, the defendant, believing that his workmates were about to kill him, stole a car and hit the plaintiff and a cyclist. The court found that the defendant was insane at the time of the accident. The issue was whether the insanity excused him from negligence. The court did not directly deal with the issue, finding that the defendant (even though he may not have appreciated it was wrong) had understood what he was doing at the time of the accident.

The objective test is often not used in relation to persons with disabilities. So, for example, in *SA Ambulance v Wahlheim* (1948), a driver with defective hearing was absolved from contributory negligence for failing to hear an ambulance siren. However, the courts may impose a higher standard in respect of other activities. For example, in *Henderson v PTC* (1981), a plaintiff who had a serious defect in peripheral vision stepped into the path of a bus and was injured. The court held that the plaintiff had contributed to the negligence ,as the defective peripheral vision requires extra effort to look sideways. In *Daly v Liverpool Corp* (1939), the court held that an older person was not negligent in crossing the street and being injured by the defendant's bus, as she was not expected to possess the same agility as a younger person.

Further, allowances are made where drivers have lost control of their cars due to involuntary conduct, such as being stung on the nose by a bee (*Scholz v Standish* (1961)). A reasonable person in the defendant's position could not have avoided the accident.

4 Element Three – Causation

You should be familiar with the following areas:

- causation
- tests used by the court to prove causation: 'but for' test; 'material cause' test
- *res ipsa loquitur*

Introduction

The defendant's negligence must cause or materially contribute to the damage suffered by the claimant. There must be a causal link between the act of the defendant and the claimant's injury. This is a question of fact which must be proved on the balance of probabilities by the claimant. Courts have accepted that it is to be resolved as a matter of common sense and convenience, rather than as a scientific or mathematical formula (*Fitzgerald v Penn* (1954)).

Many texts deal with causation and remoteness together. However, each element is different:

- the issue of causation which we are concerned with in this chapter is a focus of fact, that is, did the defendant's act cause the claimant's damage? This is referred to as causation in fact;
- the issue of remoteness is classified as a question of law and is concerned with whether the damage or injury is too remote from the conduct of the defendant. This is referred to as causation in law.

The 'but for' test

The universal legal test used by courts to prove a causal link between the defendant's conduct and the claimant's injury is the 'but for' test. While the 'but for' test is the basic rule of thumb, it will have no application where there is more than one cause of an accident.

Using the 'but for' test, courts decide whether the claimant's damage would have occurred 'but for' the wrongful act of the defendant. The test is that a causal connection will be established between the defendant's careless conduct and the claimant's injury where it can be shown that the claimant would not have suffered injury if the defendant had not been negligent; that is, 'but for' the negligence of the defendant, the claimant's harm would not have occurred.

In ascertaining whether the claimant's injury would have occurred but for the defendant's negligence, the court is undertaking a hypothetical evaluation of what might have happened. In other words, the court looks to the claimant's damage and asks whether it was more likely than not that the damage would have occurred without the defendant's act. For example, in *Hole v Hocking* (1962), it was held that a plaintiff would not have suffered a haemorrhage if he had not been involved in a car accident (that is, 'but for' the car accident, the plaintiff would not have suffered any injury).

However, if no connection can be established, then the action for negligence will fail. For example, in *Robinson v Post Office* (1974), a doctor was found not to be liable for failing to administer a test where it would not have revealed the plaintiff's allergy. In that case, the plaintiff was wounded in his left side, the doctor gave him an injection of anti-tetanus serum, but did not follow the accepted medical procedure for the administration of a test dose. The plaintiff developed encephalitis which resulted in brain damage and permanent partial disability. The doctor's failure to give a test dose was held not to have caused or materially contributed to the encephalitis.

It should be noted that the 'but for' test has been commented upon as being of limited usefulness in determining causation (see, for example, *Chappel v Hart* (1998), especially the judgments of Gummow and Kirby JJ). This is because picking the act of the defendant which is the legal cause of the claimant's damage will generally require some test other than the 'but for' test to be applied.

Multiple causes – 'material cause'

The 'but for' test is problematic where there are multiple causes of the claimant's injury or where there are intervening acts between the defendant's negligence and the claimant's injury. The application of the 'but for' test in such situations may lead to the undesirable result that none of the acts is the cause of the damage (*March v E & MH*

Stramare Pty Ltd & Anor (1991)). In other words, the 'but for' test, if applied by the courts, would state that no act was the cause of the claimant's loss as the same injury would have occurred without one or the other.

In *March v E & MH Stramare Pty Ltd & Anor* (1991), the High Court held that the 'but for' test is not the exclusive test of causation. The High Court pointed out that the test is unable to deal with the situation where there is more than one cause of damage where each is sufficient to cause the damage. In *March v E & MH Stramare Pty Ltd & Anor* (1991), the defendants had parked their truck in the middle of a six lane road outside their fruit and vegetable market. The truck was parked there to load it with bins containing fruit and vegetables. The street was lit and the trucks hazard lights were on. The plaintiff, who was intoxicated and driving too fast, collided with the truck. The plaintiff was injured and sued the defendant, alleging that his injuries were caused by the negligence of the defendant in parking the truck in the middle of the road.

Thus, as can be seen in *March v E & MH Stramare Pty Ltd & Anor*, the concept of causation can be difficult. Every event has a number of causes which combine to produce it. For example, if the truck had not been parked in the middle of the road, the accident would not have happened. However, if the plaintiff had not been driving too fast, the accident would not have happened.

The factors which may cause an injury to the claimant may be complex. As a result of this complexity, the courts have resolved that the defendant's act does not have to be the sole cause of the claimant's injury. It is sufficient if the defendant's actions were a material cause. For example, in *Chapman v Hearse* (1961), a car had rolled over as a result of the negligence of its driver. The accident occurred on a wet, dark night. A doctor, Cherry, went to the assistance of Chapman who was lying injured on the road. The doctor, in the course of treating Chapman, was run over and killed by another car driven by Hearse. The court held that the defendant was liable as his actions were a 'material' cause of the plaintiff's injuries. A cause will be material where it is not negligible (*Western Australia v Watson* (1990)).

Additional intervening acts

Where a claimant suffers damage as a result of the defendant's act but the effect of the defendant's act is negated by a second event which causes the claimant the same or greater damage, then the defendant is

liable for only that much of the claimant's loss attributable to their own negligence. For example, in *Faulkner v Keffalinos* (1970), the plaintiff was injured through the defendant's negligent driving. This resulted in a partial loss of earning capacity. Before the trial took place, the earning capacity of the plaintiff was reduced to nothing when he was involved in a further motor car accident. It was not clear as to whom was responsible for the second accident. The defendant was held liable for the plaintiff's loss up until the second accident. In *Nicholson v Walker* (1979), liability was apportioned between two defendants where the plaintiff suffered a fractured leg in a car accident with the first defendant and subsequently suffered a re-fracture of the leg in a car accident with the second defendant.

Later tortious event

Both of the Australian cases *Faulkner v Keffalinos* (1970) and *Nicholson v Walker* (1979) applied the decision of the House of Lords in *Baker v Willoughby* (1970). In *Baker v Willoughby*, the plaintiff was injured in a car accident on 12 September 1964 caused by the defendant's negligence, with the result that the plaintiff's left leg was partially disabled. Later, in a second accident, which occurred on 29 November 1967, the plaintiff was shot in the same leg by men demanding money and the leg had to be amputated. Accordingly, the man's disability was greater as a result of the second injury. The court stated that 'He now has an artificial limb whereas he would have had a stiff leg'. The first defendant argued that he ought not be responsible for any of the loss. However, at the trial on 26 February 1968, the court held that the first defendant was liable for the original injury and the second defendant for the additional loss. The court held that the first defendant should pay compensation on the basis of a continuing disability.

Thus, where the subsequent act compounds the injury or damage caused by the defendant's original act, the defendant will remain responsible for as much harm as is attributable to their own negligence. For example, in *Nilon v Bezzina* (1988), the plaintiff was injured in successive motor vehicle accidents. The first accident occurred in 1976, as a result of which, the plaintiff injured his spine and subsequently brought an action against B. The second accident occurred in 1982 where the plaintiff injured his spine and his right hand. He sued ND for the second accident. B contended that his liability for damages ended in the 1982 accident. The court held that B's liability had not ended with the 1982 accident and that ND and B had to share the liability, as 'the second accident or happening in 1982 added to the injury caused by the first. It did not prevent the harm

caused by the first from continuing to affect the earning capacity and pain and suffering and the loss of amenities already sustained by the plaintiff in 1976'.

If the second act does not compound injury, then that defendant may escape liability altogether. For example, in *Performance Cars v Abraham* (1962), a Rolls Royce had its fender dented in an accident but before the repair could be carried out, the car was damaged in the same spot in a second accident by the defendant. The latter escaped liability for the cost of respraying, because he had caused no additional loss.

Later non-tortious event

This principle extends to the case where a later event is not caused through negligence. In *Jobling v Associated Dairies* (1982), the plaintiff employee had sustained back injury at work in the form of a slipped disc which had reduced his working capacity by 50%. Prior to the trial, the plaintiff developed a condition called cervical myelopathy which resulted in a total incapacity for work and which was independent and unrelated to the first injury. The House of Lords held that the latter event must be taken into account when awarding damages, the effect being that no damages were awarded for the plaintiff's loss of working ability after the onset of the condition.

The finding in *Jobling v Associated Dairies* (1982) does not sit well with *Baker v Willoughby* (1970). However, the two may be reconciled as *Baker v Willoughby* (1970) is concerned with a later tort while *Jobling v Associated Dairies* (1982) is concerned with a later natural event. Thus, where there is a later tort, the policy appears to be that the defendant should not benefit from it unless the second tort reduces the claimant's loss. This situation will only arise where each tort is a sufficient cause of the damage which the claimant suffers. The Australian position has not been clearly established.

Damages may also be apportioned where the damage is caused by a negligent act and an innocent act. For example, in *Re Armstrong and State Rivers & Water Supply Commission* (1952), the plaintiff, Armstrong, claimed compensation from the State Rivers and Water Supply Commission for damage to her land caused by flooding. The court ordered that the Commission compensate the plaintiff for the flooding less any amount of such injury and damage which was not due to the Commission's negligence.

Alternative causes

In some cases, more than one event can be the cause of a single injury. If two or more independent acts of negligence combine so that the harm would not have occurred without either of them, then each may be *prima facie* regarded as causing the loss. The claimant cannot, however, be compensated twice – once one defendant has paid, the claimant cannot gain money from the other.

For example, in *Barker v Permanent Seamless Floors Pty Ltd* (1983), the plaintiff claimed he contracted a terminal illness as a result of exposure to toxic chemicals in the course of his employment. The illness was a result of exposure to five chemicals. The court held that where damage is sustained through the contribution of several tortfeasors, it is not necessary to demonstrate that each defendant contributed to the damage suffered by the plaintiff. In such a case, each defendant bears the burden of proving that their conduct was not a cause of the damage suffered by the plaintiff.

Cumulative causes

In *Bonnington Castings v Wardlaw* (1956), the plaintiff contracted a disease from inhalation of dust at work. The inhalation came from two sources, one innocent in the sense that the employer had not been negligent with respect to it and one guilty in the sense that the employer had been negligent in relation to it. The court held in favour of the plaintiff, stating that the 'guilty' dust was a material contribution to the plaintiff's disease. In this sense, the causes were cumulative – the innocent dust not being treated as separate from the 'guilty'.

Intervening events – *novus actus interveniens* (breaking the chain of causation)

Several events may lead to the claimant's injuries. A claimant may be hurt in a car accident and then injured on the way to hospital by negligent driving of the ambulance. This is referred to as a chain of causation.

According to the 'but for' test, the original tortfeasor would be liable for the damages which followed the accident since, without the original incident, none of the following damage would have occurred. However, the injuries to the claimant would also not have occurred without the negligence of the ambulance driver. The court's role is to examine the chain of causation and determine where the link from the claimant's injuries to the defendant's acts takes place. If a subsequent

event, such as the negligence of the ambulance officer breaks the chain of causation, the claimant will not be able to claim from the original tortfeasor.

Where the chain of causation is broken by an intervening act which renders the defendant's act no longer responsible for the claimant's injuries, then the defendant's conduct will not be considered the cause of the claimant's injuries. For example, grossly negligent medical advice may break the chain of causation where it is solely responsible for exacerbation of the claimant's injuries (*Martin v Isbard* (1946)). In *Martin v Isbard*, the plaintiff suffered personal injuries including minor concussion as a result of an accident which occurred through the defendant's negligence. As a result of bad medical advice, she formed an incorrect belief that she was suffering from a fractured skull. Due to that belief, she developed an anxiety and litigation neurosis. The court held that the anxiety induced by the bad medical advice was a new and intervening cause of damage.

It has also been argued that a failure to follow medical orders and a lack of proper medical treatment is sufficient to break the chain of causation. This argument failed in *Adelaide Chemical & Fertilizer Co Ltd v Carlyle* (1940). In that case, the plaintiff's husband was loading earthenware jugs of sulphuric acid when one broke, spilling the acid over his legs. He was treated at hospital and told to report back the following day. He did not follow this advice, but was treated by the plaintiff with 'tannemol' which a chemist had advised them to use. The plaintiff's husband developed streptococcal septicaemia and died. The defendants who supplied the acid in the earthenware jars were held to be negligent. The court rejected the argument that the cause of death was the infection rather than the burn.

In *March v E & MH Stramare Pty Ltd & Anor* (1991), the High Court suggested a common sense approach to this situation of intervening events. Such an approach has been employed in the subsequent decision of *Bennett v Minister for Community Welfare* (1992). In that case, a 16 year old plaintiff was injured while using a saw without a proper guard in 1973 while at a detention centre where the plaintiff was a ward of the State. The plaintiff was entitled to damages from the Minister of Community Welfare for his injuries. The defendant negligently failed to inform the plaintiff of his right to obtain independent legal advice about the accident. In 1976, when the plaintiff was no longer a ward of the State, he sought legal advice and was wrongly advised by a barrister that he had no cause of action. In 1979, the plaintiff's right to sue became statute barred. The plaintiff sued the defendant who

argued that the barrister's negligent advice had operated as a *novus actus interveniens* and was the sole cause of the plaintiff's loss. The court held that this was not the case and that the plaintiff was entitled to recover from the defendant, as the plaintiff was only seeking legal advice from the barrister because of the defendant's failure to perform their duty originally: 'That circumstance makes it difficult, if not impossible, to conclude that, in the situation described, the 1976 advice superseded the breach of duty as the sole cause of the subsequent loss.'

Intervening events – voluntary human intervention

In *Lamb v Camden London Borough Council* (1981), the plaintiffs were denied a remedy by the courts as the damage suffered by them was too remote from the defendant's conduct. The damage was too remote due to the intervention of squatters between the defendant's negligent act and the plaintiff's damage. In that case, the plaintiffs owned a house which had been let furnished to a tenant in 1972. In 1973, the foundations were undermined due to a water main which burst while the defendants were replacing a sewer in an adjoining road. The tenants moved out. The house was left unoccupied and unfurnished. Squatters moved in throughout 1974 and 1975 and caused £30,000 damage. The court held that it could not reasonably be foreseen that a burst water main in 1973 could lead to the house being occupied by squatters in 1974 and 1975.

Coincidence

In *Woods v Duncan* (1946), a naval submarine sank, killing all but four aboard it. The plaintiff alleged the sinking was due to the defendant's negligent opening of the submarine's torpedo tubes. The defendant was one of the four who survived. The court held that there was no evidence that the defendant was negligent, as there was 'an extraordinary combination of events which produced the disaster'.

Similarly, in the American case of *Canada v Royce* (1953), a cab driver was negligent in not giving right of way to a pedestrian. As the driver passed the pedestrian, the door of the cab flew open (through no fault of the driver) and injured the pedestrian. The injury was found not to be causally linked to the negligence of the driver.

Problems in causation

Consequential harm – medical evidence

One of the difficulties with causation is that often there is a lack of medical certainty as to the cause of a claimant's injury. For example, in *Tubemakers of Australia Ltd v Fernandez* (1976), the plaintiff was struck heavily on the back of his hand because of a fault in the machine he was working on. The hand was bandaged in an ambulance room in the factory. The plaintiff resumed work and the hand became increasingly swollen and painful. Six months later, the plaintiff was diagnosed as suffering from Dupuytren's contracture where the fingers contracted towards the palm of the hand. An operation did not help. Medical evidence was not authoritative as to the cause of the condition, although swelling was not a symptom. The High Court held, however, that there was evidence upon which a reasonable jury could have found that the plaintiff's injury was caused, or materially contributed to, by the defendant's negligence.

Omissions

The difficulty of determining whether the defendant's negligence was the cause of injury is compounded in cases where the defendant has omitted to act. The court then must determine what would have occurred in the absence of the defendant's negligence.

For example, where the defendant fails to supply protective equipment, it is only a claimant who would have worn the equipment who will be able to recover. In *Cummings v Sir William Arrol & Co Ltd* (1962), the plaintiff was unable to prove to the court that the deceased construction worker who fell to his death from a steel tower would have worn a safety belt if one had been provided. In other words, the plaintiff was unable to show that the defendant's failure to provide the equipment caused the accident and, thus, could not succeed in an action of negligence.

Similarly, in *Barnett v Chelsea and Kensington Hospital Management Committee* (1969), the plaintiff nightwatchman, Barnett, and two of his colleagues became very ill after drinking tea. He went to the local hospital where the doctor was ill and no doctor was on duty. The hospital telephoned a doctor who told them to go home and call their own doctors the next day. Five hours later, Barnett died. The tea had been laced with arsenic. The widow sued the doctor and the hospital. The action failed because of causation, that is, even if the doctor had

given Mr Barnett treatment, he still would have died. There was no link between the doctor's failure to be on duty and Mr Barnett's death.

Increased risk

Where the claimant can show that the breach of the defendant increased the risk of injury to the claimant and where there is no alternative cause, then the defendant may be held liable. For example, in *McGhee v National Coal Board* (1972), the plaintiff argued that he had contracted dermatitis through his employer's negligent failure to provide showers. McGhee worked cleaning out brick kilns where the conditions were hot, dirty and dusty. The conditions were exacerbated as McGhee had to cycle home after work caked with sweat and grime. The House of Lords held that this omission had materially increased the risk of dermatitis which amounted to a finding that the defendant had 'materially contributed' to the plaintiff's condition. Therefore, it did not matter that other factors which were beyond the defendant's control, such as the plaintiff cycling home, had contributed to the injury.

Res ipsa loquitur

In Australia, application of *res ipsa loquitur* makes out a *prima facie* case of negligence. The result of the application of the principle is to shift the onus of proof, in that if a *prima facie* case is assumed to be made out, the defendant will have the task of proving he or she was not negligent. For example, where a moving car collides with a tree, this is *prima facie* evidence of negligence on behalf of the driver of the car. This was the case in *Government Insurance Office (NSW) v Best* (1993), where a car driven by the plaintiff's 78 year old husband crashed into a tree, injuring the plaintiff and another passenger and killing her husband. Neither of the passengers was able to say how the accident occurred. The plaintiff brought an action for damages alleging that the deceased's negligence could be inferred from the occurrence of the accident under the maxim of *res ipsa loquitur*. The insurer originally admitted liability, but then withdrew this admission, arguing that the accident may not have been caused by the negligence of the defendant because he may have had an epileptic fit.

In *Schellenberg v Tunnel Holdings Pty Ltd* (2000), in the High Court, *res ipsa loquitur* was held not to be a rule of law, but a process of valid

inferential reasoning used in tort law. It was held that it only applies in cases where it is proven that an accident would not ordinarily occur without the negligence of the defendant. In this particular case, where a worker was injured when an air hose uncoupled from a compressor, it was held that *res ipsa loquitur* did not apply, as there was insufficient evidence to establish that the employer was negligent.

5 Element Four – Remoteness

You should be familiar with the following areas:

- reasonable foreseeability
- the eggshell skull rule

Introduction

To succeed in an action for negligence, the claimant must have suffered damage. A defendant will not be liable for damage which the court regards as too remote.

The purpose of this fourth element of negligence is to set a limit to the consequences for which a defendant may be liable. This element of remoteness sets a cut off beyond which a defendant will not be liable to a claimant for damage. A defendant is not responsible for all results which flow from a negligent act. Thus, this element is a public policy measure through which courts can limit liability.

The test used by the court to establish whether the damage suffered by the claimant is too remote is reasonable foreseeability. If the damage is not a reasonably foreseeable result of the defendant's negligence, the claimant will be unable to claim compensation from the defendant for it. The damage may be to the claimant's person or property.

Reasonable foreseeability

The court looks at whether the type of damage incurred by the claimant was a reasonably foreseeable result of the defendant's negligence. This question of reasonable foreseeability of damage is different to that with respect to the standard of care. However, the concept itself is the same.

