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LAWS2702 – Torts 1 (Negligence)

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Negligence

Elements

1. D must owe P a duty of care
2. Duty must have been breached through unreasonable conduct
3. Breach must have caused damage
4. Damage must not be too remote a consequence of breach

DoC – Novel Cases

Discrete Categories and Analogical Development

- Fragmented approach applied to cases when there is no generally accepted conception of when D might owe another DoC
- Judges move the law by incrementally expanding indiv categories cases
- But it means law lacks a general reasoning tool that may be used to determine whether or not to impose liability for carelessness

Lord Atkin's Neighbour Test

- Donoghue v Stevenson
- 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'
- 'Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'
- Can owe duties without contract
- Duty of care arises when the person or property was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other
- The party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damaged in consequence of a breach of that duty

Anns 'Two Stage' Test

- Anns v Merton London Borough Council
- 1. Whether, as between the alleged wrongdoer and the person who have suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter => prima facie DoC
- 2. Yes => Whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise
    - Dorset Yacht Case
    - Hedley Byrne = class of potential Ps was reduced to those shown to have relied upon the correctness or statements made
    - SCM v WJ Whittal = economic loss where a duty having been held to exist, the nature of recoverable damages was limited
- Rejected in Aus

Proximity

- Notion of nearness or closeness and embraces physical proximity between person or property of P
    - Includes value judgements when recognising a DoC in a new area or class of case
- Circumstantial proximity => relationship of employment, professional and client
- Causal proximity => closeness or directness of the relationship between the particular act or cause of action and the injury sustained
- Jaensch v Coffey = P's wife alleged that her psychiatric damage is a breach of D's duty, HCA held that D owed her a DoC because her mental injury was reasonably foreseeable by D and there was a proximate relationship between the parties

Salient Features or Multiple Factors

- Current HCA approach
- Whether a DoC is owed in new categories by looking at a number of different factors or salient features of the care before it
- One absolute req => harm to P is reasonably foreseeable
    - Other factors depend on type of care in question
- Perre v Apand = if a case falls outside an established category, but D should reasonably have foreseen that its conduct would cause harm to P, we have only to ask whether the reasons that called for or denied a duty in other cases reqs imposition of duty in instant case, incremental approach from established cases and principles
    - Ascertain whether the case comes within an established category
    - No => was the harm in a finding no duty
    - Yes => invites further inquiry and an examination of analogous cases whether the courts have held that a duty does or does not exist
- Caltex Refineries v Stavar = if the circumstances fall within an accepted category of duty, little or no difficulty arises; if the posited duty is a novel case must closely analyse the facts bearing on the relationship between P and putative tortfeasor by reference to salient features => non-exhaustive list
    - Foreseeability of harm
    - Nature of harm alleged
    - Degree and nature of control able to be exercised by D to avoid harm
    - Degree of vulnerability of P to harm from D's conduct, including capacity and reasonable expectation of P to take steps to protect itself
    - Degree of reliance by P upon D
    - Any assumption of resp by D
    - Proximity or nearness in physical, temporal or relational sense of P to D
    - Existence of category of relationship between D and P, or a person closely connected with P
    - Nature of activity undertaken by D
    - Nature or degree of hazard or danger liable to be caused by D's conduct or the activity or substance controlled by D
    - Knowledge (actual or constructive) by D that conduct will cause harm to P
    - Any potential indeterminacy of liability
    - Nature and consequences of any action that can be taken to avoid harm to P

- Extent of imposition on autonomy or freedom of indivs, including right to pursue one's own interests
- Existence of conflicting duties arising from other principles of law or statute
- Consistency with terms, scope and purpose of any statute relevant to existence of a duty
- Desirability of and need for conformance and coherence in the structure and fabric of CL

DoC in Cases of Personal Injury

Reasonable Foreseeability

- Palsgraf v Long Island Railroad (US) = no knowledge of contents => no duty, specific to the situation, D not liable for injury that could not be reasonably foreseen, tort liability can only occur when D breached DoC that D owes to P
- Chapman v Hearse (HCA) = the precise sequence does not need to be reasonably foreseeable, instead it needs to be consequence of same general character, it is not necessary to show that particular incident and damage were probable, sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probably results of a wrongful act, intervening act does not cut off liability as long as that intervening act is reasonably foreseeable result of the original act