The test of reasonable foreseeability was established in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* (1961). In that case, the defendant charterer of a ship negligently spilt oil. The oil floated on the surface of the water in Sydney Harbour. The oil was ignited by some molten metal falling from the plaintiff's wharf, where welding operations were being carried out, onto cotton waste floating in the water which acted as a wick. The resulting fire extensively damaged the plaintiff's wharf. The flashpoint of the oil was 170˚C and would not normally have ignited on the water. The court found that the defendants were not negligent, because the kind of damage which resulted was not a reasonably foreseeable result of an oil spillage.

The test of reasonable foreseeability is elastic, as Herron CJ stated (*Beavis v Apthorpe* (1962)):

> [I]n one sense almost nothing is quite unforeseeable, since there is a very slight mathematical chance, recognisable in advance, that even the most freakish accidents will occur. In another, nothing is entirely foreseeable, since the exact details of a sequence of events never can be predicted with complete confidence.

In essence, the defendant will not be liable for damage which is of a different kind or type from that which is reasonably foreseeable.

The type of injury

It is only necessary that the type or kind of injury which the claimant suffered as a result of the defendant's conduct be reasonably foreseeable. The extent of the injury which actually results is irrelevant. In other words, as long as the class of injury can be reasonably foreseen, the particular injury need not be foreseen. For example, in *Havenaar v Havenaar* (1982), it was held that physical injury is a type of damage which is a reasonably foreseeable result of a road accident, therefore, pancreatitis brought on as a result of alcoholism as a result of the accident was held to be a foreseeable type of injury. Similarly, death may be held to be a reasonably foreseeable type of injury resulting from a road accident (*Chapman v Hearse* (1961)).

In Australia, *Mount Isa Mines v Pusey* (1970) established the same principle. In this case, two of the defendant's employees suffered severe burns from an intense electric arc while working in the defendant's powerhouse. The defendant had been negligent in not properly instructing the men in their duties. The plaintiff, a fellow

employee, went to the accident scene and saw one of the men, whom he did not know, severely burned. The plaintiff aided him and helped him to the ambulance. Around nine days later, he heard of the death of the man. About four weeks later, the man developed acute schizophrenia. He sued the defendant, alleging it was caused by the employer's negligence. The High Court held that the schizophrenia was not too remote a consequence of the defendant negligence. The court held that a mental disturbance of some type was foreseeable as a consequence of the breach of duty. Thus, it was not necessary that the type of injury be foreseeable – the defendant would be liable for the resulting mental illness and the extent of the reaction was immaterial.

This also applies to property damage. In *Haileybury College v Emanuelli* (1983), where the plaintiff's property was damaged by fire, Murphy J held that even where damage is an improbable result of negligence, it ought to have been reasonably foreseen by the defendant. In that case, the court held that 'it was foreseeable that a possible result of the wheel coming off the trailer and of the axle dragging along the road at 50 mph on a Victorian bitumen highway bounded by long dry grass on a high north wind century heat day in summer, was that a fire could be started in the grass'.

Case examples

The question of whether a type of damage is reasonably foreseeable is, thus, difficult to categorise, as it depends on the classification of types of damage. The court may approach this very broadly or narrowly. Precedent is not particularly useful in knowing which approach to take.

For example, in *Tremain v Pike* (1969), the plaintiff, in the course of being employed as a herdsman on the defendant's farm, contracted a rare disease through contact with rats' urine. The disease, Weil's disease, is carried by rats but rarely contracted by humans because they are only slightly susceptible to it. The farmer was held not to be liable on the ground that, although other diseases were foreseeable from the presence of rats, Weil's disease was not. There was no evidence that the farmer knew or ought to have reasonably known of Weil's disease.

In *Rowe v McCartney* (1976), the owner of a car reluctantly allowed her friend to drive the car on the basis that he would be careful. The car ran off the road, hit a telegraph pole and the driver became a quadriplegic. The owner took an action against the driver and recovered for physical injuries, but not for a depressive neurosis

caused by guilt associated with allowing her friend to drive. The court held that this damage was not foreseeable – the plaintiff's psychiatric illness did not arise out of her being a passenger and so was not caused by the accident. The plaintiff's feelings of guilt were in a category of injury which were not foreseeable as a result of the defendant's negligence.

In *Versic v Connors* (1969), the plaintiff's husband had died when his truck overturned in an accident caused by a collision with the defendant's car. The plaintiff was pinned beneath the truck with his head jammed in the gutter. The rain water flowing through the gutter was dammed by the truck driver's head, it covered his nose and mouth and he drowned. The defendant argued that it was not reasonably foreseeable for a man to drown on a suburban street. The court held that the damming of the gutter water by the truck driver's head and his asphyxiation was reasonably foreseeable.

The complexity of events which caused the harm

Once the damage is foreseeable, the fact that it may be continued or arises through a set of complex and unusual events will not help the defendant (*Malcolm v Broadhurst* (1970)). For example, in *Hughes v Lord Advocate* (1963), a young boy suffered burns when the defendant workmen left an open manhole, covered by a tent bearing four paraffin lamps, unattended. The eight year old plaintiff had gone to investigate inside the tent, taking one of the lamps. The lamp was either knocked or dropped into the manhole. An explosion followed which was caused by the paraffin from the lamp vaporising and being ignited by a flame. The plaintiff was knocked into the manhole and was severely burnt as a result. The court held that the burns were not too remote from the defendant's negligence. Some kind of burn was reasonably foreseeable and the fact that the extent of those burns was not reasonably foreseeable was immaterial.

In *Chapman v Hearse* (1961), the High Court has established that the plaintiff does not have to prove that the manner in which the injury was sustained was reasonably foreseeable. For example, in *Wells v Sainsbury and Harrigan Ltd* (1962), it was accepted by the court that neither the exact injury or the precise sequence of events which brought about the injury was foreseeable, but the general sequence of events was. In that case, a fellow employee brought a high pressure hose in contact with the body of the plaintiff who suffered severe internal injuries as a result. The court held that even though the

defendant may not have foreseen the passage of air through the rectum into the intestines, it was enough that the plaintiff establish 'that the negligent handling of a high pressure hose should have been foreseen to be likely to cause injury to some part of the body of the person against whom it was directed'.

The claimant

The particular claimant does not have to be reasonably foreseeable. The claimant only has to belong to the class of claimants which may be injured as a result of the defendant's actions. For example, in *Farrugia v Great Western Railway* (1947), a lorry loaded with a large container failed to clear a bridge and the container fell off the lorry onto a boy who was about to climb aboard. His presence behind the lorry was enough to incur liability – it was irrelevant that the likelihood that the boy was to be a passenger could not be foreseen. The defendants had created a potential source of danger and owed a duty of care to anyone who might be near when the danger materialised, whether that person was a trespasser or not. The court held that the duty could not be confined to someone the defendant reasonably expected to be there at the time of the accident.

The eggshell skull rule

This rule operates as an exception to the test that the type of damage which results to the claimant must be a reasonably foreseeable result of the defendant's negligence. When a claimant has a condition which makes them more susceptible to injury than the ordinary person, the defendant will be held liable for the full extent of the injuries incurred. This is referred to as the 'eggshell skull rule', which means that you must take your victim as you find him or her. Provided the injury is reasonably foreseeable, once a breach of duty has been found, the defendant will be held liable for the damage, even if the victim has an eggshell skull, a weak heart, etc.

This is not to say that the abnormal susceptibility of the claimant will not be relevant when assessing whether the defendant has breached their duty of care owed. However, once the breach is established and the type of damage is foreseeable, the defendant must take the victim as they are and will be responsible for the damage, however 'abnormal'.

There is also no difference in principle between an eggshell skull and an eggshell personality. For example, in *Malcolm v Broadhurst* (1970), a plaintiff who was physically injured in a car accident was able to recover all damages including damages for a pre-existing nervous disposition. Similarly, in *Havenaar v Havenaar* (1982), the plaintiff was injured when a car he was travelling in as a passenger hit a telegraph pole. Following the accident, the plaintiff developed a condition of pancreatitis due to the consumption of alcohol by him for the purpose of relieving his pain. The court held that the consumption of alcohol was involuntary, as it was 'attributable to the sort of person the plaintiff happened to be'.

6 Defences to Negligence

You should be familiar with the following areas:

- contributory negligence
- *volenti non fit injuria*
- illegality

Introduction

There are several defences available to a defendant against whom negligence is alleged. The two principal defences are:

- contributory negligence – that the claimant's own carelessness contributed to the damage suffered; and
- *volenti non fit injuria* – that the claimant voluntarily assumed the risk of the injury.

The burden of proof is upon the defendant. Contributory negligence is a partial defence, while *volenti non fit injuria* is a total defence.

Contributory negligence

Where a claimant has contributed to their injury or loss through their own negligence, a defendant may utilise the defence of contributory negligence. Contributory negligence must be specifically pleaded. Contributory negligence is a partial defence, in that, if it is successful, it will not deny the claimant's claim, but will result in the amount of damages paid to the claimant being reduced.

The history of the defence

Historically, at common law, contributory negligence was a complete defence. However, since the introduction of apportionment legislation,

contributory negligence now operates to reduce the amount of damages awarded to a claimant to the extent that the claimant's carelessness contributed to the damage suffered. Thus, if successful, the claimant's damages may be reduced according to the degree of negligence (that is, if the claimant was 40% responsible for the negligence, then the damages the claimant receives may be reduced by 40%).

Apportionment legislation

Apportionment legislation was introduced in England to allow damage to be apportioned between the plaintiff and the defendant. Similar legislation has been passed in all Australian States:

- Law Reform (Miscellaneous Provisions) Act 1955, ACT;
- Law Reform (Miscellaneous Provisions) Act 1956, NT;
- Law Reform (Miscellaneous Provisions) Act 1965, NSW;
- Law Reform (Tortfeasors' Contribution, Contributory Negligence and Division of Chattels) Act 1952, Qld;
- Wrongs Act 1936, SA;
- Tortfeasors' and Contributory Negligence Act 1954, Tas;
- Wrongs Act 1958, Vic;
- Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1974, WA.

(Note that the legislation in Western Australia is slightly different from the English Act.)

This legislation has been modelled on the English statute, which states that:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

In the section, 'fault' is defined as including 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort, or which would, apart from this Act, give rise to the defence of contributory negligence'. In Western Australia, the provision applies to 'any claim for damages founded on an allegation of negligence'.

Courts express the apportionment of liability between the claimant and the defendant in percentage terms. They arrive at this apportionment

through a comparison of the departure from the standard of care of the reasonable person of both the claimant and the defendant. For example, in *Pennington v Norris* (1956), the plaintiff, a pedestrian, was struck by the defendant's car while crossing a road at night in Tasmania. Under the Tasmanian apportionment legislation, the trial judge reduced the plaintiff's damages by 50% for contributory negligence. The High Court held that the plaintiff's damages should be reduced by only 20%, stating that:

> The only guide which the statute provides is that it requires regard be had to the claimant's share in the responsibility for the damage … What has to be done is to arrive at a 'just and equitable' apportionment as between the plaintiff and the defendant of the 'responsibility' for the damage. It seems clear that this must of necessity involve a comparison of culpability. By 'culpability' we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man. To institute a comparison in respect of blameworthiness in such a case as the present seems more or less impracticable, because, while the defendant's negligence is a breach of duty owed to other persons and therefore blameworthy, the plaintiff's 'contributory' negligence is not a breach of any duty at all, and it is difficult to impute moral blame to one who is careless merely of his own safety … Hence, in our opinion, the negligence of the defendant was in a high degree more culpable, more gross, than that of the plaintiff.

Thus, apportionment legislation has allowed for damage to be recovered where the claimant was 95% responsible for their own damage, meaning that the claimant received 5% of the damages awarded to him or her (*Cumming v Murphy* (1967)). In *O'Connell v Jackson* (1972), a moped rider who failed to wear a helmet suffered a reduction in damages according to the extent to which that failure caused additional injury. The amount of damages awarded to the plaintiff was therefore reduced by 15%.

As such, contributory negligence is not a complete defence; it is a plea by the defendant in mitigation for damages. In other words, if proven successfully, contributory negligence will result in the amount of damages awarded to the claimant being reduced. The damages will be reduced to an amount which the court considers to be fair, having regard to the extent of the claimant's responsibility for the damage.

How to prove contributory negligence

Contributory negligence is not concerned with whether damage or a risk of damage is done to another, rather it is concerned with the failure of a person to take care of their own safety and interests. Thus, in contributory negligence, the claimant does not have to owe the defendant a duty of care. As stated by Lord Denning in *Froom v Butcher* (1976):

> Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself …

In other words, the defendant needs to show:

- that the claimant failed to take the precautions a reasonable person would have for their own protection, that is, the standard of care applicable to the claimant's act;
- that the damage was reasonably foreseeable and was contributed to by the claimant's act.

Some commentators also include a third criteria:

- that the injury is within the risk.

Each of these is dealt with below.

Standard of care

The issue in contributory negligence is whether the conduct of the claimant amounts to a failure to take reasonable care of their own safety. This test is objective and will be judged by reference to all the circumstances of the case. Contributory negligence requires a departure from an objective standard of care – the claimant's act will be judged against that of a person of ordinary prudence (*Sungravure Pty Ltd v Meani* (1964)).

A finding of contributory negligence is essentially a finding of fact (*TAL Structural Engineers Pty Ltd v Vaughan Constructions Pty Ltd* (1989)). However, the courts have developed some general principles:

- children are capable of being held contributorily negligent. For example, in *Bye v Bates* (1989), a six and a half year old was held 12.5% responsible for his injuries when he was electrocuted as he knew he should not be playing with any electrical appliances and was misbehaving;

- the social utility of the defendant's act may be taken into account. For example, if the person is a rescuer and is hit by oncoming traffic while performing a rescue, they may not be held to be contributorily negligent (*Chapman v Hearse* (1961));
- the claimant may also be held to be contributorily negligent for the acts of a third party *(Milkovitz v Federal Capital Press of Australia Pty Ltd* (1972)). This is a form of vicarious liability which is sometimes referred to as the doctrine of identification. This includes employers and employees, car owners and drivers, and passengers and carriers;
- the courts have drawn a distinction between 'mere inattention or inadvertence' and contributory negligence. Thoughtlessness, inattention or inadvertence will not necessarily amount to contributory negligence. For example, in *Commissioner of Railways v Ruprecht* (1979), the plaintiff railway employee lost his legs when he stepped onto a railway line in front of a moving wagon without looking. The court held that the plaintiff was not contributorily negligent due to such things, as 'inattention born of familiarity and repetition, and the man's preoccupation with the matter in hand'. The court looked to the conduct of the employer to refute contributory negligence;
- passengers who accept lifts with drivers they know to be intoxicated may expect to be held to be contributorily negligent for any damage which results. For example, in *Banovic v Perkovic* (1982), the passenger was held not to be contributorily negligent, as he could not tell the driver was drunk;
- the courts will not hold a claimant contributorily negligent where the negligence of the defendant has placed the plaintiff in a position of imminent personal danger. This is known as the 'agony of the moment rule', the 'sudden emergency' rule, the 'rule in *The Bywell Castle* (1879)' or the doctrine of alternative danger.

For example, in *The Bywell Castle* (1879), two ships collided and it was held that the plaintiff ship was not contributorily negligent, as the mistake it had made in navigation was made in the agony of the moment created by the negligence of the defendant ship.

In *Caterson v Commissioner for Railways* (1973), the plaintiff was injured when he jumped from a train which had started to move, in order to prevent being transported to the next station, which was 128 kilometres away from the station he had just left. The plaintiff's 14

year old son was alone on the platform of that station some 64 kilometres from home. Finding for the plaintiff, Gibbs J said:

> Where a plaintiff has by reason of the negligence of the defendant been so placed that he can only escape from inconvenience by taking a risk, the question whether his action in taking the risk is unreasonable is to be answered by weighing the degree of inconvenience to which he will be subjected against the risk that he takes in order to try to escape from it ...

However, an emergency will not always exempt a claimant from contributory negligence. For example, in *Cortis v Baker* (1968), a car driver who lacked the skill of a reasonable driver when faced by an emergency created by the defendant was held liable in contributory negligence. Thus, in an emergency, a claimant is required to exercise only the level of care and skill which a person of ordinary prudence might exhibit in an emergency:

- breach of a statutory standard by the claimant is not decisive as to whether the claimant is liable for contributory negligence (*Sibley v Kais* (1967)).

Causation – was the damage reasonably foreseeable and contributed to by the claimant's act?

There must be a causal link between the claimant's negligent conduct and the damage suffered by the claimant. In most cases, causation with respect to contributory negligence is proved by using the ordinary principles of causation in negligence.

This means that the question of causation is essentially one of fact which will be resolved by common sense (*March v E & MH Stramare Pty Ltd* (1991)). For example, in *Fitzgerald v Penn* (1954), the court noted that 'the absence of a tail light could not operate to cause a head-on collision even at night'. Also, in *Gent-Diver v Neville* (1953), the plaintiff was held not to have contributed to his own negligence where he carelessly rode as a pillion passenger on a motorcycle, even though he knew the lights were defective. The driver of the motorcycle collided with an oncoming car. The driver of the motorcycle was on the wrong side of the road at night without lights. The court held that the plaintiff was not contributorily negligent, as he had exposed himself to the risk of a collision from the absence of headlights and had not exposed himself to the risk of collision through the motorcycle driver's failure to avoid a collision with a vehicle which was visible.

Similarly, in *O'Connor v South Australia* (1976), the plaintiff, a court stenographer, was held to be contributorily negligent when she was injured by a judge opening a door in a quick and forceful manner. She was standing on the other side of the door. The court divided responsibility as one-third for the plaintiff for standing too close to a door which she was aware that people may use, and two-thirds the responsibility of the defendant who was negligent in his manner of opening the door.

In some cases, however, the claimant's acts may contribute to the damage suffered without contributing to the accident from which those injuries occurred. The most common of these situations are the seat belt and crash helmet cases. For example, in *Froom v Butcher* (1976), the plaintiff was driving correctly when he was hit head-on by a car coming in the opposite direction. The plaintiff was not wearing a seat belt and there was no legislation at the time making the wearing of seat belts a requirement. The court held that the failure to wear a seat belt was contributory negligence. In South Australia and New South Wales, s 35a of the Wrongs Act 1936, SA, and s 74(2)(c) of the Motor Accidents Act 1988, NSW, impose statutory requirements for contributory negligence where a claimant fails to wear a seatbelt. In South Australia, the statutory minimum for a reduction of damages in such cases is 15%.

Injury within the risk

The claimant's injury must result from the risk to which the claimant was exposed. For example, in *Jones v Livox Quarries* (1952), a workman was standing in the back of a traxcavator, riding down to lunch, which was against an express prohibition which had been issued. A dumper, loaded with stone, crashed into the traxcavator from behind and injured the plaintiff. The argument put forward for the defence was that the plaintiff was not contributorily negligent, as being crushed by a dumper was not the type of risk which the prohibition was issued to stop. The prohibition against riding on traxcavators was intended to stop risks of falling off or becoming trapped in the machine. Thus, the plaintiff's argument was that being crushed in the back of the traxcavator was not within the risk he exposed himself to when riding on it. The court held that the plaintiff had contributed to his damage in this case, as Denning LJ stated:

> Even though the plaintiff did not foresee the possibility of being crushed, nevertheless in the ordinary plain common sense of this business, the injury suffered by the plaintiff was due in part to the fact that he chose to ride on the towbar to lunch instead of walking down on his feet.

Volenti non fit injuria

Volenti non fit injuria means that an injury cannot be done to a willing person. In other words, an injury cannot be done to a person who has voluntarily assumed the risk. This may be a complete defence to a negligence action.

In alleging the defence of *volenti non fit injuria*, the defendant is arguing that the claimant was aware of the risk of injury and had fully accepted the risk. For example, a boxer who is injured during a tournament cannot claim damages for injury provided the match was conducted according to the rules. The assumption is that the boxer has consented to the risk of injury if the game is played fairly. Thus, *volenti non fit injuria* is often equated to the notion of 'consent' in actions for intended harm such as trespass (see Chapter 10). The difference is that in *volenti non fit injuria,* the claimant is consenting to a risk whereas the notion of 'consent' is that agreement is given for an actual event to take place.

Often, *volenti non fit injuria* and contributory negligence may be argued on the same set of facts, for example, if a passenger gets into a vehicle with a driver they know to be drunk. Whether this is the case, however, is to be determined on the facts. The major difference between the two actions is that in *volenti non fit injuria,* the claimant must know of the risk, whereas contributory negligence does not require actual knowledge. In New South Wales, *volenti non fit injuria* is not available in relation to motor accidents or workers claims for injuries at work (s 76 of the Motor Accidents Act 1988, NSW; s 151 of the Workers Compensation Act 1987, NSW).

Elements of defence of *volenti non fit injuria*

The elements of this defence have been set out by Sangster J in *Ranieri v Ranieri* (1973):

> The elements of the defence are: (1) that the plaintiff perceived the existence of the danger; (2) that he fully appreciated it; (3) that he voluntarily accepted the risk … It is, of course, important to see what is 'the risk' (if any) that the plaintiff has voluntarily accepted, for the acceptance of one risk is not necessarily the acceptance of all risks.

These elements are strictly applied and may be difficult to prove. In short they are:

- perceived danger;
- scope of the risk;
- voluntary acceptance of the risk.

Perceived danger

The claimant's knowledge of the facts creating the risk must be established. For example, the defence has failed in drunk driver cases where the claimant passenger was too drunk to appreciate the defendant driver's level of intoxication (*Sloan v Kirby* (1979)). The test is subjective.

Scope of the risk

Further, the nature of the risk which has been accepted is important. For example, in *Rootes v Shelton* (1967), the plaintiff was injured during the performance of a dangerous waterskiing exercise. The plaintiff was performing crossovers when he crashed into a moored boat. The plaintiff alleged that his injuries were a result of the defendant driver's negligence in failing to warn him of the presence of the stationary boat. The defence argued that the plaintiff had, by engaging in the sport voluntarily, assumed the inherent risks of waterskiing. The court held that while waterskiing was dangerous, the plaintiff had not voluntarily assumed the risk of colliding with an obstruction in the water which he was not warned about.

Similarly, in *Gent-Diver v Neville* (1953), a pillion passenger, who rode on a motorcycle with the knowledge that the lights were not working, was held to have only voluntarily assumed the risks associated with such lack of lighting and not to have assumed the risk of a head-on collision caused by the driver's negligence, where the driver had time to avoid it and the visibility of the approaching car was not affected by the absence of lights on the motorcycle.

Voluntary acceptance of the risk

Courts have also been reluctant to apply the defence in situations where the claimant's actions were not voluntary and/or where the claimant has not accepted the risk. For example, in the case of rescuers who are injured while undertaking a rescue, courts have displayed a reluctance to apply the defence of voluntary assumption of risk, arguing that the moral obligation upon a rescuer to go to the rescue

means that the rescuer is not 'free' to assume the risk in the necessary sense (*Haynes v G Harwood & Son* (1935); *Ogwo v Taylor* (1988)).

Mere knowledge of the existence of a risk does not imply that consent has been given to it. In *Smith v Baker & Sons* (1891), the plaintiff, an employee of the defendant railway contractors, was aware of the danger of a crane continually swinging stones above his head. A stone from the crate fell out and injured him. The plaintiff sued the defendant in negligence. The defendant argued that the plaintiff was aware of the risk. The court held that even though the plaintiff knew of the risk, he had not voluntarily undertaken it.

Express or implied assumption

A defence of *volenti non fit injuria* is available expressly or through implication. In most cases, the defendant must prove the claimant voluntarily assumed the risk from their conduct, through implication.

Implied assumption

There are a number of situations where courts have deemed claimants to have assumed the risk:

- *Employers and employees*

  This rule that employees were deemed to have accepted the risks of their employment was a very important defence in the 19th century, where workers sued their employees for injuries they suffered at work. The defence is available today (except in New South Wales: Workers Compensation Act 1987).

  For example, in *Imperial Chemical Industries Ltd v Shatwell* (1965), the plaintiff shotfirer and his brother were injured in an explosion caused by their failure to follow regulations and directives issued by their employer. They knew of the regulations and had no reason not to follow them when using the explosive. The plaintiff sued his employer. The court held that the action failed as the plaintiff had voluntarily assumed the risk of detonating the charge in the manner they had. Lord Reid stated 'If he did not choose to believe what he was told, I do not think that he could for that reason say he did not fully appreciate the risk'.

- *Sporting events*

  Participation in sport involves assumption of the risks inherent within it. However, this does not mean that a person injured in sport may never raise the defence of *volenti non fit injuria*. Whether

the claimant assumed the risk will be judged by what is reasonable conduct in the circumstances of the sport (*Condon v Basi* (1985); *Rootes v Shelton* (1967)).

- *Intoxicated drivers*

  Many of the cases dealing with an intoxicated driver and passenger fail on the requirement that the claimant fully understood the extent of the risk. For example, in *Insurance Commissioner v Joyce* (1948), the plaintiff was a drunk passenger who was injured in an accident caused by the drunk defendant driver. The Insurance Commissioner alleged that the drunk passenger had voluntarily assumed the risk of negligent driving by getting into the car with a drunk driver. The plaintiff's action failed.

  Whether or not a drunk passenger will be held to have assumed the risk of injury when they are in a car with a drunk driver seems to depend upon the amount of knowledge they had as to the driver's condition at the time. In other words, the claimant must be aware of the risk they are undertaking. If the claimant is aware that the person who is driving is intoxicated and unable to drive safely, they are likely to be held to have voluntarily assumed the risk of injury arising from negligent driving.

  This defence is not available in New South Wales or South Australia where the driver is intoxicated (Motor Accidents Act 1988, NSW; Wrongs Act 1936, SA).

Express assumption

Express consent to the risk of negligence by the defendant given by the claimant raises the defence of *volenti non fit injuria*. In *Bennett v Tugwell* (1971), the plaintiff rode in the defendant's car which contained a sign stating 'Warning. Passengers travelling in this vehicle do so at their own risk'. The plaintiff was held to have voluntarily assumed the risk of the defendant's negligent driving. In *Birch v Thomas* (1972), the 19 year old defendant driver had not been given cover by his insurance company because of his age. On the insurance agent's advice, he stuck a notice in his car stating 'Passengers ride at their own risk and on the condition that no claims shall be made against the driver or owner'. The defendant pointed the notice out to the plaintiff, the plaintiff was later injured and brought an action against the defendant in negligence. The court held that the plaintiff was not entitled to damages because the plaintiff knew of the notice.

Volenti distinguished from other defences

- *Express volenti*

  There is some comment as to whether express *volenti* is merely exclusion of liability by contract or notice. Nicholson J in *Scanlon v American Cigarette Co (Overseas) Pty Ltd (No 3)* (1987) prefers this approach stating that 'otherwise, the objective nature of the test propounded is inconsistent with the requirement of actual knowledge which appears to be an essential ingredient of the defence of *volenti*'. In other words, *volenti non fit injuria* is based upon the subjective awareness of the risk that the claimant held.

- *Standard of care*

  Volenti also differs from the defence of reduced standard of care which was recognised in the judgment of Dixon J in *Insurance Commissioners v Joyce* (1948). For example, in *Cook v Cook* (1986), a learner driver was held to have a lesser standard of care than that of a normal road user. This lesser standard of care was only applicable, as the exceptional situation of driving instructor and pupil applied in that situation.

Illegality

The issue is whether it is a defence to a negligence action that the claimant was engaged in a form of illegal enterprise at the time the incident occurred. The fact that a claimant may have suffered injury from a negligent act suffered during the course of illegal activity does not, in itself, afford the defendant a defence to an action in negligence.

The High Court has established that participation in an illegal act is not a bar to recovery in negligence. For example, in *Jackson v Harrison* (1978), disqualified drivers obtained a car through deceit and the plaintiff passenger was injured through the negligence of the defendant driver. The court allowed recovery, fixing a standard of care despite the plaintiff's illegal conduct. The court was able to fix a standard as it could be done without reference to the illegal activity of taking the car. Thus, the standard determined was that of a reasonable driver. However, if the plaintiff's injury had been caused by the negligence of the defendant during a bank robbery, no standard of care could be established, as courts will not entertain establishing what standard a reasonable bank robber should perform at.

It also appears that the court will take the seriousness of the illegality into consideration. In *Henwood v Municiple Tramways Trust (South*

Australia) (1938), the plaintiff's son was killed while vomiting out of the window of a tram – leaning out of a window was in breach of a bylaw. The High Court held that the fact that the boy was acting illegally did not constitute a defence to the plaintiff's action in negligence.

In essence, the illegal nature of the act may affect recovery. The court may not grant relief to a claimant because of public policy reasons. In *Gala v Preston* (1991), the court held that the defendant driver of a stolen car did not owe a duty of care to the claimant passenger, since the joint illegal enterprise of stealing the car negated the existence of the duty of care.

7 Intentional Interference with the Person – Trespass

You should be familiar with the following areas:

- the elements of assault
- the elements of battery
- the elements of false imprisonment

Introduction

Negligence is only one type of tort. Another type of tort is trespass to the person. Trespass to the person means that any unwanted or unjustified interference with a person's body, liberty or a creation of fear of such interference is actionable at law. Trespass to the person differs from the tort of negligence in a number of ways. For example, trespass to the person:

- has no strict requirement to prove the injury or damage suffered. Trespass is actionable *per se*, this means that loss or damage is not part of the cause of action. Damages for trespass to the person may be awarded not only in respect of physical injury but also in respect of insult, injury of feelings, indignity, disgrace and mental suffering which may have occurred (*Fogg v McKnight* (1967));
- is known as an 'intentional tort', as it requires a positive voluntary act which interferes with a protected interest of the claimant. The voluntary act of the defendant must be either intentional, reckless or negligent (*Williams v Milotin* (1957)). This is judged by the act and its consequences, which means that trespass to the person may operate as a form of strict liability;
- the interference must be a 'direct' result of the action. A distinction is made between a direct result and a consequential result of an action. For example, in *Dodwell v Burford* (1669), it was held that there was no direct result where A struck B's horse, B fell from his horse and was then trampled on by the horse of another party.

There are three types of tort which make up the tort of trespass to the person: assault, battery and false imprisonment. Battery and assault are crimes as well as torts, thus, victims may receive compensation under legislative criminal injuries compensation schemes (see Chapter 13). Often, these three torts will occur in combination.

Introduction to assault

Assault is any direct threat by the defendant which intentionally or negligently creates in the claimant an apprehension of imminent harmful or offensive contact (assault is usually brought for intentional acts, though reckless or careless conduct is not precluded). In newspapers and in general speech, you will often hear people talk of how they have been assaulted through the application of physical force, in other words, by someone hitting or touching them. In a tortious sense, this will constitute a battery not an assault.

The gist of assault lies in the *apprehension* of impending contact. The claimant must have knowledge of the threat. This refers to whether the claimant expects that imminent contact is about to take place – they do not have to experience fear. The question is whether a reasonable person in the same situation would have been apprehensive of harmful contact. However, this does not preclude an unusually timid person from recovering where the defendant knows that person to be of such a disposition. The effect on the victim's mind created by the threat is crucial to the issue of assault, not whether the defendant actually had the intention or the means to follow it up. In this sense, assault is an exceptional tort, as it allows an action for damages not for any material harm, but for a purely emotional reaction to the defendant's conduct. For example, Sue stands in front of David waving her fists in a threatening manner and saying 'I'm going to hit you'. This is an assault, even though there is no physical contact. On the other hand, if Sue attempts to hit David from behind, this would not constitute an assault, as David would not have been in the position to apprehend the imminent contact.

Elements of assault

The method to use to prove assault is to ensure that each element of the tort is made out. To return to the definition of assault it is:

- any direct;
- threat by the defendant;
- which intentionally creates in another person (reckless or careless conduct is not precluded);
- an apprehension of imminent harmful or offensive contact;
- without lawful justification.

If these elements are made out, the court may award damages for any physical injury arising out of the assault, such as nervous shock, and may award aggravated or exemplary damages (see Chapter 12).

Direct

An assault must be caused by a direct act of the defendant (*Stephens v Myers* (1830)). This also includes a continuation of an act, as in *Scott v Shepherd* (1773). For further discussion of the concept of directness, see discussion of battery below.

Threat

Threats may be acts, words or both. For example, a threat to someone made over the telephone may be an assault if it intentionally raises an apprehension of imminent body contact (*Barton v Armstrong* (1969)).

The whole of the circumstances of the defendant's conduct must be looked at by the court. Often, both words and conduct will be threatening and the concept of direct threat is relatively easy to identify. However, words may contradict conduct. For example, in *Tuberville v Savage* (1669), Tuberville, after an exchange of words with Savage, put his hands on his sword and said 'If it were not assize time, I would not take such language from you'. This was held not to be an assault. The words which were uttered by Tuberville suggested that he would not fight Savage as the judges were in town (that is, it was assize time) prevented what would have otherwise been an assault (T putting his hand on his sword).

In *Rozsa v Samuels* (1969), words which held a conditional threat were accompanied by actions which amounted to an assault. In that case, the plaintiff taxi driver walked up to and threatened to punch the defendant taxi driver who was seated in the front seat of his taxi. The defendant pulled out a knife, holding it saying 'I will cut you to bits if

you try it' and moved to get out of the taxi. The court considered this to be assault and pointed to the fact that the defendant had other options which he could have considered as a response to the threat, including locking the door of his cab or moving away.

Alternatively, words may assist in proving that there is a direct threat where conduct is insufficient. In *Fogden v Wade* (1945), the accused was standing in the driveway of the young woman plaintiff's hostel. As she walked towards him and drew level to him, he asked 'Are you frightened?'. She answered, 'I'll say, you should not stand there. You might frighten somebody'. The man then started to follow her, got quite close behind her and said 'Don't go in yet, you've got time for a "quick one"?'. In this case, the words accompanied by the accused moving in the direction of the victim was held to be an assault.

Where there is no threat, there is no assault. For example, in *Innes v Wylie* (1884), the plaintiff was excluded from a meeting – his entry into the meeting was 'blocked' by a policeman guarding the door. The court stated that:

> If the policeman was entirely passive like a door or a wall, put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff. The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the doorway passive, and not move at all.

Intention

There is a distinction between acts which are voluntary and acts which are intentional. The requirement that the act be intentional requires more than mere voluntariness. In other words, intention comes from the defendant intending the consequences of the act, rather than the doing of the act itself. For example, in *Stephens v Myers* (1830) the defendant interrupted a parish meeting and it was resolved by a vote of those at the meeting that he be turned out. The defendant stated that he would rather pull the chairman out of the chair than be turned out of the meeting and proceeded to advance toward the chairman with clenched fists. The defendant was stopped by a churchwarden who was sitting next to the chairman. Even though the defendant did not get near enough to the chairman to have struck him physically, the judge directed the jury that it was advancing with the intent to strike which was the assault, not whether the defendant was close enough to have landed a blow.

The necessary intention to establish an assault is an intention to cause apprehension in the claimant that a battery is about to occur. Thus, it is an assault to point a pistol at a person in such a way as to make them believe that they are about to be shot, even if that pistol is in fact not loaded (*Brady v Schatzel* (1911)). If a defendant's act is accidental or without fault, there will be no action in assault (*Stanley v Powell* (1891)). However, if the defendant's act is reckless, this may constitute the requisite intention.

Recklessness is where the consequences of the defendant's acts are not certain, but the defendant is so reckless or indifferent to the consequences of his or her acts that the result must have been or should have been foreseen. In *Morris v Marsden* (1952), the defendant, 'a catatonic schizophrenic and a certifiable lunatic', attacked and injured the plaintiff. The court held that the defendant understood the nature and quality of his act, even though he was incapable of knowing that the act was wrong. The result was that the defendant was held liable in assault and battery. As Stable J stated:

> … knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased.

Apprehension of imminent harmful contact

Not all threatening acts will constitute an assault. The essence of the tort is the apprehension of imminent contact, thus, the focus is upon the mind of the victim and not whether the defendant was actually going to follow up the threat (although there must have been an apparent ability on the part of the defendant to do so). The test used is an objective one – would a reasonable person in the claimant's position have been apprehensive of imminent harmful contact? Therefore, the question of whether an assault has occurred will not depend upon whether the claimant is unusually brave or cowardly. The threat must be sufficient to have been able to raise apprehension in the mind of a reasonable person. The only exception to this is where the defendant knows the claimant to be timid and plays on that fact. As Bray CJ stated in *MacPherson v Beath* (1975), 'if the defendant intentionally puts in fear of immediate violence an exceptionally timid person known to him to be so then the unreasonableness of the fear may not prevent conviction'.

The imminence of the harm is relevant. In *Zanker v Vartzokas* (1988), a young woman got in the defendant's van after he offered her a lift

home. When he started to offer her money for sexual favours, she asked to be let out. He accelerated and refused to let her out, saying 'I am going to take you to my mate's house. He will really fix you up'. The court held that this threat was imminent, even though it was one of future violence as the violence threatened would occur immediately at the end of the period of imprisonment of the woman. There was thus an immediacy or imminent threat of the harm occurring after the threat was made.

Without lawful justification

See defences in Chapter 10.

Introduction to battery

A battery is a direct and intentional act of the defendant which has the effect of causing contact with the body of the claimant without their consent (battery is usually brought for intentional acts – though reckless or even careless acts are not precluded). Battery occurs when physical force is used. It is committed by intentionally bringing about unwanted contact with the person of another. So, when Sue stands in front of David and waves her fist and punches David – this is both an assault and a battery – it is an assault when he has reasonable expectations that he is about to be hit and it is battery when he is actually hit.

Battery may be brought by a claimant who has actually suffered harm through the defendant's contact or whose dignity has been violated through the defendant's contact. In other words, the violation of being touched without consent is sufficient to enable a claimant to bring this action even though there has been no physical harm. Compensation for any injury suffered by the claimant may be given by the court. In addition, a claimant may be given aggravated or exemplary damages to compensate for any outrage to the claimant's feelings (as to damages, see Chapter 12). The claimant need only prove direct contact with his/her person caused by the defendant's act. Once a claimant has established direct contact caused by the defendant, the burden of proof shifts to the defendant to show that the act was involuntary or they were not at fault (*McHale v Watson* (1964)). The exception to this is highway trespass, where the claimant must prove either intention or negligence on the part of the defendant (*Venning v Chin* (1974)).

Elements of battery

The method to use to prove battery is to ensure that each element of the tort is made out. To return to the definition of battery, it is:

- a direct;
- intentional act of the defendant (reckless or careless conduct is not precluded);
- which causes unwanted contact to the body of the claimant;
- without lawful justification.

Direct act

A direct act includes the obvious examples of one person hitting another, but also includes a defendant setting a dog on a claimant or overturning a car in which someone is sitting. It also extends to the continuation of an act, as was the situation in *Scott v Shepherd* (1773). In this case, the defendant threw a lighted squib made of gunpowder on to the stall of Y whereupon W instantly and to prevent injury to himself picked up the lighted squib and threw it across the market-house upon the stall of R who instantly, to save his goods, picked up the still lighted squib and threw it to another part of the market-house where it struck the plaintiff and exploded, putting out one of the plaintiff's eyes. The defendant was held to be liable in trespass (battery) to the plaintiff and the injury to the plaintiff was held to occur because of a 'direct' act of the plaintiff. Note that the acts of W and R were not regarded as breaking the chain of directness, as W and R were not regarded as free agents, but as acting under a compulsive necessity for their own safety and preservation. The court regarded what they did as the inevitable consequence of the defendant's unlawful act.

Note that there is an action on the case for intentional infliction of indirect physical injury or nervous shock: see *Bird v Holbrook* (1828); *Wilkinson v Downton* (1897).

Intentional act

The defendant must have either intended, had reckless disregard for or been negligent with respect to the consequences of his or her actions. Trespass to the person will not succeed if the injury to the claimant, although directly caused by the defendant, was caused unintentionally and without negligence on the defendant's part (*Fowler v Lanning* (1959); *National Coal Board v JE Evans & Co (Cardiff) Ltd & Maberley Parker Ltd* (1951)). The tort of battery requires a physical

act, although there is no requirement that damage be the result of such an act.

The act must be intentional. Perhaps an easier way to approach this concept of intention is to use the word 'voluntary' in its place. An intentional act can be equated with the idea of voluntariness – so if someone takes your hand and hits the person sitting next to you with it, this will not be considered to be a voluntary act on your part. The trespass will not be committed by you, but by the third party who used your hand to commit the battery.

The act is intentional and voluntary if the defendant means to do it. It is not necessary that the intent of the defendant extend to harming the claimant; it is enough that the defendant intends to perform the act which caused the offensive contact. Note that there are some commentators who suggest that for the act to be intentional, the defendant must have intended to cause the offensive contact with the body of the claimant. For example, in *McNamara v Duncan* (1979), the defendant intentionally struck the plaintiff, after the ball was passed, while playing a game of Australian Rules Football. The court held the defendant liable in trespass even though the court did not consider the defendant intended to harm the plaintiff. Fox J stated 'I have come to the conclusion that the striking of the plaintiff by the defendant was intentional; he meant to do it. I do not suggest that he meant to incapacitate the plaintiff or indeed to cause him any serious injury'.