Accepted Duty Situations

- Manley v Alexander = drivers to other road users, driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger
- Czatyrko v Edith Cowan University = employer to employee, -er owes a non-delegable duty to provide a reasonably safe system of work, -er must take reasonable care to avoid risk by devising a method of operation for performance of task that eliminates the risk, or by provision of adequate safeguards, -er must take into account possibility of thoughtlessness, inadvertence or carelessness; employer has obligation to provide -ees w/ suitable plant and equipment to enable safe work
- Thompson v Woolworths = occupier to entrants of commercial premises, occupier may still be liable if risk of injury is to P if there is evidence occupier could have taken steps to alleviate the risk, obviousness of risk is relevant to contributory negligence

Standard of Care

- Objective
- Person's conduct is judged by reference to standards of a reasonable person
- Legal fault is different to moral fault
- Imbree v McNeilly = SoC owed by driver to someone who might foreseeably be injured by lack of care is objective and impersonal and is not modified by personal attributes of driver (age, skill, alertness, physical/mental health, sobriety, temperament), care that is reasonably required of driver is product of harm that can result from failure to exercise care, SoC is objective and it does not vary with particular aptitude or temperament of indiv, knowledge of inexperience can provide no foundation for applying different SoC; SoC only increases when profession of particular skill, and decreases when child
- McHale v Watson = young children are expected to exercise the degree of care one would expect, not of the average reasonable man, but of a child of the same age and experience
- CLA ss 21, 22, 35, 46

Breach of Duty

- Requires P to show that D departed from standard of reasonable care => D's conduct was unreasonable in circumstances
- Question of fact
- For D's conduct to be unreasonable => harm had to be foreseeable
- Wyong Shire Council v Shirt = D is only obliged to take care and prevent risks which are foreseeable => 'real' and 'not unlikely to occur', not merely 'far-fetched' or 'fanciful'

Negligence Calculus

- Probability of harm to P
    - Bolton v Stone = duty to exercise 'such reasonable care as will avoid risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care' (Burhill v Young), not enough that event is reasonable foreseen, the injury that is likely to follow must be as such as a reasonable man would contemplate, there must be sufficient probability to lead a reasonable man to anticipate it
- Magnitude of harm to P
    - Paris v Stepney Borough Council = must take into account the likelihood of an accident happening and the gravity of the consequences; the more serious the damage which will happen if an accident occurs, the more thorough are the precautions an [employer] must take
- Cost to D of precautions to avert harm
    - Balanced against the above 2
    - D is entitled to take into account the costs to themselves of the measures which is alleged they should have taken to avoid risk of harm
    - Caledonian Collieries v Spiers = cost was low to implement tram catch points
- Social utility of conduct

    - Watt v Hertfordshire County Council = must balance the risk against the measures necessary to eliminate risk, saving of life or limb justifies taking considerable risk
- CLA ss 9, 10
    - Drinkwater and Ors v Howarth = CLA applies to deliberate acts taken without due care, CLA removed concept of risk which is 'not far-fetched or fanciful' and replaced it with concept of risk that is 'not insignificant'; if P was clearly at risk then it cannot be said risk was insignificant

Principles of Proof

- Onus is on P to prove breach of duty
- Res ipsa loquitur => discharges onus by applying evidential principle
    - If the thing (causing the accident) be shown to be under management or control of D
    - Accident is such as in the ordinary course of things does not happen is those who have management use proper care, then
    - It may be inferred that the accident was caused by D's negligence w/ the result that a prima facie case is made out and the case can go to the jury and the jury may but is not req's to infer negligence
- Schellenberg v Tunnel Holdings = once cause of injury was explained then res ispa loquitur does to apply
    - Principles of res ispa loquitur
        - Absence of explanation of occurrence that caused injury
        - Occurrence was of such a kind that it does not ordinarily occur without negligence
        - Instrument or agency that caused injury was under control of D (cf exclusive control?)