In *Fagan v Metropolitan Police Commissioner* (1969), a policeman (the plaintiff) stopped a motorist (the defendant) to question him. The policeman directed the motorist to park at the kerb. Whilst parking the car, the motorist accidentally brought the car to rest on the policeman's foot. The policeman said to the motorist 'Get off, you are on my foot!' The motorists window was open and the motorist said 'Fuck you, you can wait'. The motorist stopped the engine and the policeman said several times 'Get off my foot'. The motorist reluctantly said 'Okay, man, okay' and slowly reversed the vehicle. The court found that the original act of driving onto the policeman's foot was not intentional or negligent, but was accidental and therefore not a battery. However, thereafter deliberately ignoring the policeman's plea and purposively delaying the removal of the car from the plaintiff's foot was battery. *Fagan v Metropolitan Police Commissioner* also illustrates that a battery can be inflicted through the medium of a weapon or instrument controlled by the actions of the defendant.

Contact with the body of the claimant

In *Cole v Turner* (1704), it was established that 'the least touching of another in anger is battery'. This concept of touching is varied. It may mean offensive behaviour such as spitting in someone's face (*R v Cotesworth* (1704)), an unwelcome kiss or hitting a person with a missile or object such as a water bomb or a stick. It may also extend to taking something from the claimant's hand (*Fisher v Carrousel Motor Hotel Inc* (1967)). Contact may also extend to throwing water over the clothes of the claimant, without the need for any contact with the body of the claimant (*Pursell v Horn* (1838)) or shining a light in someone's eyes (*Kaye v Robertson* (1991)). Thus, the reference to 'in anger' in *Cole v Turner* (1704) really means unpermitted contact. It follows that the claimant does not have to be aware of the contact at the time it is made. For example, where an operation is carried out under anaesthetic and the wrong limb is amputated, this will constitute a battery.

While unwanted contact constitutes battery, not every unwanted contact will be sufficient to constitute the action. As the court held in *Wilson v Pringle* (1987): 'Although we are all entitled to protection from physical molestation, we live in a crowded world in which people must be considered as taking on themselves some risk of injury (where it occurs) from the acts of others which are not in themselves unlawful.' A battery must be a positive and affirmative act which introduces some form of contact which is offensive outside the accepted usages and accidental contacts of daily life – thus, it will not usually be actionable to tap someone on their shoulder to attract attention or to brush against someone in a crowded passage or market place unless this is done:

- in a 'rude and inordinate fashion' (*Cole v Turner* (1704)); or
- in a way which is not an everyday occurrence (*Wilson v Pringle* (1987).

For example, in *Collins v Wilcock* (1984), a police officer committed battery when she took the arm of the accused to restrain her, without intending to arrest her. The court held that the police officer had gone beyond the scope of her duty in detaining the woman accused in circumstances short of arresting her. The actions of the police woman went beyond the generally acceptable conduct of touching a person to gain their attention. Thus, hostility is not necessary for the tort of battery, however, its presence may affect the amount of damages awarded to the claimant (see Chapter 12).

Without lawful justification

See discussion in Chapter 10.

Introduction to false imprisonment

The tort of false imprisonment is the wrongful total restraint on the liberty of the claimant which is directly brought about by the defendant (usually intentional though reckless and negligent acts are not precluded). It is important to note that a restraint on liberty is not restricted to the physical confinement of a claimant.

There is no need for the claimant to have suffered damage. However, if the claimant has suffered loss or damage, the court may award compensation for such loss together with aggravated damages (see Chapter 12).

Elements of false imprisonment

Again, false imprisonment may be broken into elements:

- wrongful;
- total restraint on the liberty of the claimant;
- directly (reckless or careless conduct is not precluded) brought about by the defendant;
- intentionally.

Wrongful

The restraint must be against the will of the claimant. There is authority to support the argument that the claimant need not be aware of the restraint at the time (*Murray v Ministry of Defence* (1988)). However, this point is unsettled in Australia. For example, in *Meering v Grahame-White Aviation Co* (1919), the plaintiff went to the employer's office to answer questions about thefts. He remained in the office for a long time and was unaware that there were detectives stationed outside the room to stop him leaving. This was held to be false imprisonment. In *Hart v Herron* (1984), the plaintiff was detained by the defendant and given treatment such as deep sleep therapy and electroconvulsive treatment to which he claimed he had not consented – the court held this to be false imprisonment, even though the plaintiff could not remember the treatment.

However, there is also authority to support the contrary view that the claimant's knowledge of the imprisonment is necessary (*Herring v*

Boyle (1834)) and that it may affect the amount of damages awarded to the claimant (*Myer Stores Ltd v Soo* (1991)).

Total restraint

Imprisonment does not have to include a prison. Any form of deprivation of liberty is sufficient, even if it is only for a short period of time. This does not have to be done by throwing someone in a dungeon unlawfully. To be unlawfully kept on land that a person has entered of their own free will may be unlawful imprisonment; or if the driver of a car drives too fast to allow someone to alight, this is wrongful imprisonment; or to be held on a boat without threat or the use of force may also be unlawful imprisonment. The gist of the tort is the total restriction of someone else's freedom of movement. Coleridge J in *Bird v Jones* (1845) stated:

> A prison may have its boundary large or narrow, visible and tangible or, though real, still in the conception only; it may itself be moveable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing … Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

For example, in *Symes v Mahon* (1922), a man was held to be falsely imprisoned when he accompanied a police officer to town on a train, even though he had paid his own fare and sat in a separate compartment to the officer. The court held that the man, who was told that there was a warrant out for his arrest, had submitted to the defendant's power. This was based upon a reasonable belief that he had no way of escape which could reasonably be taken by him.

Whether there is a total restraint depends upon whether there is a reasonable means of escape. For example, in *Bird v Jones* (1845), the plaintiff was prevented for around half an hour from going forwards along a footway by two policemen who were positioned by the defendant. The court held this was not a false imprisonment, as it was not a total restraint – the plaintiff could have gone back in another direction.

A reasonable means of escape is one which does not involve danger to the claimant. For example, in *R v Macquarie and Budge* (1875), Macquarie owed the Bank of NSW money. X, a representative of the bank tried to take possession of Macquarie's yacht. Macquarie and

Budge (an employee of Macquarie) were unco-operative. X was on the moored vessel and refused to come ashore. On the orders of Macquarie who shouted 'let the Bank of New South Wales have her and be d—-d', the engines were turned to full speed ahead and the vessel cast off. X, who did not know how to stop the engines, steered the vessel out of Darling Harbour and was eventually rescued at Lavender Bay. In this case, the court found that X had been falsely imprisoned. The fact that the plaintiff was put in a situation from which he had some means of escape (that is, swimming) was not a defence as the means of escape involved hazard. Justice Hargrave in that case said 'Can it be said that where a person is set afloat in a vessel and his only way of escape is by jumping into the water that he is not imprisoned … To my mind it is clearly unlawful imprisonment for anyone to set any other person adrift in any boat in the harbour without his assent'.

Also, whether there is a reasonable means of escape may depend upon the amount of knowledge available to the claimant. In *Robinson v Balmain New Ferry Co* (1906), the plaintiff's action failed as the court held that the restraint of the plaintiff was not total – that is, that the plaintiff could have escaped through another route which was known to him. In this case, the plaintiff entered the defendant's wharf at Sydney to cross on the ferry to Balmain. There was a notice posted near the entrance stating that any person who entered the wharf would be charged a penny regardless of whether they travelled. The plaintiff changed his mind about going to Balmain and tried to leave the wharf and was asked to pay a penny. He was restricted from leaving and the plaintiff claimed false imprisonment. The court held that this was not false imprisonment as the plaintiff knew the conditions of entry (payment of money) before he entered the wharf.

Directly brought about by the defendant

False imprisonment need not involve the use of force or contact. Most simply, false imprisonment will be brought about by some direct action of the defendant, for example, turning a key and locking the room where the claimant sits; or where a claimant believes that if they do not accompany the defendant voluntarily, they will be forced to go along as in *Watson v Marshall* (1971). In that case, the defendant police officer asked the plaintiff to accompany him to a psychiatric hospital. The plaintiff believed he would have been forced to go along if he had refused. However, false imprisonment may also occur where there is no positive act, for example, failing to release a prisoner at the end of

their sentence (see *Withers v Henley* (1614)). Whether through inaction or action, the claimant must prove that the defendant personally, or through the conduct of persons for whom the defendant is responsible, participated in the claimant's false imprisonment (*Watson v Marshall* (1971)).

Intentionally

The false imprisonment has to be committed intentionally by the defendant, although the intention does not have to coincide with the act of imprisonment. For example, intention will not be relevant where the defendant has made a mistake as to their right to imprison the claimant. In *Cowell v Corrective Services Commission* (1988), the plaintiff, a prisoner, was detained past his due date for release. The plaintiff's action for false imprisonment succeeded, even though the defendant had been operating under a reasonable yet mistaken belief – the Corrective Services Commission had unintentionally and non-negligently kept the plaintiff confined in prison past his date for release because his entitlement to remissions had been miscalculated.

8 Trespass to Land

You should be familiar with the following areas:

- elements of trespass to land
- remedies for trespass to land

Introduction

Trespass to land is committed by a physical act of the defendant which constitutes a direct interference with the claimant's possession of land. As with other forms of trespass there is no need for damage to result. The tort is the trespass itself. The policy of the law is to protect the possession of property and the privacy and security of its occupiers (*Plenty v Dillon* (1991)). Examples of trespass to land include where a defendant steps onto a claimant's land; cuts down crops growing on the claimant's land; or throws or removes an object from the claimant's land.

Elements of trespass to land

There are a number of elements which comprise trespass to land. Each of these must be proven by the claimant in order for an action in trespass to land to succeed. A trespass to land consists of:

- an unauthorised;
- voluntary act of the defendant, which must be intentional, reckless or negligent;
- which constitutes a direct interference with;
- the claimant's possession of;
- land.

Each of these is discussed below.

Unauthorised

Any unauthorised entry onto land, no matter how slight, may be trespass. For example, it has been held that resting a ladder against a wall is trespass (*Westripp v Baldock* (1939)).

Entry under the terms of a licence, express or implied, will not be trespass. The trespasser must establish that the licence exists. Examples of implied licences include entering upon the normal route of entry to the front door of a house to do business with the occupier; entry upon property to lead away an errant child or to avoid an obstruction such as a vehicle parked across a footpath (*Halliday v Nevill* (1984)).

Even if a licence exists, a person may be a trespasser where they enter the land for a purpose not covered by the licence. For example, in *Barker v The Queen* (1983), the defendant was held to have trespassed when he entered the plaintiff's house for the purpose of theft when he had been given the house key to look after the house while the plaintiff was away. In *Lincoln Hunt Australia Pty Ltd v Willesee* (1986), a trespass was committed by the defendants' reporters and camera operators where they entered onto the plaintiff's public premises, asked the plaintiff questions and took footage of the premises which had nothing to do with the plaintiff's ordinary business.

Trespass to land may also be committed by a licensee:

- after lawful entry. For example, in *Bond v Kelly* (1873) the defendant committed a trespass when he cut down more than the amount of timber on land which he was allowed to enter;
- where a person enters land under a licence, the licence expires or is withdrawn and they do not leave after a reasonable time. In such circumstances, the defendant must have notice of the withdrawal of the claimant's consent (*Cowell v Rosehill Racecourse Co Ltd* (1937)).

Also, there may be continuing trespass. For example, in *Konskier v B Goodman Ltd* (1928), the defendant builders left rubbish on the roof of an adjoining house in April 1926 which they were meant to take away. In July 1926, the plaintiff became the tenant of the adjoining house and in September 1926, the rubbish caused the plaintiff's house to flood. The court held that leaving the rubbish on the roof beyond a reasonable time after completing the work was a trespass which was continuing at the time the plaintiff became the occupier of the premises.

Certain persons who are carrying out their public duties may also enter on land without trespassing. Some of these duties may be statutory (for example, the execution of a search warrant) or they may be common law duties, such as the common law duty of a police

officer or a citizen to prevent a murder being committed. Except in these special instances provided for by the common law or statute, police or persons carrying out public duties have no special rights to enter land (*Plenty v Dillon* (1991)).

Voluntary act of the defendant

The trespass must be the result of the voluntary act of the defendant. For example, in *Smith v Stone* (1647), there was no trespass as the defendant had been thrown onto the plaintiff's land by third parties. In *Public Transport Commission of NSW v Perry* (1977), a passenger who fell onto railway tracks while having an epileptic fit was held not to be a trespasser as she had gone onto the tracks involuntarily.

The act of the defendant extends to the defendant causing an object to come into contact with the land of the claimant. For example, in *Yakamia Dairy Pty Ltd v Wood* (1976), the defendants, who managed the plaintiff's land, committed a trespass when they depastured their cattle on the plaintiff's land without permission.

The issue is whether the defendant intended to enter the land itself, not whether there was an intention of invading the claimant's interests. This means that mistake is not a defence to an action for trespass. For example, a defendant who mistakes land for their own and enters upon it and mows the grass (intending to mow their own grass) will be trespassing (*Basely v Clarkson* (1681)).

Direct interference

The defendant's act must directly cause the trespass and not be consequential. For example, in *Southport Corp v Esso Petroleum* (1954), oil was discharged from a stranded fuel tanker in an attempt to refloat it. The oil was carried by the tide to the foreshore of the plaintiff's land where it caused damage. Lord Denning (supported on appeal by Redcliffe and Tucker LL in the House of Lords) thought that this was too indirect to be trespass. Morris LJ disagreed with Denning and said that the defendant had made use of the forces of wind and water to produce the invasion, thus constituting trespass. In two similar cases, *Gregory v Piper* (1829) and *Watson v Cowen* (1959), where piled up rubbish in one case and bulldozed earth in the other accumulated on the plaintiff's land, the courts looked to whether this was a natural and probable consequence of the defendant's act, rather than whether it was a direct consequence. In both cases, trespass was established.

Where there is no entry on land, there is no trespass. For example, in *Perera v Vandiyar* (1953), the plaintiff's electricity was turned off outside the premises of the plaintiff by the defendant landlord. The court held that there was no trespass, as the defendant had not trespassed onto the land.

Claimant's possession

The claimant does not have to be the legal owner of the land. What is required is that the claimant was in actual possession of the land at the time that the defendant's trespass took place. Thus, there is no need to prove a legal or equitable title to the land. In *Newington v Windeyer* (1985), the plaintiffs who were not the owners of the registered title of the land called the Grove, were able to sue the defendant in trespass on the basis of a possessory title. That is, they treated the land as their own over a period of 50 years (they cut down trees; paid the rates; employed a person to mow the lawn, etc).

It is unclear as to whether a person who has licence to use land may sue in trespass to land. It seems that if the licence is for value, it allows the holder to sue in trespass. In *Vaughan v Shire of Benalla* (1891), the holder of a grazing licence was able to sue in trespass where the defendant deposited night soil in a quarry hole which was filled with water, making the water unfit to drink and therefore endangering cattle. However, in *Moreland Timber Co v Reid* (1946), it was held that a licence is personal and does not allow a plaintiff to sue in their own right.

In certain circumstances, the true owner of land may commit trespass onto it. For example, an owner who is entitled to immediate possession of land may enter land for the purpose of repossessing it and eject the occupier. However, where an owner enters upon their land against the terms of a lease, a tenant may sue the owner in trespass to land (*Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* (1957)). In this case, the defendant landlord erected an advertising sign which projected into the airspace above the plaintiff's single storey shop. The invasion of airspace by the sign was held to be a trespass.

Land

Land includes fixtures, buildings, trees and unsevered crops above and below the surface of the land. The extent of land above and below the surface is dependent upon the possessor's ability to use that space.

Airspace

For example, in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* (1978), the court held there to be no trespass to land where the defendants flew an aeroplane over the plaintiff's land in order to take an aerial photograph of it. The court held that this was not a trespass, as the flight did not come within the airspace that the plaintiff might be expected to use as a 'natural incident of his use of the land'. In *Davies v Bennison* (1927), shooting a cat which was on the plaintiff's shed has also been held to be trespass through invasion of the plaintiff's airspace. Thus, rights to airspace above land are restricted to a height necessary for the ordinary use and enjoyment of land and the structures upon it. Recently, there have been cases concerning overhanging cranes in construction projects and scaffolding – Australian decisions have favoured the removal of the scaffolding or cranes (*LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989)).

Several Australian jurisdictions have created a statutory exception to trespass for aircraft (for example, s 2 of the Damage by Aircraft Act 1952, NSW; s 4 of the Damage by Aircraft Act 1964, WA; s 3 of the Damage by Aircraft Act 1963, Tas; ss 30 and 31 of the Wrongs Act 1958, Vic).

Underneath the land

A person who possesses the surface of land is generally regarded as also possessing the area below the land (*Elwes v Brigg Gas Co* (1886)). In *Stoneman v Lyons* (1975), the court held that it was a trespass where two workers digging a trench undermined the adjoining land owner's garage wall, causing it to collapse once rain fell.

Although at common law, there is a presumption that the owner of land also owns everything on or below the land, mineral rights are normally vested in the Crown pursuant to statute (see *Halsbury's Laws of Australia* [170–-50]; [170–65] and, for example, see s 16 of the Mining Act 1971, SA; s 9 of the Mineral Resources Development Act 1990, Vic).

Remedies for trespass to land

Damages

Exemplary damages may be awarded where the defendant's conduct was intended to outrage the claimant (*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985)). The principle of foreseeability of damage does not apply to trespass to land; rather, the courts look to consequential loss. For example, in *Hogan v AG Wright* (1963), the defendant's bulldozer broke the plaintiff's fence, resulting in the escape of the plaintiff's horses. Some hours later, while trying to round them up, two of the horses collided and one had to be destroyed. This loss was held to be a natural consequence of the trespass and the defendant therefore had to compensate the plaintiff for the loss.

Injunction

An injunction is the most common remedy to prevent the behaviour continuing. As it is an equitable remedy, it is given entirely at the discretion of the court and the claimant has to show that it is the most effective form of relief. It is generally given where damages will not be an adequate remedy.

Ejectment

This remedy allows the claimant to regain possession of the land by ejecting the trespasser so long as only reasonable force is used. This is a self-help remedy. Property may be defended against intrusion or dispossession on similar principles to self-defence against personal aggression. The amount of force you may employ to exclude or expel a trespasser varies with the nature of the intrusion and the resistance encountered. Normally, no force at all is justified until the trespasser has first been asked to leave and given a reasonable opportunity to comply.

You may use some indirect methods of protection such as barriers to protect your property; however, there are many rules surrounding this, for example, it is a statutory offence to set spring guns, man traps and other mechanisms calculated to destroy human life or inflict grievous bodily harm. A useful way to think about it is that an occupier may put up deterrent dangers to keep trespassers out (such as barbed wire on top of a fence), but not retributive dangers whose purpose is primarily to inflict injury.

Defences to trespass to land

Necessity

Necessity is available as a defence to trespass (*Rigby v Chief Constable of Northamptonshire* (1985)). Mistake is not a defence to an action for trespass (*Basely v Clarkson* (1681)).

9 Intentional Interference with Goods

You should be familiar with the following areas:

- trespass to goods
- conversion
- detinue
- replevin

Introduction

There are a number of intentional torts relating to goods:

- *Trespass to goods*
  This is where goods in the possession of the claimant are interfered with by a direct act of the defendant.
- *Conversion*
  This refers to a defendant dealing with goods in a manner which is inconsistent with the person who has proprietary rights to the goods.
- *Detinue*
  This is where a defendant, after demand, wrongfully refuses to deliver goods to the person who has proprietary rights to the goods.
- *Replevin*
  Replevin is used almost exclusively as an action contesting goods seized by distress or other judicial process. An example of this is where a tenant's goods may be seized for failing to pay rent. An action in replevin allows the person who has been deprived of goods to recover them provisionally in summary proceedings pending an action to determine the rights of the parties. This action has generally been replaced by interlocutory orders.

Possession

Goods may be owned or possessed. So, a good may be owned by one person and possessed by another. Trespass protects persons who possess goods from being interfered with by others. Therefore, in many instances, a bailor or bailee may take action in trespass to goods. Generally, the possession need not be lawful, so a thief may sue in trespass to protect a possession (*Bird v Fort Francis Municipality* (1949)).

Terminology – goods and chattels

The term 'chattel' is used loosely as an alternative to describe 'goods'. More precisely, the term 'chattels' refers to property of a tangible nature, while the term 'goods' has connotations of commercial transactions. For simplicity, the term 'goods' is used throughout this chapter.

Goods are any tangible property which is not land or which are not fixtures, but are capable of being property, for example, bottles, cars, and animals. Once an item is severed from land, it will become a good (*Dymocks Book Arcade Ltd v McCarthy* (1966)).

The good must be capable of being property for an action to be maintained in trespass to goods, conversion or detinue. For example, in *Doodeward v Spence* (1908), an action of conversion and detinue was taken by the plaintiff against a museum who held the corpse of a stillborn two-headed child. The court held that the action failed, as there could be no property in a human corpse.

Intangible property such as cheques and insurance policies may be goods (*Lloyds Bank Ltd v The Chartered Bank of India, Australia and China* (1928)). The value of the document is not the paper itself but the rights it protects.

Introduction to trespass to goods

The tort of trespass to goods is committed when a defendant either intentionally or negligently, directly interferes with the claimant's possession of the good. Trespass to goods includes taking goods from the possession of a claimant, moving them, damaging or destroying them or directing a missile at them.

Elements of trespass to goods

A claimant must prove on the balance of probabilities that:

- the defendant either intentionally or negligently;
- directly interfered with;
- the claimant's possession of the good;
- without lawful justification.

Intentionally or negligently

If the trespass is unintended and there is no negligence, there will be no action in trespass (*National Coal Board v JE Evans and Co (Cardiff) Ltd* (1951)).

Directly interferes

The interference must be direct. It must invade the claimant's possession. For example, in *Hutchins v Maughan* (1947), the defendant laid poisonous baits on unfenced land. The defendant warned the plaintiff, a drover, of the existence of the baits. The plaintiff ignored the warning and his two dogs picked up the baits and died. The defendant argued that the plaintiff's injury was not caused by him, but was merely consequential and not direct and therefore was not a trespass. Herring CJ held that it was not a trespass, stating:

> In these circumstances, the injury [the plaintiff] suffered cannot, in my opinion, be said to have followed so immediately in point of causation upon the act of the defendant as to be termed part of that act. It should rather be regarded merely as consequential upon it and not as directly or immediately occasioned by it. And so trespass does not lie in respect of the defendant's act in laying the baits. Had the bait been thrown by the defendant to the complainant's dogs, then no doubt the injury could properly be regarded as directly occasioned by the act of the defendant, so that trespass would lie.

Thus, the court held that this was not a trespass to the defendant's goods (his dogs), as the baits had been laid before the defendant took his dogs onto the land and so the injury to the defendant's dogs was a consequential result of the defendant's acts, not a direct result of it.

The claimant's possession of the good

A claimant in an action to trespass to goods need not prove title to the good. The claimant need only show actual or constructive possession of the good at the time of the defendant's act – an owner out of

possession cannot maintain action. However, this does include a bailor-at-will being able to sue for trespass to goods in the bailee-at-will's possession (*Wilson v Lombank Ltd* (1963)).

Possession is normally established through intention to hold the good for one's own purposes and physical control. Bailees are included in having possession of goods.

Constructive possession is where a claimant has possession of the goods without actual physical possession. For example, in *Wilson v Lombank Ltd*, the plaintiff bought a car which he left at a garage for repair. In fact, the plaintiff had purchased the car from a person who was not the true owner, the result being that the plaintiff did not become the owner of the car. The defendants thought that they owned the car, so they took it from the garage. Eventually, the defendants discovered who was the true owner and delivered the car to its true owner. The plaintiff sued the defendants in trespass, arguing that possession is title. The court held that the plaintiff succeeded, as 'the plaintiff never lost possession of the motor car'. In this case, as the defendants wrongfully took the motor car, delivery of the motor car to the true owner was held not to defeat the plaintiff's claim.

Must there be damage?

Trespass to the person and trespass to land are actionable *per se* (without proof of loss or damage). There is no clear authority as to whether trespass to goods is actionable *per se*. In other words, there is no authority on the point as to whether merely touching someone's goods without damaging them is trespass. However, it has been held that accidentally touching a good without causing damage is not sufficient to maintain an action in trespass. In *Everitt v Martin* (1953), the plaintiff was held not to be liable in trespass when his coat was torn by accidentally brushing it against the broken front mudguard of the defendant's car.

Without lawful justification

See defences in Chapter 10.

Introduction to conversion

One difference between trespass and conversion is that moving a good without removing it from the claimant's possession is a trespass, but not a conversion. Further, if the goods are taken without any intention

to exercise permanent or temporary dominion over them, the act may constitute a trespass, but will not be a conversion (*Penfold Wines v Elliott* (1946)). As Tipping J stated in *Wilson v New Brighton Panelbeaters*:

> The essence of trespass is an unlawful interference with possession of goods. The essence of conversion is an unlawful denial of the plaintiff's rights to his goods or an unlawful dealing with the plaintiff's goods by asserting a temporary or permanent dominion over them in a manner inconsistent with the plaintiff's rights thereto.

Elements of conversion

Conversion is the:

- wrongful and;
- intentional;
- exercise of control over a good;
- which so seriously interferes with;
- the claimant's possession or right to immediate possession of the good that it amounts to a denial of their right to it.

Wrongful

There is no liability in trespass in the absence of wrongful intention or negligence. For example, if goods are lost when they are given to a person, this is not conversion. If, however, those goods are given away or delivered to a wrong person, this will constitute conversion (*Joule v Poole* (1924)).

Intentional

Conversion is a tort which involves the denial by the defendant of the right to possession claimed by the claimant. The denial need not be express, but it must be intended, so it will not necessarily be inferred from the defendant's mere inaction or negligence. For example, in *Ashby v Tolhurst* (1937), the defendant car park was held not to be liable in conversion when the attendant at the car park negligently allowed the 'owner's friend' to take the car from the car park without a ticket. The car was never recovered. The court held that the car park attendant, in allowing the 'owner's friend' to take the car, was not intending to deny the owner's right to his car or to assert a right inconsistent with the owner's right. Thus, there must be a positive, intentional act by the defendant dealing with the good – negligence on the behalf of the defendant is not sufficient.

The intention required is only one to physically deal with the good, not to convert it. Honest mistake or good faith is thus irrelevant, the intention is to exercise dominion over the good. For example, in *Wilson v New Brighton Panelbeaters Ltd* (1989), both the plaintiff and the defendant were the subject of a 'cruel and probably fraudulent hoax' when the defendant towed away the plaintiff's vehicle, mistakenly believing it had been bought by a third party. The defendant was held to have committed conversion.

Exercise of control over a good

Thus, for the dealing with the good to amount to conversion, the defendant must have demonstrated an act of ownership which is inconsistent with the rights of the owner. This inconsistency may be either denying the claimant's title or rendering the claimant's right to possession difficult to exercise. In most cases, control requires the good to be physically dealt with by the defendant.

The act must be positive, so the mere detaining of goods is not a conversion. For example, in *Spackman v Foster* (1883), the plaintiff's title deeds were taken from them by a third party and deposited with the defendant who held them, without knowledge of the fraud, to secure the payment of a loan. Grove J held that the defendant was not liable in conversion as:

> [The defendant] held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim title to it, nor claim to hold it against the owner. The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion.

Similarly, in *Joule Ltd v Poole* (1924), the plaintiff, a consignor of goods, took an action against the defendant carrier regarding a parcel of silk which was received and signed for by the carriers, but which was never delivered. The court held in favour of the defendant carriers, saying that there was no conversion, as no act of misfeasance could be proved against them. In this case, the carrier had not actively done anything with the goods, therefore, this situation was not a conversion, whereas if the carrier had delivered the goods to the wrong person, this would have been conversion.

Not every type of dealing with goods will amount to a conversion. The following acts are examples of conversion:

- taking possession of goods, such as stealing (*Rendell v Associated Finance* (1957)). For example, it was held to be a conversion when a defendant appropriated apples from a neighbour's apple tree after cutting off branches overhanging the defendant's land (*Mill v Brooker* (1919));
- disposing of goods. For example, in *Consolidated Co v Curtis & Son* (1892), auctioneers were held liable in conversion for selling the plaintiff's furniture. The auctioneers did so mistakenly, not being aware of a bill of sale which existed between the person who brought them the furniture and the plaintiffs;
- if goods are intentionally destroyed (*Simmons v Lillystone* (1853));
- denying the claimant's rights (*Motor Dealers Credit Corp v Overland Ltd* (1931));
- withholding possession (*Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (1993)).

Seriously interferes

A conversion will only occur where the defendant's act seriously interferes with the claimant's right to immediate possession of goods. In other words, because conversion involves a denial of the claimant's rights to possession, a wrongful taking of goods which does not involve such a denial does not constitute this tort. For example, in *Fouldes v Willoughby* (1841), the defendant, Willoughby, removed the plaintiff's horses from his boat, as he did not want to carry them. The court held in this case that Willoughby's act, though it may have been a trespass, did not constitute a conversion of the animals, as the facts did not disclose any denial by the defendant of the plaintiff's right to possession. There was no intention on the part of Willoughby to exercise control or dominion over the horses.

Compare *Fouldes v Willoughby* with *Mills v Brooker* (1919). In the latter case, the plaintiff grew apple trees on his land, with the branches of some trees overhanging the defendant's land. The defendant cut off the overhanging branches and sold the apples from them. The defendant argued that he could do so because of his right to lop the overhanging branches on which the apples grew. The court held the defendant liable in conversion, stating:

> The apples were the plaintiff's property before severance, and they equally remained his property after they were severed, and he had a right to possession of them. Whether there are any means by which he could have enforced that right, if the defendant had done nothing

> more than sever them, it is not necessary here to decide. But the defendant went on to appropriate them to his own use by selling them. That clearly amounted to a conversion.

The length of time for which the intentional use takes place is generally irrelevant. It is also not necessary for the defendant to have intended to acquire full ownership of the good. For example, in *Aitken Agencies Ltd v Richardson* (1967), the taking of a van for a joyride was a conversion. The court held that the defendant intended to exercise temporary dominion over the van.

Claimant's possession

The claimant's possession or right to immediate possession of the good must exist at the time of the defendant's act (*Singh v Ali* (1960)). This right to immediate possession does not include a right to future possession. For example, in *Penfold Wines Pty Ltd v Elliott* (1946), the plaintiff's wine bottles were embossed with the plaintiff's name and were to be returned to the plaintiff when empty. The defendant sold bulk wine to his customers by filling whatever empty bottles the customers bought to his hotel, including the plaintiff's bottles. The plaintiff sued the defendant in conversion. While the action did not succeed, the plaintiff had a right to sue in conversion because even though the plaintiff did not have actual possession of them at the time of the defendant's act, the plaintiff had a right to immediate possession of them.

For example, this means that in the case of a bailment for a term, the bailor cannot bring an action in conversion, as their right is to future, not immediate, possession. However, a bailee may bring an action in conversion. For example, in *City Motors (1933) Pty Ltd v Southern Aerial Service Pty Ltd* (1961), the owner was liable for dispossessing the bailee during the term of the bailment which was not one determinable at will. Where the bailment is determinable at will, the bailor and the bailee may sue on the basis of an immediate right to possession (*Nicolls v Bastard* (1835); *Kahler v Midland Bank Ltd* (1950)). Where a bailee commits an act which is wholly inconsistent with the terms of the bailment, the immediate right to possession reverts to the bailor, who can then sue the bailee and/or a third party. The act must be more than a breach of the bailment; it must be so serious as to cause the whole bailment to fail and must demonstrate an intention by the bailee to use the goods as if they were the bailee's own (*Milk Bottles Recovery v Camillo* (1948)).

This right to possession must be immediate and is satisfied by:

- actual ownership including statutory property (*Butler v Egg Marketing Board* (1966));
- equitable title to property (*International Factors Ltd and Rodriguez Ltd v Perkins* (1979)). This will exist where third parties have a right of access to property (*NCA v Flack* (1998));
- possessory title to property (*Perpetual Trustee and National Executors of Tasmania Ltd v Perkins* (1989)). This will exist even where third parties have a right of access to property (*NCA v Flack*);
- the holder of a lien, a lien meaning that there is a right to retain possession of a good until a debt is paid. For example, in *Standard Electronic Apparatus Laboratories Pty Ltd v Stenner* (1960), the holder of a lien was able to sue an owner of the goods in conversion;
- a contract of sale where the buyer has a sufficient right to immediate possession of the goods (*Empressa Exportadora de Azucar v IANSA* (1983));
- a licensee may be able to sue in conversion (*Northam v Bowden* (1855));
- co-ownership where one co-owner destroys or sells the goods so as to remove title from the remaining co-owner. However, use of goods by one co-owner even to the exclusion of the other is not conversion (*Parr v Ash* (1876); *Kitano v Commonwealth* (1973));
- finders may sue in conversion. For example, in *Armory v Delarmarine* (1722), a chimney sweep found a jewel in a chimney and took it to a valuer who refused to give it back. It was held to be trover (conversion) as although the plaintiff had not acquired absolute ownership of the jewel upon finding it, his possession gave him better title than the defendant and possibly better title against anyone except for the true owner.

Introduction to detinue

Detinue is where a good is wrongfully detained by a defendant who has been requested to give it back by a claimant who has a right of immediate possession. The essence of detinue is demand and refusal.

Elements of detinue

Three elements:

- defendant possesses goods;
- claimant demands return of goods;
- defendant refuses to comply.

Defendant possesses goods

Merely being in the possession of another person's goods without authority is not a tort. If the goods are lawfully acquired, detention alone does not become a wrong in the absence of an intent to keep the goods adversely or in defiance of another's rights. For example, a bailee who holds over may be liable for breach of contract, but neither for conversion or detinue.

Claimant demands return of goods

The claimant must prove the right to possession at the time of the defendant's refusal to return the goods – that he or she has made a demand, specific as to time and place for the delivery up to him or her of the goods and that the defendant has refused delivery. The law of detinue indicates that the demand is not sufficient where the claimant does not indicate at what place the defendant should deliver the goods or indicates a place of undue burden (*Lloyd v Osborne* (1989); *Capital Finance Co Ltd v Bray* (1964)).

Refusal

It is the deliberate refusal to return the goods which is the gist of the action of detinue. The refusal must be unreasonable and categorical, although it does not have to be express. Where the defendant's refusal is categorical, it does not matter that the defendant may have had reasons for it. For example, in *Howard E Perry & Co v British Railways Board* (1980), a railway depot which refused to return the plaintiff's chattel was held liable even though it refused because of a genuine and reasonable fear of retaliatory action by trade unions.

Remedies

Where the defendant is in possession of the good at the time of judgment, courts may order the return of the good and damages – payment to the claimant of the value of the good (see, also, Chapters 10 and 12).

Difference between detinue and conversion

The same situation may give rise to an action for detinue or conversion. Most cases of detinue will also give rise to an action in conversion.

However, the action of detinue is only for the detention of the goods not for any damage done to them. Further, while damages is the primary remedy for conversion, the main reason for suing in detinue is that the claimant may claim for specific restitution of the good. This claim is not possible in conversion. The claimant in conversion is *prima facie* entitled to recover the full value of the goods.

10 Defences to Intentional Torts

You should be familiar with the following areas:

- defences to trespass to the person
- defences to trespass to land
- defences to trespass to goods

Introduction

An action in trespass will fail where the elements are not proven. Additionally, there are a number of defences available to a defendant who is being sued for the intentional torts of trespass to the person, land or goods. This chapter examines these defences.

Consent

Where the claimant has given consent to a trespass by the defendant, there will be no trespass to land, person or goods. Consent may be given either expressly or by implication. For example, a patient in a hospital will normally sign a consent form before an operation – this is express consent. Consent which is implied is often implied by conduct. For example, implied consent is given where a patient rolls up their sleeve for an injection or turns to a position suitable for a treatment to be undertaken. Consent may be conditional and may be withdrawn at any time (*Plenty v Dillon* (1991)).

In order for consent to be 'real' or 'valid', it must:

- be voluntary;
- come from a competent person;
- be given with knowledge;
- be in relation to the act complained of.

Voluntary

This refers to where the patient does not give their consent voluntarily because of:

- fraud;
- undue influence;
- bribes;
- misrepresentation of facts;
- duress.

Consent must be genuine. For example, consent is not genuine when it is given by a claimant under sedation following earlier refusals (*Beausoleil v La Communauté des Doeurs de la Charité de la Providence* (1964)) or where it is obtained by threat or by a person in a position of influence (*Freeman v Home Office (No 2)* (1984)).

For example, in *Malette v Shulman* (1991), Ms Malette was seriously injured in a car accident. She was taken to the hospital unconscious. She was carrying a card, unsigned and unwitnessed, stating she was a Jehovah's Witness and would not have a blood transfusion. She was bleeding profusely and deteriorating. Dr Shulman gave her a blood transfusion and she sued him. He argued that as she was unconscious, he was under a legal and ethical duty to give emergency treatment. The court found in favour of Ms Malette, stating that the card did impose a valid restriction upon the treatment which could be given. The court said that the patient did foresee this happening and that was the reason the patient carried the card. It was her responsibility if harmful consequences came from her decision. The court recognised that this was difficult for the doctor, but said that he would not have violated legal or ethical principles by respecting her wishes.

(Note: she received only nominal damages and had to pay her own costs. This is an example of where the doctor has breached the patient's autonomy, but was acting in the best interests of the patient.)

In some jurisdictions, statute has attempted to clarify the position where a patient refuses to undergo treatment (Medical Treatment Act 1988, Vic).

Must come from a competent person

To give consent, you must be capable of understanding what you are consenting to. A claimant must have legal capacity in order to give valid consent. Thus, minors, unconscious persons and certain psychiatric persons are incapable of giving legal consent.

At common law, there is no fixed age for when a child is deemed able to give consent (*Department of Health and Community Services v JWB* (1992)). In New South Wales, consent of a minor to medical or dental treatment is subject to legislation (Minors (Property and Contracts) Act 1970, NSW; Children (Care & Protection) Act 1987, NSW). In general, if a parent or guardian refuses consent, this can be overcome by taking the power out of that persons hands by:

- making the child a ward of the State;
- asking the Supreme Court to exercise its general paternal jurisdiction;
- having the Guardianship Board or a 'person responsible' consent on behalf of a person.

Must be given with knowledge

Consent is no consent at all unless it is freely given and it is known what is being consented to. In order for consent to be valid, it must be given in relation to the nature and character of the act and not be merely collateral to it.

For example, compare *Papadimitropoulos v R* (1957) to the case of *R v Williams* (1923). In *Papadimitropoulos v R*, the High Court held that a man was not guilty of rape where he had convinced a woman to have sexual intercourse with him because she believed that he was her husband. The woman was unable to read English and wrongly believed she had gone through a marriage ceremony with the defendant. The court held that her belief in the marriage did not affect her consent to intercourse. In *R v Williams* (1923), the plaintiff was held not to have given consent where the defendant singing teacher convinced the plaintiff, his 16 year old pupil, that intercourse would improve her voice. He told her that her breathing was not quite right and that he had to perform an operation which would clear her breathing passages for singing to allow her to produce her voice properly. In this case, the plaintiff was held not to have given consent to sexual intercourse; instead, she was giving consent to a surgical operation. Thus, the court held that she had not given legal consent.

Consent must be in relation to the act complained of

This means that consent to one act does not necessarily authorise any act of a different type to be carried out. For example, in *McNamara v Duncan* (1971), the defendant ran into the plaintiff during a game of Australian Rules football. The plaintiff had just kicked the ball when the defendant, on the opposing team, ran to him, raised his elbow and

struck the plaintiff on the side of his head. The plaintiff suffered a fractured skull and was left with a minor permanent disability. The court held that the striking by the defendant was a serious infringement of the rules. Fox J stated that the 'risk of being injured by such an act is not part of the game, if the game is being played according to the rules' and that 'I do not think it can reasonably be held that the plaintiff consented to receiving a blow such as he received … [i]t was contrary to the rules and was deliberate'.

Onus of proof

The Australian position as to who must prove the action is uncertain. In Australia, the burden of proving consent in trespass to land seems to lie with the defendant (*Hart v Herron* (1984); *Plenty v Dillon* (1991)).

Use of force

Self-defence

When there is an immediate danger of imminent violence, one's own safety is in danger and the amount of force used in response to the threat is reasonable, then force will operate as a defence. This defence operates where the defendant responds to a direct action of the plaintiff. For example, in *McClelland v Symons* (1951), the plaintiff picked up a rifle, loaded it and pointed it at the defendant, stating 'I've brought the gun to shoot you and here it is'. The defendant then struck the plaintiff on the head with a metal bar. This was held to be reasonable self-defence and so was not a battery.

Generally, the force used must not exceed what is necessary to beat off the attack. However, disproportionate force may not always be unreasonable. The question as to what is reasonable force is a question of fact. For example, the High Court has considered it to be relevant to consider whether a defendant could have moved out of range to avoid being struck with a T-square rather than defending himself by throwing a piece of broken glass (*Fontin v Katapodis* (1962)). The court considered that throwing the piece of glass was out of all reasonable proportion to the emergency confronting the plaintiff.

Defence of others

Where there is a relationship between persons such as master and servant, parent and child or husband and wife, one person may defend

the other. In Australia, this has been extended to protect a defendant who takes action to prevent harm coming to strangers. For example, in *Goss v Nicholas* (1960), Crawford J stated:

> … a person is entitled to use force to prevent a stranger from being assaulted if he has reasonable grounds for believing that an assault upon the stranger is about to take place. In considering what force may be used, I hold that it must be reasonably proportioned to the degree of injury to be expected from the assault upon the stranger.