Factual Causation

'But for' Test

- s11(1)(a) replicates 'but for' test
- Although it is prelim test, if fails then P's claim ends
- Negative criterion (Merk Sharp v Peterson)
- Barnett v Chelsea = arsenic poising case, claim failed on basis that it could not be proven on balance of probabilities that D's negligence had caused the death
- March v Stramare = P drunk driver hit back of D's truck, 'but for' test had role to play in determining causal question
- Duyvelshaff v Cathcart = if the damage would have occurred notwithstanding the negligent act or omission, the act or omission is not a cause of the damage and there is no legal liability for it

Difficult Cases

- Application of 'but for' test of causation causes problems
    - Yields results that are regarded as paradoxical or undesirable in terms of legal policy or principle
- Courts departed from this test at CL => authorised under s11(2) of CLA

Problem Case 1 – Evidential Gaps

- Onus is on P to prove causation according to 'but for' test on a balance of probabilities
    - Both at CL and s12 of CLA
- Can be hard for P to discharge onus of proof => esp w/ non-understood medical conditions
- P will often not be able to show that it is more probable than not, but for D's negligence, P would not have suffered injury
    - P may only be able to show that D increased the risk of injury that they suffered
- Fairchild v Glenhaven Funeral Services = multiple employees of P had suffered asbestos related disease could not prove on balance of probabilities which particular negligent exposure had triggered the disease

Technique 1 – drawing robust inferences of causal connection

- Accepted in Aus in some cases
- Chappel v Hart = P suffered voice impairment from infection, P could not prove alternative outcome, evidential gap of could not be bridged, accepted that it is sometimes possible to prove D's conduct materially contributed to an injury where it increases the risk of the particular type of injury that P suffered; where duty to inform => P must give evidence as to what would or would not have happened if info had been provided; very risk P should have been warned materialised => in absence of evidence that breach had no effect, breach will be taken to have caused duty
    - Breach of duty is treated as materially causing or contributing to that injury unless there is sufficient reason to the contrary
- Betts v Whittingslowe = breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amount to the breach

Technique 2 – loss of chance

- Soundly rejected in Aus
- Allow P to claim damage for loss of chance of a better outcome
- Widely accepted where chance lost is financial opportunity (Sellars v Adelaide Petroleum)
- Tabet v Gett = rejects this for physical outcomes/ death/ personal injury; would frustrate the fact that P is req'd to prove causation of physical injury itself on balance of probabilities
    - Action in tort where damage is gift of action, before assessing damages, must determine if lose opportunity is same as 'loss or damage' that is compensable
    - Characterising the damage as the loss of chance of avoiding harm relieves P of burden of proving that the harm itself occurred => easier to prove actionable damage
        - D created risk of harm instead of actually causing harm itself
    - P has to prove "more probable" inference that has great degree of likelihood, opposed to certainty

Problem Case 2 – Multiple Sufficient Causes

- Where D's negligence is just one of 2+ factors
- 'But for' test produces paradoxical result that none of the factors caused the injury
- There can be a departure from 'but for' test
    - D's negligence was necessary element of a set of conditions collectively sufficient to bring about the injury in the ordinary course of events
- March v Stramare = BFT gives rise to difficulty where 2+ acts/events which would each be sufficient to being about P's injury
- Baker v Willoughby = original cause of injury to leg was compensable, unless D was held liable there would be a gap in P's compensation for harm
- Jobling v Associated Dairies = supervening natural event swallowed loss caused by original accident, thus D not liable
- Nilon v Bezzina = confirmed Jobling, distinguished Baker => not followed in QLD

Problem Case 3 – Intervening Causes

- D will not be held to have caused P's injury on account of some other intervening act
- Second intervening event severs causal chain between D's negligence and injury

First Party Interventions

- P's own act will sever causal chain and remove D's responsibility only where it is unreasonable
- McKew v Holland = P jumped down stairs w/ injured leg, this action severed chain of causation
- March v Stramare = D was liable for accident even though P drunkenly drove into back of D's carelessly parked vehicle, fact that intervening action is deliberate, or voluntary does not mean P's injuries are not consequence of D's negligent conduct*