Defence of property

Land and chattels may be defended by reasonable force. The person defending the goods or chattels must have possession of the good or land being defended. The degree of force which may be used will depend upon the circumstances of the case, however, there have been judicial warnings against using extreme force to protect property. In *Hackshaw v Shaw* (1984), the defendant had lain in wait for a petrol thief to come onto his property and steal his petrol. The defendant shot at the thief's car to immobilise it, being unaware that there was anyone in it. One shot hit the plaintiff passenger in the car. The High Court perceived that the defendant's actions in defending his property with a shot gun were going 'too far'. It has also been held that it is reasonable to use barbed wire to prevent or deter property being broken into; however, to deliberately set spring guns or any other device which is calculated to kill is not reasonable (*Bird v Holbrook* (1828)).

Discipline

Parents may use reasonable punishment to control their children. At common law, teachers may also punish students provided it is moderate and reasonable (*Mansell v Griffin* (1908); *Cleary v Booth* (1893)). There are now statutory enactments which ban the use of corporal punishment (Education Regulations, Vic). The captain of a ship may use reasonable force against anyone who threatens the safety of a ship and, by analogy, an aircraft.

Retention and re-entry of land

Land may be retained or re-entered through the use of reasonable force. Reasonable force may also be used to expel trespassers where

the person using the force has a right to actual possession or exclusive possession (*Cowell v The Rosehill Racecourse Co Ltd* (1937)).

A right of entry onto another's land to retake goods which may be in their possession is available when goods accidentally fall or are placed on another's property (*Anthony v Haney* (1832)).

Retaking goods

This refers to the claimant retaking a good, with reasonable force where necessary, a chattel to which the claimant has the right to immediate possession and of which the defendant is in possession (*R v Mitton* (1827)).

Emergency/necessity

The defence of necessity is available where:

- a defendant commits an immediate trespass to the person, land or goods;
- in response to a reasonably perceived need to avoid an imminent threatened harm;
- the defendant's conduct must be a reasonable response to that harm which may be to one's own person, goods or land or that of a third party.

This defence may be available regardless of whether the outcome is desired. For example, in *Proudman v Allen* (1954), the defendant prevented the plaintiff's car from crashing into another by intentionally diverting it over a cliff into the sea. Even though the defendant's actions resulted in far worse damage to the car, it was held that the defendant's actions were not a trespass. This was because the defendant's interference with the plaintiff's property was reasonable and necessary to protect the property from imminent danger.

Further, the defence is available even where damage results to an innocent party. For example, in *Gerrard v Crowe* (1921), the defendants were found not liable when they erected an embankment on their land which resulted in the plaintiff's land being the subject of increased flooding. Similarly, in *Greyvensteyn v Hattingh* (1911), the defendants were held not liable for the damage caused to the plaintiff's neighbouring property when they drove away a swarm of locusts from their own land in the direction of the plaintiff's cultivated land.

This resulted in the plaintiff's crops being destroyed. The court held that the defendants were entitled to drive the locusts away as a measure of self-protection and that they were not liable for the consequences.

Courts have stated that the doctrine of necessity must be carefully circumscribed (*Southwark London Borough Council v Williams* (1971)). Thus, necessity has not been admitted as a defence to cannibalism (*R v Dudley and Stephens* (1884) or for squatters entering houses and staying for an indefinite period of time (*Southwark London Borough Council v Williams*).

Inevitable accident

Inevitable accident may operate as a defence. In cases of inevitable accident, the defendant's acts will be neither intentional nor negligent.

For example, in *Smith v Lord* (1962), the defendant's defence of inevitable accident succeeded where a driver who was on his way to the doctors collided with a stationary vehicle due to a 'blackout' caused by cardiac failure. The court described the defence of inevitable accident as 'to be taken as meaning that a catastrophe of some sort, a mishap, was unintended and unexpected. In the circumstances, it was quite unavoidable by the person who would otherwise be treated as responsible'.

Compare the case of *Blacker v Waters* (1928), where the plaintiff lost his eye when he was struck by a fragment of a bullet fired by the defendant at a shooting gallery. The court stated that the defence of inevitable accident was not open to the defendant, as he had considerable experience of shooting galleries and knew that the bullets broke into fragments and that they could fly back and thereby injure onlookers and passers by such as the plaintiff.

Jus tertii

Jus tertii or 'right of a third party' applies to the tort of trespass to goods and to conversion. It means that an action to recover goods may be brought by anyone who is in actual or constructive possession of the goods (even if that possession is wrongful) against anyone except for the rightful owner who interferes with their possession of goods. Generally, *jus tertii* is available when:

- the defendant has acted throughout on the instructions of a third party;
- where the defendant has been evicted from the good by the title of the third party who has paramount title;
- where the defendant is defending the action under the authority of the third party.

Provocation

Authority is unclear with respect to the defence of provocation. It seems that provocation is no defence to an action for battery or assault (*Fontin v Katapodis* (1962)), although it may lead to an alteration in the type of damages awarded (*Horkin v North Melbourne Football Club Social Club* (1982)). However, the Supreme Court in Queensland has accepted provocation as a defence to assault and battery (*White v Connolly* (1927)).

No defence to intentional torts

There are a number of defences which do not operate in relation to intentional torts.

Mistake

Mistake is not a defence to intentional torts. For example, in *Rendell v Associated Finance Pty Ltd* (1957), the defendant was liable for conversion of an engine when he repossessed a truck on behalf of a finance company in the mistaken belief that the whole truck belonged to the insurance company. Similarly, in *Glasspoole v Young* (1829), mistake was not available as a defence when goods were seized in the mistaken belief that they were subject to a court order.

However, police officers who have made mistakes when arresting a person based on a reasonable belief are treated more leniently by the court (*Beckwith v Philby* (1827)). For example, a police officer who seizes goods which are not specified in a search warrant may have a defence if the goods were seized in the reasonable belief that the goods were stolen (*Chic Fashions (West Wales) Ltd v Jones* (1968)).

Contributory negligence

Contributory negligence is not a defence to intentional torts (*Wilton v Commonwealth Trading Bank* (1973)). For example, in *Horkin v North Melbourne Football Club Social Club* (1982), the plaintiff was found to be guilty of contributory negligence when he became intoxicated, failed to leave the premises when asked to do so by authorised employees of the defendant and pushed past them to go further into the premises bringing about the situation that he was injured when forced marched to the door. The court held that contributory negligence is no defence to an action of battery. However, this defence may operate when the trespass is negligent.

Insanity

Insanity is not a defence to intentional torts. A defendant may be liable for the nature and quality of tortious acts even though the defendant has no understanding that the act was was wrong (*Morris v Marsden* (1952)).

Infancy

It is no defence that the defendant was a child at the time the tortious act occurred. Windeyer J in *McHale v Watson* (1964) stated:

> A child is personally liable for the consequences of his wrongful acts. That is certainly so if he was old enough to know that his conduct was wrongful – that is to say if, in the common phrase, he was old enough to know better.

11 Nuisance

You should be familiar with the following areas:

- the definition of public nuisance
- the definition of private nuisance
- how to prove an action in public and private nuisance
- the differences between public nuisance and private nuisance
- defences to public and private nuisance
- remedies for public and private nuisance

Introduction

Nuisance refers to two torts – public nuisance and private nuisance. Private nuisance is primarily concerned with conflict of rights relating to uses of land, whereas public nuisance is concerned with protecting rights of the public at large. The same incident may give rise to both a public nuisance and a private nuisance (see, for example, *Halsey v Esso Petroleum Co Ltd* (1961)).

Private nuisance

Private nuisance is an unreasonable interference with the use and enjoyment of land. Nuisance is a form of tort liability which covers a range of fact situations: fire; flood; offensive sights; blocking a right of way. Thus, nuisance includes non-physical damage such as noise which interferes with the comfort or amenities of the claimant's property and physical damage to land such as discharge of water.

Private nuisance protects a claimant's interest in the beneficial use and enjoyment of their land. The distinction between private nuisance and trespass to land is that nuisance involves an indirect interference with land, while trespass to land involves a direct interference with

land (as to trespass to land, see Chapter 8). A remedy to prevent or provide damages for a claimant who has suffered unreasonable interference with the use and enjoyment of their land may be given in nuisance – this is not available in trespass. For example, an action for nuisance may involve an intangible object which indirectly interferes with a claimant's use of their land such as noise (*Hollywood Silver Fox Farm v Emmett* (1936)). Similarly, private nuisance differs from negligence, as private nuisance does not require the establishment of a duty of care, is restricted to land, limits who has title to sue and it looks to whether the use of land is reasonable.

A person will commit the tort of private nuisance where they:

- cause a substantial interference
- through conduct which is unreasonable
- with the claimant's beneficial use or enjoyment of land.

Nature of interference

The interference may take the form of:

- physical damage to property, such as the breaking of windows by golf balls or the killing of trees by noxious fumes. For example, in *McKinnon Industries Ltd v Walker* (1951), there was held to be a nuisance where the defendant's premises emitted sulphur dioxide which damaged the plaintiff's plants;
- interference with enjoyment of land such as noise, smoke, offensive sights, smells and glare which may diminish the comfort or amenities of the inhabitants of the property. For example, in *McKenzie v Powley* (1916), the singing of songs at 7 am on a Sunday morning in a Salvation Army Hall was found to be a nuisance. In *Thompson-Schwab v Costaki* (1956), the use of the defendant's house for the purpose of prostitution in a residential street was held to be a nuisance;
- interference with property rights (easements, profit *à prendre* or right of access);
- personal injury of the inhabitants, for example, escaping cricket ball. There is little authority upon this point and it seems likely that, today, any action for personal injury is more likely to be taken in negligence rather than nuisance.

Must there be damage?

There is disagreement between commentators as to whether damage need be proven in an action for nuisance. Generally, damage must be proved in all actions for nuisance. However, there are three exceptions where there is no need to prove damage:

- where property rights are interfered with;
- in *quia timet* actions (where the court grants an injunction to prevent harm occurring);
- where a presumption as to damage is made. In *Baten's Case* (1610), a house was built so that one of its cornices projected over the plaintiff's land. The court presumed that damage would be caused to the plaintiff's land by rain water dripping from the cornice onto the land.

Must the interference be substantial?

The interference must be substantial. As Veale J in *Walter v Selfe* (1851) stated, the test for whether the interference is substantial enough to have an effect of the claimant is whether the inconvenience is:

> … more than fanciful more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?

Land occupiers are expected to tolerate some interference with their enjoyment of land. This rule has been called one of 'give and take, live and let live' (*Bamford v Turnley* (1862), *per* Bramwell B). For example, it has been held not to be a nuisance where a claimant's private property has been video taped and photographed outside the claimant's land (*Bathurst City Council v Saban* (1985)). This means that if the defendant's use of the land is ordinary or natural, the activity may not constitute a nuisance. Thus, the conduct must be unreasonable for it to constitute a nuisance.

Certain rights of landowners may, however, be regarded as absolute and no matter what the effect on adjoining landowners, they will not constitute a nuisance. For example, courts have held that there is no liability in nuisance where one neighbour blocks another's view (*Knowles v Richardson* (1670)). In *Elston v Dore* (1982), the High Court held that the defendant's blocking of an artificial drain on his land so that water no longer drained from the plaintiff's land, causing the plaintiff's land to flood, was not a nuisance. The court held that the

defendant could not be responsible for causing a drainage problem on the plaintiff's land when that problem was a naturally occurring one.

Conduct must be unreasonable

The defendant will be liable in the tort of nuisance where their conduct is unreasonable. In determining whether a defendant's conduct is unreasonable, the court looks to balance the competing interests of the parties. That is, the court looks to the effect of the nuisance upon the claimant and the nature of the defendant's conduct which produced the nuisance. The test is objective. As Lord Wright stated in *Sedleigh-Denfield v O'Callaghan* (1940):

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usage of mankind living in society or more correctly in a particular society.

Claimant's beneficial use of land and 'unreasonable conduct'

The courts have established different standards of what is 'unreasonable conduct' depending upon how the claimant's use of land is interfered with. In essence, where there is physical damage or personal injury, the courts will infer nuisance more readily than where there is interference with the enjoyment and amenities of the land.

Physical damage

An important point to note is that, in determining whether the defendant's conduct is unreasonable, the court is weighing competing interests. However, where the nuisance has caused physical damage to the claimant's property or personal injury, the courts are less likely to take account of factors which may advantage the defendant.

For example, in *Halsey v Esso Petroleum* (1961), Esso operated an oil distributing premises opposite the plaintiff's residential home. The plaintiff complained as to the noise and acid smells from the defendant's boilers which damaged clothes hanging out to dry in the plaintiff's garden and the polish on the plaintiff's car, which was kept on the highway. Veale J drew a distinction between an action brought for nuisance upon the ground that the nuisance causes a material

injury to property and an action brought for nuisance on the ground that the nuisance produces personal discomfort. Where there is a material injury to property which is not trivial, the damage establishes the nuisance. However, where the nuisance causes personal discomfort, Veale J held that it is 'always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance'. The court held that nuisance was established through proof of damage to clothing caused by acid smuts whereas damage caused by smell and noise had to be established by balancing all relevant factors.

Similarly, in *St Helen's Smelting Co v Tipping* (1865), where the defendant created vibrations which caused the plaintiff's building to collapse, the House of Lords held there to be a nuisance due to the existence of a material injury which was not trifling and which resulted in a diminution in the property's value. Further, the court held that where this injury is proved, there is no need to look at whether the locality where the defendant carried out the activity was a suitable area to do so.

'Enjoyment' damage

Damage to a claimant's enjoyment of their land is referring to the ability of a claimant to use and enjoy their land. It does not include physical damage to the property or personal injury. Courts are more reticent to find nuisance where the damage complained of is enjoyment damage rather than physical damage.

When determining whether a defendant's conduct has been unreasonable so as to interfere with the claimant's 'enjoyment' of their property, the courts attempt to balance the competing interests of the parties to determine whether the interference is unreasonable given the surrounding circumstances. Factors which the courts find relevant are:

- abnormal sensitivity;
- locality;
- timing of act;
- duration of activity;
- precautions taken by defendant;
- motive of defendant;
- the nature of the claimant's interest.

Abnormal sensitivity

Whether or not an act will cause a nuisance is judged by their effect upon a 'normal' person. Thus, the fact that the claimant is unusually sensitive will not be taken into account by the court.

For example, a claimant will not render a defendant liable in nuisance by putting land to extra sensitive uses. In *Robinson v Kilvert* (1889), the plaintiff rented the ground floor of a warehouse from the defendants who continued to occupy the cellar below the plaintiff's room. The defendants put in pipes to heat the cellar and the heat went up to the floor of the plaintiff's room and caused damage to brown paper which the plaintiff used in his business as a dealer in twine and paper. The court held that this was not nuisance, as the plaintiff's use of the land was sensitive and the heat would not have affected 'ordinary paper'. However, even where there would not be a nuisance, an interference with a sensitive use of land may succeed where malice is present (*Hollywood Silver Fox Farm v Emmett* (1936)).

Locality

The locality where the activity occurred may be relevant to determine whether the interference is unreasonable. What may be unreasonable behaviour in one locality may not be unreasonable in another. For example, in *Laws v Florin-Place Ltd* (1981), locality was relevant where the court gave an injunction to stop the defendants setting up a sex shop in a residential area. This factor has become decreasingly important due to the advent of governmental planning legislation.

Timing of act

The time when the claimant is exposed to the interference may be critical. In *Haddon v Lynch* (1911), the timing of the nuisance was relevant as the ringing of church bells before 9 am on Sundays and public holidays was held to be a nuisance. Timing of the act is often examined, together with the duration of the activity. For example, when the interference is temporary, it is more likely to be regarded as reasonable; however, if the interference (however short) causes inconvenience, it may be unreasonable (*Stoakes v Brydges* (1958)).

Duration of activity

Nuisance is usually associated with a continuing state of affairs, although it can be an isolated occurrence. Generally, the nuisance will have to be recurrent before the law takes action, unless it is an action for personal or physical damage.

If the interference is with the comfort of the inhabitants such as infrequently occurring loud parties, the law is not likely to award

damages for any damage or an injunction to stop the noise. This is based on the premise of 'give and take'. However, such a statement is not absolute. The courts have held that the loss of even one night's sleep may be unreasonable and a substantial interference with one's enjoyment of property (*Andreae v Selfridge & Co Ltd* (1937)).

Further, duration may be less important when it results in physical damage to property. For example, in *Midwood & Co Ltd v Manchester Corp* (1905), the court did not view duration as an issue where the defendants allowed a leakage of electricity from their mains which caused an explosion which damaged the plaintiff's property.

Precautions taken by the defendant

The court may also examine whether the defendant could have prevented the claimant's land being effected by their activity through taking reasonable practical steps. For example, in *Painter v Reed* (1930), where the plaintiff complained of the noise and smell of the defendant's horses, the courts treated nuisance as conclusive as the defendant could have installed equipment and used alternative methods (such as not walking the horses on concrete) to lessen the interference. Not to do so was unreasonable.

However, even if the defendant has acted with all reasonable care, this does not mean that the use of the land was reasonable. Indeed, even if the defendant has taken steps to eliminate the nuisance, it will not automatically follow that the defendant will not be liable in nuisance (*Rapier v London Street Tramways* (1893)).

Motive of defendant

The motive of the defendant or the utility of the defendant's conduct may be relevant. In broad terms, the courts may look more favourably upon the defendants act if it was carried out with social utility, as opposed to an act which is motivated by malice.

For example, some consideration may be given to the necessity of the conduct such as an early morning milk delivery (*Munro v Southern Dairies* (1955)). However, where the defendant's conduct is based upon causing annoyance or damage, it may be unreasonable and be found to cause a nuisance. In *Hollywood Silver Fox Farm v Emmett* (1936), the defendant who wanted to develop property neighbouring a silver fox farm shot a gun during the breeding season. As a result, the vixens became alarmed, miscarried and devoured their young. This was held by the court to be malicious. The court found a nuisance even though the plaintiff's use of the land was extra sensitive and the nuisance an

isolated event. Thus, malice may render an interference unreasonable when it is otherwise reasonable.

Retaliation for nuisance may itself be nuisance. There is conflicting authority on this point. In *Fraser v Booth* (1950), a plaintiff responded to her neighbour's racing pigeons by letting of fire crackers, hosing the birds and cracking a whip. The court held that these acts did not constitute a nuisance. On the other hand, in *Stoakes v Brydges* (1958), the defendant began to telephone a noisy milkman's employers late at night. This was found to be a nuisance.

Interests protected

Not all uses of a claimant's property will be protected by the tort of private nuisance. For example, in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1938), the plaintiff could not recover on the grounds of nuisance where the plaintiffs lost profits in running their race course where the defendant from a structure outside the course broadcast the races. The court perceived that the defendant had only impacted upon the plaintiff's business activities and not on their use and enjoyment of land.

The claimant's title to sue

Only a person who has a legal or equitable recognised interest in the land affected by the nuisance may sue in nuisance. The interest which the claimant must have in the land is not clear.

Historically, a licensee could not bring an action in nuisance, nor could the family of the person who has title to the land (*Oldham v Lawson (No 1)* (1976)). However, recent case law has altered the ability of such claimants to have standing to sue. In *Animal Liberation (Vic) Inc v Gasser* (1991), the plaintiffs were given an injunction to restrain a nuisance, even though there was no evidence as to the type of interest the plaintiff's had in the land. In *Khorasandjian v Bush* (1993), it was held that a young woman living at home with her parents, who was being harassed there by a former boyfriend, could bring an action in private nuisance even though she had no legal or equitable interest in the property affected by the nuisance. The court granted a *quia timet* injunction. Thus, it appears that occupiers of property may have standing to sue in nuisance (*Motherwell v Motherwell* (1976)).

One way to cut through these apparent differences is to examine the type of damage which has occurred as a result of the nuisance. For example, if the property has been physically damaged, more than a licence will be required for the claimant to be able to sue, as it is more

likely that a landowner will be compensated for the damage. Alternatively, where the damage is interference with 'enjoyment' of the property or personal injury, any occupant may recover. Thus, the owner of an easement may sue in nuisance for interference with that interest without having to be in possession and a reversioner may also sue in nuisance when it has caused permanent damage to the land.

Who may the claimant sue?

A defendant does not have to create the nuisance or have actual knowledge of it to be liable for it. Conversely, the creator of a nuisance may be liable for it whether they are the occupier of the land, a contractor or a servant acting on behalf of the occupier (*Fennell v Robson Excavations Pty Ltd* (1977), *per* Glass JA).

A defendant may be liable for a nuisance started by a third party (*De Jager v Payneham & Magill Lodges Hall Inc* (1984)) or a natural event such as lightning (*Goldman v Hargrave* (1967)). A defendant may also be liable for adopting or continuing a nuisance, however, liability will only follow where there is an element of fault, such as where the defendant has actual knowledge or means of knowledge of the nuisance and inadequately attempts to control it, thereby adopting it or continuing it. In other words, 'an occupier is not *prima facie* responsible for a nuisance created without his knowledge or consent' (*Sedleigh-Denfield v O'Callaghan* (1940), *per* Lord Wright). For example, in *Sedleigh-Denfield v O'Callaghan* (1940), the defendant was held liable for the flooding of the plaintiff's land caused by a down pipe which was established on the defendant's land three years before by the previous owner. The court found that the downpipe was something which the defendant knew about as a person authorised by the defendant knew of the ditch which contained the pipe and cleaned it out on their behalf every six months.