3rd Party Interventions

- Chapman v Hearse = Dr Cherry, if 3rd party's act was unforeseeable and deliberate, it is more likely to sever causal chain; however, if both D's and 3rd party's acts are negligent and 'bur for' causes of the injury, the most likely outcome is that both parties will be held liable
- Lamb v Cambden = D was not liable for vandalism since acts of squatters were novus actus intervenient, being unforeseeable by D BUT foreseeability of 3rd party's act is not definitive criterion

Remoteness of Damage

- Even if P is able to satisfy proof of factual causation, will fail if damage is too remote a consequence of the breach or beyond the scope of liability
- Dealt with under s11(1)(b) and s11(4) CLA

Foreseeability

- The Wagon Mound = test => was the type of harm reasonably foreseeable, if yes then not too remote
- Extension 1 => foreseeable to the type of harm
    - D need not be able to foresee precise injury suffered, precise extent not way, provided the general type of damage was foreseeable
    - Hughes v Lord Advocate = don't have to foresee precise sequence of events => just general type of harm
- Extension 2 => thin skull rule
    - D may be liable for unforeseeable type of harm, if the type of harm is sustained by P on account of some pre-existing physical susceptibility of which D is unaware
    - D is still liable for additional, unforeseeable damage
    - D must take victim as he finds him
    - Smith v Leech Brain = burn to lip from molten metal lead to cancer, D was liable for P's death

Damage Must be Within Scope of D's Duty

- D will not be liable for it unless it falls within type of harm that it was D's duty to guard against
- Dealt with under s11(1)(b) and s11(4)
- Wallace v Kim = scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid
    - Medical practitioners' liability does not to extend to every physical injury to a patient that does represent the materialisation of risk (of which he had duty to warn) even where factual causation is established
- The Wagon Mound = clear that D's actions had directly caused fire, they were not liable since the damage was not foreseeable consequence of the discharge of oil

Extension 1 – Foreseeability of Type of Harm

- D need not be able to foresee precise injury suffered, its precise extent or precise way in which is occurred => provided that general type of damage was foreseeable
- Hughes v Lord Advocate = above, cannot be said that injuries from burns were unforeseeable, was not unlikely that if lamp fell and broke that someone would be burnt and that they would be serious

Extension 2 – Thin Skull Rule

- D may be liable for unforeseeable type of harm, if type of harm is sustained by P on account of some pre-existing physical susceptibility of which D is unaware

- D is still liable for additional, unforeseeable damage
- D must take his victim as he finds him
- Smith v Leech Brain = D's negligence lead to P sustaining burn to lip from molten metal which developed cancer from which P died, D was liable for P's death even though only burn was foreseeable, damages were reduced to account for chance that P might have developed cancer at some other stage during his life anyway
    - Q is whether these employers could reasonable foresee that type of injury suffered
    - What is the amount of damage which he suffers as result of burn depends on characteristics and constitution of victim?

Additional Limitation – Damage Must be Within Scope of D's Duty

- Even where harm is factually caused by D's negligence and is foreseeable
- D will not be liable for it unless it falls within type of harm that it was the D's duty to guard against
- Wallace v Kim = D was surgeon who negligently failed to advise patient of 2 material risks of an operation, accepted that if he had been warned about both risks he would not have had the operation, but if P was only warned about the risk that materialised he would have had operation anyway, D was not liable for injury because risk that eventuated was not the one that P wanted to know about, imposing liability for its occurrence would have extended D's liability beyond scope of duty to warn
    - Scope of alibility in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of negligent party to exercise reasonable care and skill to avoid
    - Not necessarily appropriate for liability of medical practitioner to extend to every physical injury to a patient that does represent the materialisation of a risk about which it is the duty of the medical practitioner to warn, even where factual causation is established

Multiple Tortfeasors

- P can never, by suing more than one tortfeasor, recover more than their total loss
- Multiple TF + separate/different damage => TF only liable to pay for damage they caused
- Multiple TF + same damage
    - Difficult when concurrent liability => very same injury
    - Personal injury => solidary (each and every TF is equally liable for full loss)
    - Left to TFs to seek contribution or adjustment of their liability
    - CLA ch2
        - Proportionate liability
        - Most cases involving concurrent property damage or pure economic loss
        - Not personal injury
        - Each D who is resp for same harm is basically liable only for such proportion of harm as reflect their own resp for it
        - For P to recover full loss => P must successfully pursue all resp parties