A defendant cannot evade liability by passing land (that is, let land to a tenant) on to a third party where there is a nuisance in the form of some disrepair. Further, if the defendant authorises the use of the land for the commission of a nuisance, he or she will be liable. For example, in *De Jager v Payneham Lodge* (1984), the defendant owned a hall which was hired out for functions such as weddings and birthdays. The tenant of a room in neighbouring premises suffered discomfort and loss of sleep as a result of the hiring of the hall. The defendant was held liable in nuisance, as he had hired out the premises for a particular purpose involving a special danger of nuisance and, therefore, the owner was liable for nuisance caused by the hirer.

This seems to extend to where the landlord has let the land to a tenant where it is an ordinary and necessary consequence that a nuisance would be created by the activity of the tenant. This was the situation in *Tetley v Chitty* (1986), where the landlord council was held liable for creating a nuisance by permitting tenants to use council land for go-kart racing. This racing created noise which interfered with the plaintiff rate payers in the area near the track.

Vicarious liability applies in nuisance between employers and employees (as to vicarious liability, see Chapter 14). Thus, where an employee creates a nuisance during the course of employment, the employer will be liable.

Public nuisance

A public nuisance is a nuisance so widespread in its range that it would not be reasonable to expect one person to take action against it by themselves; in other words, it is reasonable to expect that action should be taken by the community at large (*Attorney General v PYA Quarries Ltd* (1957)). Public nuisance refers to interference with rights shared by the public – these rights are not confined to land.

At common law, public nuisance is a crime. It is an unlawful act or omission to fulfil a statutory or common law duty which places a class of the public at risk. The test was stated in *Attorney General v PYA Quarries Ltd* as to whether the nuisance is:

> … so widespread in its range or so indiscriminate in its effects that it would not be reasonable to expect one person to take proceedings on his own responsibility or put a stop to it, but that it should be taken on the responsibility of the community at large.

Public rights and the 'public'

The most common examples of a public nuisance are interference with a public place, such as obstruction of a public highway. Other examples are polluting a river so as to render the water unfit for drinking, discharging oil into the sea in such circumstances that it is likely to be carried on shore and selling food unfit for human consumption. However, where there are no public rights, there will be no nuisance. For example, in *Kent v Johnson* (1973), the court held that the building of a tower on Black Mountain in Canberra was not a public nuisance, as there is no public right to a skyline.

The number of persons who need to be affected by the nuisance is not clear, the courts have declined to 'answer the question of how many people are necessary' (*Attorney General v PYA Quarries Ltd*, *per* Denning LJ). An action for public nuisance has been brought by a class of six people (*Baulkham Hills Shire Council v Domachuk* (1988)).

Who may bring an action in public nuisance

Tort actions in public nuisance may be brought by:

- *the Attorney General*

  The Attorney General is the public representative who may deal with a wrong suffered by the community at large;

- *private individuals*

  The claimant must show that he or she has suffered a 'particular' or 'special' loss which is different to that suffered by the public at large or which is greater than the loss suffered by the public at large. This special loss may be through personal injury, property damage, excessive noise or economic loss.

Substantial and unreasonable interference

As with private nuisance, the interference must be substantial and unreasonable. Thus, it is not a public nuisance if a vehicle temporarily breaks down unless it is there for an unreasonable period of time. For example, in *Maitland v Raisbeck* (1944), the plaintiff argued that a nuisance was created by a lorry travelling on a highway with its rear light extinguished. The court held in favour of the defendant, as the obstruction was not one which the court considered to last for an unreasonable time or in unreasonable circumstances. Again, the utility of the defendant's conduct is balanced against the competing interest of the nuisance or annoyance caused to others.

Defences to public and private nuisance

Prescription

This is a defence to private nuisance only. Twenty years of continuous exercise of the conduct which constitutes the nuisance will establish a right to commit the nuisance.

This period of use will not be established where the claimant could not have prevented it, for example, where the action was carried out in secret or because there were no claimants to complain. In *Sturgess v Bridgman* (1879), the defendant had operated a confectionery shop with a noisy pestle and mortar for 20 years. The operation had not affected anyone until a physician built a consulting room on his own land immediately adjoining the confectionery shop. The court held that the defendant had not gained a prescriptive right to the use of the noisy pestle and mortar, as it is no answer to a claim in nuisance for the defendant to show that the plaintiff had brought the trouble to themselves by coming to the defendant's activities.

Note, however, that such a defence depends upon the defendant's activities being first characterised as a nuisance and, secondly, upon other circumstances such as whether the defendant's activities were in the public interest (*Miller v Jackson* (1977)). The interference must be constant or have a degree of uniformity: for example, in *Lemmon v Webb* (1895), there was held to be no prescriptive right for branches overhanging land, as the length of the branches varies from year to year. As the court noted, '[T]he tree of today is not in the condition which it was in 20 years ago'.

Conduct of the claimant

Consent by the claimant to the nuisance will operate as a defence. It is not a defence that the claimant has come to the nuisance (*Sturgess v Bridgman* (1879); *Miller v Jackson* (1977)). Similarly, it is not a defence to argue that a claimant has used their land in a manner that increases exposure to nuisance. For example, a claimant is not expected to stop their ordinary lives to avoid a nuisance. In *Lester-Travers v City of Frankston* (1970), the plaintiff occupied a residence between two holes in a golf course. The court held that the plaintiff was under no obligation to stay indoors while golf was being played.

Act of a third party

If the nuisance is created by a third party and the defendant did not know nor could be reasonably expected not to know of the creation of the nuisance, the defendant will not be responsible for the third party's acts. In other words, there must be a finding of 'fault' on the part of the defendant (*Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986)). However, in *R v Shorrock* (1993), the court held that a defendant does not have to

have actual knowledge of the nuisance, but merely be responsible for a nuisance which the defendant knew or ought to have known would be the consequence of activities on the defendant's land. In *R v Shorrock* (1993), the defendant farmer let his farm to three people for a weekend for £2,000, being told that the farm was to be used to raise money for a special school. The field was in fact used for an acid house party lasting 15 hours and attended by 3–5,000 people. The police received 275 complaints. The defendant was held liable in nuisance, as the defendant knew or ought to have known of the nuisance occurring.

Contributory negligence

Although there is no clear authority on the point and commentators disagree, it seems that apportionment contributory negligence legislation will apply to a nuisance where it is based on negligent conduct. The relevant legislation is given in Chapter 6.

Statutory authority

This defence applies if a statute has expressly or impliedly authorised the creation of a nuisance in the performance of an activity authorised by statute. The defence is also available to acts done under delegated legislation (*Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* (1993)). In essence, where a statute authorises the defendant's activity, the defendants will not be liable for inevitable interferences which could not have been avoided by the exercise of reasonable care. As Viscount Dunedin said in *Lord Mayor, Alderman and Citizens of the City of Manchester v Farnworth* (1930):

> When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised.

Thus, it follows that where the act may be undertaken without creating a nuisance, there is no defence. The defendant bears the onus of proof to establish that it either:

- acted reasonably in creating the nuisance. Any activity which exceeds the authority given by the statute is unreasonable (*The Mayor, Councillors and Citizens of Perth v Halle* (1911)); or
- that there was no other way the authorised acts could have been conducted without creating a nuisance. The defendant must show

that the nuisance caused was inevitable (*Lester-Travers v City of Frankston* (1970)). Expense may also be relevant in determining if there was any alternative available – if the alternative is too expensive, the defence is available (*Bourchier v The Victorian Railways Commissioners* (1910) – relating generally to statutory authority rather than specifically to nuisance).

Remedies for public and private nuisance

Abatement

This is a self-help remedy. For example, many minor annoyances such as encroaching tree branches may be removed through self-help, as long as it can be done without going onto anyone else's land (*Lemmon v Webb* (1895)). If the nuisance which arises is through an emergency, then entry onto the neighbouring property may be made without permission. To constitute abatement, the preventative measures taken must remove the nuisance rather than guard against it. Abatement of a public nuisance may only be taken by individuals who have suffered damage over that suffered by the rest of the public or by a body or person who is entitled to represent the public (*Bagshaw v Buxton Local Board of Health* (1875)).

Damages

A claimant may claim for damages alone or for damages together with injunctive relief (see, also, Chapter 12). The loss must not be too remote. This test of reasonable foreseeability of damage does not apply where the defendant has created a nuisance that causes material damage to the claimant's property. While there is no authority on the point, it seems that damages may be recovered for personal injury caused by nuisance.

Injunction

As an injunction is an equitable remedy it is discretionary (see, also, Chapter 12). The injunction may be interlocutory (that is, granted to restrain the defendant from continuing the interference while the court determines the action) or permanent. A *quia timet* injunction may be granted to restrain a threatened nuisance. Thus, even where the tort of nuisance is made out, the remedy of an injunction may not be given

where the court considers the harm not to be substantial enough or that damages are a sufficient remedy.

Difference between public and private nuisance

Private nuisance

- is a tort;
- may only be brought for nuisance with respect to land.

Public nuisance

- is a crime;
- is only a tort where there is damage suffered by an individual which is different (in kind or degree) from that suffered by the public at large;
- there is no defence of prescription;
- affects land and other interests.

12 Common Law Compensation

You should be familiar with the following areas:

- aim of compensation
- nominal damages
- contemptuous damages
- aggravated damages
- exemplary or punitive damages
- pecuniary loss and non-pecuniary loss
- special and general damages
- personal injury and property damage
- injunctions
- mitigation of damage

Introduction

This chapter examines the common law and equitable remedies which may be awarded to a claimant who has proved their cause of action. In particular, these remedies are that of damages and injunctions. Other extra-judicial remedies such as abatement have been dealt with in Chapter 11.

The overriding aim of the law of damages is to compensate the person who has been injured, not to punish the person who has caused the injury (*Ralevski v Dimovski* (1986)). As Mason, Wilson, and Dawson JJ stated in *Gates v CML Assurance Society* (1986), 'the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort'. Thus, the law has allowed a defendant to reduce liability when the claimant has incurred collateral benefits such as employment benefits. However, there is no single rule applicable to collateral benefits. Some benefits reduce the amount to be paid to the claimant by the defendant, others do not.

The common law tort system of compensation does link in with statutory schemes which are discussed in Chapter 13. Some of these schemes are additions to the common law, whereas others replace the common law action for damages.

Damages

'Damages' refers to the money paid to the claimant by a defendant who has been found liable in tort. The aim of damages is to compensate. This means that damages try to place the claimant, as far as possible, back into the position they were in before the tort occurred (*Todorovic v Waller* (1981)).

At common law, an individual is only entitled to a lump sum award. Thus, the claimant may only sue 'once and for all' for any loss which has occurred, regardless of whether that loss occurred in the past, the present or the future. The courts are often required to make speculative guesses as to the future of the claimant, thus, such guesses are bound to result in either a windfall or too little being awarded to the claimant. As Lord Scarman stated in *Lim Poh Choo v Camden and Islington Area Health Authority* (1980):

> Sooner or later – and too often later rather than sooner – if the parties do not settle, a court (once liability is admitted or proved) has to make an award of damages. The award, which covers past, present and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering – in many cases, the major part of the award – will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.

This manner of lump sum payment has been amended by some statutory compensation schemes such as workers' compensation (see Chapter 13).

There are different types of damages, which are as follows.

Nominal damages

Nominal damages award an amount to the claimant which is equivalent to nothing at all. In this context, they cannot be regarded as

existing to compensate the claimant. Such damages are awarded when the claimant's action is made out and the rightness of the claimant's cause is upheld; however, only nominal damages are awarded, because the claimant has suffered no harm as a result of the tort. As Piper J stated in *Law v Wright* (1935), 'mere assault without any physical harm and monetary loss, entitles the assailed to a nominal sum'.

Nominal damages are therefore awarded when the defendant has committed a tort which is actionable *per se* and where no damage has resulted, for example, where a trespass to land occurs, but no damage is done to the property. Thus, nominal damages will not be available in negligence and nuisance, where damage is an essential element of the tort. This does not preclude only a small amount of damages being awarded in negligence and nuisance cases.

Contemptuous damages

Contemptuous damages are awarded where a claimant may establish their action but, in the opinion of the jury, the action should never have been brought. In other words, the moral victory is on the side of the defendant. In such a case, the amount awarded to the claimant is equivalent to no damages at all. For example, in *Newstead v London Express Newspapers* (1940), a farthing (a cent) was awarded to the plaintiff. The claimant may also suffer when the costs of the action are allocated by the court.

Aggravated damages

Where the defendant's conduct was deliberate, the court may award a sum over and above the amount which would normally be paid to a claimant. These damages, which are referred to as 'aggravated' damages, are to compensate the claimant for any indignity the claimant may have gone through because of the intentional conduct of the defendant. In other words, aggravated damages compensate the claimant for outrage or injured feelings arising from the tort. The more outrageous the defendant's conduct, the more the claimant should receive for the outrage suffered (*Uren v John Fairfax & Sons* (1966)).

However, if the claimant provoked the defendant, the amount of aggravated damages may be reduced (*Fontin v Katapodis* (1962)).

Exemplary or punitive damages

Exemplary damages are awarded when the court considers the defendants behaviour to be so undesirable and outrageous that the court regards the award of damages (even including aggravated damages) as inadequate to 'punish' the defendant's behaviour. In other words, exemplary damages are awarded to demonstrate the law's disapproval of the defendant's behaviour and to discourage others from acting in the same way. The focus of the court is not upon compensating the claimant for injury, but upon punishing the defendant. An additional aspect of exemplary damages is 'that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace' (*Lamb v Cotogno* (1987)).

In assessing exemplary damages, the conduct of both the defendant and the claimant is examined. If the claimant provoked the defendant's conduct, this may reduce or extinguish the payment of exemplary damages to the claimant.

Exemplary damages are available for all torts in Australia (*Uren v John Fairfax & Sons* (1966)). To date, the torts where exemplary damages have been awarded include:

- trespass to land;
- nuisance;
- trespass to goods;
- battery;
- negligence.

There is *dicta* from the High Court in *Lamb v Cotogno* (1987) that any tort may attract exemplary damages, saying that the award is appropriate where the defendants conduct discloses 'fraud, malice, violence cruelty, insolence or the like or [the defendant] acts in contumelious disregard of the plaintiff's rights'. However, the claimant does not have to prove that the defendant was motivated by ill will (*Johnstone v Stewart* (1968)).

Aggravated damages often achieve the same end as exemplary damages and it is often unnecessary to distinguish between the two. For example, Bray CJ in *Johnstone v Stewart* (1968) made a single award of damages to cover both aggravated and exemplary damages.

Pecuniary loss and non-pecuniary loss

Pecuniary loss includes compensating loss of earning capacity and expenses such as medical treatment. Non-pecuniary loss compensates pain and suffering and the loss of enjoyment and amenities of life. This type of loss has no real monetary equivalent; however, damages are awarded in order to provide security and an easier lifestyle.

Special damages

Special damages compensate pecuniary loss as opposed to non-pecuniary loss. They compensate expenditure and past calculable monetary losses between the alleged tort and the trial. Special damages require precise pleading and proof of loss. For example, special damages are capable of precise arithmetical calculation, such as medical and hospital expenses and loss of earnings up until the date of the trial.

General damages

The bulk of a claimant's damages in personal injury cases relates to the post-trial period and is dealt with under the title of general damages. General damages arise from the tort being committed; they are not capable of calculation. For example, general damages include all non-pecuniary loss such as damages for pain and suffering, loss of life expectancy or financial loss to be suffered in the future.

Damages for personal injury

Personal injury includes bodily injury, nervous shock and illness or disease. Where the claimant has established that the defendant has committed a tort and the resulting damage was physical injury, this will be the basis of liability. In some jurisdictions, a third party, such as an employer or spouse, may sue for damages for the effects of the injury to another person.

At common law, a once and for all assessment of damages for personal injury applies. It precludes a claimant bringing further legal actions against the defendant for the same injuries. Thus, this also means that a claimant cannot go back to the court for more damages if there are later developments such as a worsening of the claimant's injury. However, if a different cause of action arises out of the same

injury, the claimant may bring action. For example, in *Brunsden v Humphrey* (1884), the plaintiff received damages for a motor vehicle. After this action, the plaintiff was held to be able to bring an action for personal injury through the same negligence. This was because the court considered damages to goods and injury to the person, even where they were caused by the same wrongful act, as infringements of different rights giving rise to distinct causes of action.

To calculate damages, the court distinguishes between pecuniary (economic) loss and non-pecuniary loss. The courts often divide the claimant's damages into heads of damages for the purpose of calculation. Thus, under pecuniary loss, the claimant may be awarded a sum for:

- medical and care expenses;
- travelling expenses;
- alteration of place of abode;
- loss of earning capacity.

Under non-pecuniary losses, the claimant may be awarded a sum for:

- loss of amenity;
- the injury;
- pain and suffering;
- loss of expectation of life;
- pain and suffering and a sum for loss of earning capacity.

Inflation is not a direct factor which is taken into account when assessing damages (*O'Brien v McKean* (1968)). Taxation is taken into account when the court is determining earning capacity – the court has regard to the claimant's net income after taxation (*Cullen v Trappell* (1980)).

While the aim of the award of damages is to restore the victim to the same position they were in immediately before the injury in the case of personal injury, damages are clearly limited in their ability to compensate. Money can never replace an injury; however, it can give some solace and long term financial security.

Death

Historically, at common law, the death of either the claimant or the defendant meant that no action was available to survivors. This rule has been changed by statute. Where personal injuries result in death, the

estate of the claimant and the claimant's dependants have a statutory right to begin an action in damages:

- Compensation (Fatal Injuries) Act 1968, ACT;
- Compensation (Fatal Injuries) Act 1974, NT;
- Compensation to Relatives Act 1897, NSW;
- Common Law Practice Act 1867, Qld;
- Wrongs Act 1936, SA;
- Fatal Accidents Act 1934, Tas;
- Wrongs Act 1958, Vic;
- Fatal Accidents 1959, WA.

The action is normally brought by the estate of the deceased. The action is for the 'wrongful act, neglect or default' of the wrongdoer. The basic principle on which damages are awarded is that the dependants of the deceased are to be compensated for pecuniary loss which occurred as a result of the death.

Property damage

A person whose property is damaged may have a variety of remedies available to them. For example, they may be able to avail themselves of a common law judicial remedy of damages or the equitable remedy of an injunction. They may also choose from the possibility of a non-judicial remedy such as abatement which is available in nuisance.

Property damage is treated similarly to damages for personal injury. Damages for property damage are intended to be compensatory, to place the claimant into a close as possible position to that which they were in before the property was damaged. Aggravated or exemplary damages may be awarded for torts protecting property. They are particularly likely to be awarded in the intentional torts such as trespass to land.

A claimant is entitled to restitution for the loss of value of the property be it damaged or destroyed. Where the destruction of property causes consequential loss such as loss of earnings (for example, rent), the claimant may claim for the loss of profit of the cost of a substitute. For example, in *Lonie v Perugini* (1977), fruit trees in an orchard were destroyed by a fire escaping from an adjoining property.

They had to be replaced by young trees. The fruitgrower claimed damages for loss of profits until the new trees became productive.

Goods

Similar principles govern damage to goods. The aim of damages is to compensate. For example, where the damaged good is:

- profit earning – the damages awarded are its profit earning value;
- to be replaced – the damages are the cost of purchasing the replacement;
- non-profit earning – damages are the market value of the good;
- to be repaired – the reasonable cost of repairs may be recovered.

A claimant whose goods are damaged may recover for consequential loss.

Real property

The basic measure for damages to real property is diminution in value. Costs of restoration may be recovered where they are not out of proportion to the value of the land.

Economic loss

Claims of pure economic loss often occur because of a negligent misstatement. Such claims should be distinguished from claims for economic loss as a consequence of physical injury or property damage. Economic loss which results from damage to another's property may also be recoverable (*Caltex v Dredge 'Willemstad'* (1976)). Claims of pure economic loss include, for example, loss of profits. Comprehensive principles to regulate the recovery of damages for economic loss have not yet been formulated by the courts.

Injunctions

Injunctions may be:

- prohibitory – prohibitory injunction orders the defendant to stop the tortious behaviour;
- mandatory – the mandatory orders a defendant to perform an act;

- interlocutory injunction – an interim injunction which is always prohibitory, which is awarded until the outcome of the action is decided.

Theoretically, injunctions can be awarded against the commission of any tort. Damages may be awarded in addition to an injunction or instead of it.

Unlike common law damages, injunctions are an equitable remedy and are therefore awarded at the discretion of the court. If a claimant is denied an injunction, they can still pursue both common law and equitable damages. Factors which the court may take into account when exercising its discretion include delay and futility (*Vincent v Peacock* (1973)). Courts will generally be far less willing to give a mandatory injunction than a prohibitory injunction.

Interlocutory injunctions

Interlocutory injunctions are awarded when a claimant can establish that there is a serious case to be tried. This does not involve the claimant having to prove or make out a *prima facie* case. Once this is established, the court must consider the balance of convenience in deciding whether to grant the injunction. This is a consideration of the competing interests of the parties.

Quia timet injunctions

Quia timet injunctions may be granted by the court to forestall feared interference with property rights. This is particularly relevant in the tort of nuisance.

Prohibitory injunctions

A court may grant a prohibitory injunction where there is proof that the wrongful act is continuing, unless there are special reasons why this should not be done. For example, in *Vincent v Peacock* (1973), the plaintiffs asked for an injunction to stop the noisy behaviour of an alcoholic neighbour. The court observed that special circumstances include extreme hardship and 'where the effect of granting an injunction is to order somebody to perform an impossibility or to abstain from doing something which it is impossible for him not to do'. In that case, the court held that the defendant's addiction to

alcohol did not establish that his conduct could not be affected by an injunction; thus, the court granted it.

Mandatory injunctions

In deciding whether to grant an injunction, courts will weigh up comparative cost. This is particularly important in mandatory injunctions where the defendant is required to do a positive act which may be expensive. For example, in *Wrotham Park Estate Co v Parkside Homes Ltd* (1974), the defendants had built houses despite a covenant not to build in the area. The plaintiffs were denied a mandatory injunction. The court refused the application for the mandatory injunction ordering the demolition of the houses on the basis of waste. No financial harm was done to the plaintiffs by the erection of the houses.

Mitigation

Mitigation of damage is concerned with the conduct of the claimant after the tort has been committed. The person injured as a result of the tort has a duty to take reasonable measures to mitigate any damage which may arise from the tort. The policy behind mitigation is to ensure that the compensation given to the claimant is just. In other words, a fair balance must be struck between the parties in order to compensate the claimant without penalising the defendant. Where a claimant does not take reasonable steps to minimise loss, the court will reduce the damages awarded to the claimant as if the steps had been taken.

If a claimant does refuse to mitigate their damage, the court will initially determine whether the refusal is reasonable. Whether or not a claimant's refusal to mitigate damages is reasonable is determined objectively, having regard to all matters in the case including matters subjective to the claimant (*Lorca v Holts Pty Ltd* (1981)). The duty is harsh. For example, in *Hisgrove v Hoffman* (1982), the court found that the plaintiff was obliged to mitigate a loss of earning power by having a below the knee amputation and having a prosthesis fitted. Where the claimant is expected to take steps to mitigate the loss, the cost of taking such steps is recoverable. So, in *Hisgrove v Hoffman* (1982), for example, the costs of the operation and rehabilitation would be recoverable by the plaintiff.

The defendant has the burden of proving that a claimant's failure to mitigate damage was unreasonable (*Munce v Vinidex* (1974)).

13 Statutory Compensation

You should be familiar with the following areas:

- insurance
- workers' compensation
- victims of crime compensation
- sporting injuries compensation
- social security compensation
- motor accident compensation

Introduction

Often, persons injured will prefer to gain compensation under a statutory scheme rather than pursue a common law action such as negligence. This is because of a variety of reasons including:

- the expense and delay which often occurs when suing a defendant through the court system;
- a tort (or fault) does not have to be proved under a statutory scheme;
- even if a tort is proved, the defendant may be insolvent or uninsured or the claimant's damages may be reduced due to contributory negligence;
- tort compensation is lump sum compensation, whereas statutory compensation is generally paid periodically.

A claimant who wishes to obtain compensation over and above that provided by statute will of course prefer to litigate at common law. In most jurisdictions, there is nothing to prevent this outcome. The current trend in Australia is not to replace tort actions with legislative schemes, but rather to supplement the common law. Such an outcome is not standard; for example, the Northern Territory has denied

recourse to tort law for persons injured in transport accidents or at work. Victoria also limits recourse to the common law for transport and work accidents.

Insurance

Tort law functions to shift a loss from the claimant onto the defendant. Many defendants are insured against risk of liability in tort.

The primary function of insurance is to distribute the risk of loss from the individual to the insurer and thereby spread the loss amongst a large pool of persons known as the insured. The presence of an insured defendant does not affect a claimant's claim in tort. The relevance of the insurance only comes when determining the amount the defendant has to pay to the claimant. Generally, sums received from the insurance policy are deducted from damages received for the tort.

The reason for making insurance compulsory (such as third party motor vehicle insurance) is to ensure that injured claimants may recover from a defendant. That is, insurance is paid from a pool of money collected from the people who take out insurance policies. Thus, payment for damage is spread over a large number of people and is more easily paid.

Workers' compensation

All Australian jurisdictions have a no-fault workers' compensation scheme:

- Workers' Compensation Act 1951, ACT;
- Work Health Act 1986, NT;
- Workers Compensation Act 1987, NSW;
- Workers' Compensation Act 1990, Qld;
- Workers' Rehabilitation and Compensation Act 1986, SA;
- Workers' Compensation Act 1988, Tas;
- Accident Compensation Act 1985, Vic;
- Workers' Compensation and Rehabilitation Act 1981, WA;
- Safety, Rehabilitation and Compensation Act 1988, Cth;
- Seafarers' Rehabilitation and Compensation Act 1992, Cth.

This legislation means that an employer's insurer (the insurance company) is liable to compensate any employee who has suffered injuries in the course of employment, regardless of whether those injuries were caused through their own, their employer's or someone else's fault. While this legislation is not uniform, in most jurisdictions, an employee may also sue the employer at common law where the damage was caused by the employer's negligence or negligence on behalf of a fellow employee.

The workers' compensation legislation imposes a form of strict liability on the employer. For example, contributory negligence on the part of the worker does not affect the claim for compensation.

In most jurisdictions, the legislation will compensate injuries which arise 'out of or in the course of the employment'. The exception is Tasmania which continues to use the UK formula of 'out of and in the course of employment'. These words mean that a link must exist between the injury and the employment. All statutes cover a worker's death or injury or disease. This includes mental illness (except for Queensland). Each scheme varies in terms of the cover provided, the method and amount of payment. The major benefits payable are periodical payments for incapacity. This is the same whether the injury is total or partial. In all jurisdictions, the legislation provides for compensation payable to dependants of an employee upon death caused by a work-related injury.

The legislation in each jurisdiction varies as to whether an employee may pursue a common law action in tort as well as under statute. In Queensland, the Australian Capital Territory, Tasmania and Western Australia, the legislation states that an employee cannot be compensated twice; any damages received will be reduced by the amount received under workers' compensation legislation. The Northern Territory has barred the right to a common law action altogether and South Australia, Victoria, New South Wales and the Commonwealth legislation place restrictions on the type and amount of damages available at common law.

The type of damages which may be given under workers' compensation legislation include: lump sum payments for loss of a specified bodily function; periodical payments to compensate for loss of earning capacity; death benefits may be paid to an employee's dependants; and hospital and medical expenses may be recovered.

Victims of crime

Every jurisdiction except for Queensland has a legislative scheme to compensate victims of crime from funds supplied by government:

- Criminal Injuries Compensation Act 1983, ACT;
- Crimes (Victims Assistance) Act 1982, NT;
- Victims' Compensation Act 1987, NSW;
- Criminal Code Act 1899, Qld;
- Criminal Injuries Compensation Act 1978, SA;
- Criminal Injuries Compensation Act 1976, Tas;
- Criminal Injuries Compensation Act 1983, Vic;
- Criminal Injuries Compensation Act 1985, WA.

The purpose of such funds is to supply State support to those who have suffered personal injury as the result of the crime or who are the dependants of a person killed by a criminal act. Injury includes pregnancy, nervous shock, bodily harm, death and mental disorders.

The reason for such funds is that, often, a victim of crime will find it impossible to receive compensation from the perpetrator of the crime. Thus, in all jurisdictions, a claimant may receive compensation where the offender has not been found or prosecuted. In all jurisdictions except for South Australia, the claimant need prove their injuries were caused by the criminal act on the balance of probabilities. In South Australia, the standard of proof is criminal – beyond a reasonable doubt.

Recovery under such legislation will not be a bar to later actions in tort. However, each of the legislative schemes attempts to ensure that it is used as a last resort. This is done by reducing the amount of compensation a victim will receive from any other sources, such as a civil award of damages or workers' compensation.

Sporting injuries

New South Wales has established a voluntary self-financing scheme to compensate death and injury incurred by people playing sport. The Sporting Injuries Insurance Act 1978, NSW, provides no-fault based compensation. If recipients later receive common law damages, the amount paid to them under the legislation must be refunded.

Social security

Tort victims may be paid social security benefits under the Social Security Act 1991, Cth. Most social security benefits are means tested through income and assets. This means that claimants who are injured and may otherwise qualify for the benefits will be excluded or have their benefits reduced because they are over the amount of income and assets allowed. Benefits which may be claimed include:

- sickness allowance – where a person is temporarily incapacitated for work because of an incapacity caused by a medical condition arising from sickness or accident;
- disability support pension – where a person's incapacity (physical, intellectual, or psychiatric impairment) is likely to continue;
- carer pension – this provides income support for a person who is not incapacitated for work, but who is not earning an income because they are supplying care to a person who is incapacitated;
- child disability allowance – paid to a person who cares for a child with a physical, intellectual or psychiatric disability.

This is not an extensive list of statutory benefits available to a person who is injured. For example, a claimant may be injured, lose their job, recover and not be able to find employment – in such situations, that person may be eligible for a job search allowance. Hospital services are provided through the Medicare scheme under the Health Insurance Act 1973, Cth.

Motor accident compensation

Motor accident compensation legislation exists in most Australian jurisdictions:

- Motor Accidents (Compensation) Act 1979, NT;
- Motor Accidents Compensation Act 1999, NSW;
- Wrongs Act 1935, SA;
- Motor Accidents (Liabilities and Compensation) Act 1973, Tas;
- Transport Accident Act 1986, Vic.

Although these statutory provisions are not uniform, they are similar. For example, there is a uniform provision that in order to receive

damages under such compensation, the death or injury must be one 'caused by or arising out of the use of a motor vehicle'.

'Use' was interpreted very broadly by the court in *Dawson v Stevens Bros Pty Ltd* (1983). In that case, an employee of a firm which hired out compressors was injured when the compressor fell on the employee while it was being unloaded from the back of a truck. The court held that the injury to the employee arose out of the use of the compressor within the meaning of the insurance policy. 'Use' was also broadly interpreted by the High Court in *Dickinson v Motor Vehicle Insurance Trust* (1987). In that case, two children were burnt when playing with matches inside a car. They had been left there while their father went shopping. The High Court held that their injuries arose out of the 'use' of a motor vehicle. The court reasoned that the vehicle had been in use to carry the children as passengers in the course of a journey which was only temporarily interrupted for shopping. Injuries 'arising out of' does not require a direct or proximate relationship between the use of the vehicle and the injuries; however, there must be a causal or consequential relationship.

No-fault schemes

The Northern Territory, Tasmania and Victoria have no-fault compensation schemes if a claimant's injuries occur in a transport accident. Thus, a person may recover compensation from a government body regardless of whether the accident occurred through fault. Such schemes are funded through car licence payments.

In the Northern Territory, the legislative scheme has abolished the right to sue at common law for damages for a transport accident. The schemes that exist in Victoria and Tasmania are in addition to claims that an injured person may make at common law.

Trade Practices Act 1975

The Trade Practices Act was introduced in 1975. It is a Commonwealth piece of legislation which has equivalent State legislation (Fair Trading Acts) in each jurisdiction.

This legislation may be of some application to behaviour which previously could only be remedied at common law. For example, the Act states that 'a corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or

deceive'. This has been held to apply to professionals *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd and Others* (1987). Thus, doctors or solicitors or engineers or teachers who make misleading or deceptive statements may be sued using this legislation.

14 Liability of Parties and Limits on Awards of Damages

You should be familiar with the following areas:

- limitation of actions
- vicarious liability
- concurrent liability

Introduction

Apart from remoteness and causation, which have been investigated in previous chapters, there are a number of legal principles which limit the amount of damages a defendant must pay to a claimant or which may deny payment at all.

Statutes of limitations

In each jurisdiction, legislation exists to prevent the enforcement of an action if the claimant has waited too long to enforce their rights:

- Limitation Act 1985, ACT;
- Limitation Act 1981, NT;
- Limitation Act 1969, NSW;
- Limitation of Actions Act 1974, Qld;
- Limitation of Actions Act 1936, SA;
- Limitation Act 1974, Tas;
- Limitation of Actions Act 1958, Vic;
- Limitation Act 1935, WA.

The purpose behind this legislation is to protect a defendant from inaccurate recall of witnesses and from being the subject of claims for

a historically removed action. In all jurisdictions, except for the Northern Territory, the 'limitation period' for actions in tort is six years. In the Northern Territory, it is three years. In New South Wales, Queensland, South Australia and Tasmania, the limitation period for personal injuries is three years.

All statutes allow for extensions of time in particular situations. For example, where a person is a minor at the time the limitation period begins to run, the limitation period will be extended until they can sue in their own right. Limitation periods may also be extended in cases of fraud and mistake concerning the commencement of the limitation period.

After the relevant period has passed, the claimant's action is 'statute barred'. The relevant period begins from the date the claimant's cause of action arises. This means that the period begins to run once the claimant has an action against the defendant.

Vicarious liability

In certain circumstances, a victim of a tort may be paid damages, not by the defendant, but by a person who is responsible for the defendant's behaviour. In other words, C will be liable to A for damage caused by B. This responsibility for the liability of others is known as 'vicarious liability'. Thus, an employer may be liable for the tort of an employee and a principal may be liable for the acts of their agent. Vicarious liability may apply and liability transferred where acts are negligent or where they are intentional.

Vicarious liability is strict liability. It arises because of the relationship between the parties. The burden of proving vicarious liability lies with the claimant.

The explanation for vicarious liability is policy. La Forest J in *London Drugs Ltd v Kuehne International Ltd* (1992) gave the following reasons for the existence of the principle:

- ability of defendant to pay;
- employer may be able to pass loss on to be insured or raise prices;
- vicarious liability encourages employers to have safe standards.

Employer and employee

An employer is vicariously liable for the acts of an employee committed during the course of their employment. Frequently, the

courts have to determine whether the individual defendant's relationship with their employer is a contract of service (employee) or a contract for services (independent contractor). Often, the question as to whether a worker is an employee is not straightforward, many 'unusual' situations have to be determined by the courts; for example, in *Zuijis v Wirth Bros Pty Ltd* (1955), an acrobat in a crime was held to be an employee.

In determining whether the relationship is an employer/employee relationship, the courts will look to the substance of the relationship rather than the form. Thus, if the parties state that they are employer and employee, this may be evidence of the nature of the relationship but it is not binding on the court.

Tests

The courts use the following tests to determine whether a person is an employee or an independent contractor.

The control test

This is the original test used by courts; it is, however, becoming increasingly difficult to apply to a skilled workforce.

When applying this test, the courts look to the degree of control which the employer may exercise over the employee. In applying this test, the courts say that a person may be an employee if the employer controls not only what work the person does, but the way the work is done. The control test was applied in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) where the owner of a sawmill employed different persons for different parts of their operation. The plaintiff truck driver was injured through one of his colleagues. The High Court held that he could not recover, as the relationship was one of employer and independent contractor. This was because the contractors were wholly outside the employer's control in the way they performed their task.

The integration test

The court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) considered the integration test to be supplementary to the control test. It looks to whether the employee is sufficiently integrated into the organisation and/or the task to be performed to be regarded as an employee.

The organisation test

This test was criticised by Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986). If employers have overall control over the running of the organisation, this test will be satisfied. A different facet of this test asks whether the person is 'part and parcel' of the organisation – this

is the integration test. Part of the organisation control test is whether there is a right to have a particular person do the work (that is, employees cannot send a substitute to work, although independent contractors may do so); who supplies the tools and equipment (an independent contractor is more likely to have their own tools); whether the employer has a right to suspend or dismiss the person (if so, then they are likely to be an employee); method of payment whether it is on a tome or a job basis. This test was applied in *Albrighton v Royal Prince Alfred Hospital* (1980). In that case, a girl was operated on for corrective surgery to her back. She suffered damage and sued the hospital, stating it was vicariously liable for the doctor's negligence. The court held that, because the doctors accepted and complied with the hospital's forms and routines and abided by its bylaws, they were employees.

There is no single test

The current approach of the courts, supported by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986), is that there is no single test for an employer/employee relationship. If the control test is not satisfied, then the court will examine the totality of the relationship between the parties. As Wilson and Dawson JJ stated in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986):

> In many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and nevertheless be a servant ... any attempt to list the relevant matters [which will establish an employer/employee relationship], however, incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

The course of employment

The tortious act must have been performed during the 'course of employment' in order for the employer to be vicariously liable. The test is whether the employee is carrying out the work they were employed to do. If the answer is yes, then the employer will be liable

even where the employed is an employee who is carrying out the work in an unauthorised way. For example, in *Century Insurance Co Ltd v Northern Ireland Transport Board* (1942), a petrol truck exploded when the defendant driver lit a match near it to light a cigarette and then threw the match on the floor. The defendant's conduct was found to be within the course of employment. However, in *Deatons Pty Ltd v Flew* (1949), a hotel barmaid was held to be acting outside the course of her employment when she threw a glass of beer and then the glass into the face of a customer.

An employer may be liable for an independent contractor where the employer has authorised the contractor to commit a tort; where the employer is liable under statute; where the employer failed to take reasonable care in instructing the independent contractor and where the employer is under a non-delegable duty.

This area intersects with legislation such as workers' compensation legislation where, for example, an employee will be covered for travel to and from work.

Principal and agent

An agent is a person authorised by their principal to legally bind their principal and third parties. The principal's liability will arise in relation to acts of the agent done in the course of carrying out the principal's authority.

Where the principal has authorised the agent's act, the principal will be held vicariously liable for the consequences of the act. This authority does not have to be express, it can be apparent or implied. For example, in *Lloyd v Grace, Smith & Co* (1912), a conveyancing clerk, employed by the defendants, a firm of solicitors, induced the plaintiff to convey to him two cottages which she wished to sell, falsely telling her that the transaction was necessary in order for the deal to go ahead. The clerk had no actual authority to act in this way, but. through allowing him to perform conveyancing, the defendants were held liable, as they had given him apparent authority to act in that manner.

Concurrent liability

In some circumstances, two or more people may be liable for the same damage. Where more than one defendant is deemed by the court to be liable for the claimant's injuries, they are known as 'joint tortfeasors'.

This may occur in the following situations:

- concerted action or joint tortfeasors. This is where more than one tortfeasor participates in a tort to further a common purpose. Joint participation means joint liability for the resulting harm, regardless of who actually did the tort. For example, in *Henry v Thompson* (1989), three police were held to have jointly contributed to assaulting the plaintiff. In that case, one defendant jumped up and down on the head and shoulders of the plaintiff, one urinated on him and one watched, blocking the escape. Further, where an employer is found to be vicariously liable for the acts of their employee, the employer and the employee will be known as 'joint tortfeasors';
- several concurrent tortfeasors. Even where there is no vicarious liability or acting as a group, two or more people may be liable for the same damage. For example, two or more people may inflict a single injury upon the claimant, such as where two motorists inflict injuries on a claimant in separate accidents (*Nilon v Bezzina* (1988));
- independent tortfeasors. This is where several tortfeasors contribute different damage, for example, where a medical practitioner exacerbates a claimant's medical condition by negligent medical treatment (*Mahoney v J Kruschich (Demolitions) Pty Ltd* (1985)). However, successive independent tortfeasors will not share liability where the second tort is not causally related to the first, nor where the torts cause different damage to the claimant.

A claimant cannot be compensated for more than they have lost; therefore, where there is more than one tortfeasor, the amount each defendant has to pay to the claimant is shared amongst them and, thus, is reduced.

Legislation allows liability to be apportioned amongst tortfeasors according to blame or what is considered to be 'just and equitable':

- Law Reform (Miscellaneous Provisions) Act 1955, ACT;
- Law Reform (Miscellaneous Provisions) Act 1956, NT;
- Law Reform (Miscellaneous Provisions) Act 1946, NSW;

- Law Reform (Tortfeasors' Contribution, Contributory Negligence, and Division of Chattels) Act 1952, Qld;
- Wrongs Act 1936, SA;
- Tortfeasors' and Contributory Negligence Act 1954, Tas.
- Wrongs Act 1958, Vic;
- Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947, WA.

This legislation allows a claimant to sue one joint tortfeasor or all joint tortfeasors. If the claimant chooses to sue one joint tortfeasor, then that tortfeasor must try to recover from the others.

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