Multiple TFs Causing Separate Damage

- Different wrongs
- Cause distinct damage to P simultaneously => easy
- Court has to decide how much of the harm added by D2 is attributable to D2's actions alone and how much is attributable to original injury by D1
- Hunt v Protonotarios = ratifies WA's State Government Insurance Commission v Oakley
    - (1) where further injury results from subsequent accident which would not have occurred BUT FOR damage/ injury caused by D1 => added damage is caused by D1
    - (2) where further injury results from subsequent accident which would have occurred regardless of first accident BUT aggravates earlier injury => additional damage is caused by D1
    - (3) where further injury results from subsequent accident which would have occurred regardless of first accident and there is no aggravation of earlier injury => each D is liable for their own separate damage

Multiple TFs Causing Same Damage

- D1 and D2 liable concurrently for causing same damage
- Same wrong => same damage
- Different wrongs => same damage

Joint Liability => 2 Ds, 1 Wrong

- D1 and D2 resp for same wrong
- Liable for same damage
- Arises when
    - D1 vicariously liable for D2's tort
    - D1+2 breached same duty
    - D1+2 acting in concert towards a common end
- Thompson v ACT = discharging D1 does not discharge D2 of solidary => can receive up to 100%, must seek contribution if possible (but not in this case)

Several, Concurrent Liability => 2Ds, 2 Separate Wrongs

- Intendent torts => same damage
- Liable is several but concurrent
- P free to pursue action against D1, irrespective of what happened in respect of actions against D1
    - Subject only to general restrictions that apply to multiple actions against different wrongdoers

Solidary Liability & Contribution

- Solidary = all TFs liable for 100% of loss caused
- Applies in all cases of personal injury
- Applies in property damage and pure economic loss => only if Ds were joint TFs
- Law Reform Act

    - s6(c) – any TF liable may recover contribution from any other TF who is liable, whether as joint TF or otherwise
    - s7 – amount of contribution recoverable form any person shall be such as may be found by court to be just and equitable
- Chapman v Hearse = *
- Brambles Constructions v Helmers = at date when D was sued less than 6 years had passed, when D asked for contribution more than 6 years has elapsed, no need to import temporal element for contribution, read as "if used at any time" opposed to "if sued [within time limitations]"

Restrictions on Multiple Actions for Same Damages

- Law Reform Act
- s6 – where damage is suffered by any person as a result of a tort
    - (a) judgement recovered against any TF shall not be a bar to an action against any other person who would have, if sued, been liable as joint TF in respect of same damage
    - (b) if more than 1 action is brought in respect of that damage against TFs liable in respect of damage, sums recoverable under judgements given in those actions by way of damages shall not in the aggregate exceed the amount of damages awarded by judgement first given, and in any of those actions, other than that i/w judgement is first given, P shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action

Proportionate Liability Regime

- CLA
- s28 – application of pt 2
- s30 – who is concurrent wrongdoer
- s31 – proportionate liability for appropriate claims
- s32B – subsequent actions
- Hunt & Hunt Lawyers v Mitchell Morgan Nominees = purely economic loss resulting from fraud, proportionate liability applied so D2 was only liable for a small portion of loss opposed to the original 100% (solidary)

Defences

- Onus on D to establish a defence
- Difference between total defences vs those that only mitigate liability

Contributory Negligence

- At CL was total defence
- CLA => P's loss to be apportioned between D and P in proportion of their relative responsibility for the injury
- Does not apply to intentional torts
- Question of fact (McLean v Tedman)
- Joslyn v Berryman = P is guilty of contributory negligence when P exposes themselves to risk of injury which might have been foreseen and avoided, and suffers an injury within the class of risk to which P was exposed

Carelessness – Unreasonable Conduct as Regards Own Safety

- D must show that P failed to take reasonable care for own safety in circumstances of accident
- More than simply making a mistake
- P must have been at fault
- Judged by reference to standards of objective reasonable person in P's position at relevant time
- McLean v Tedman = garbage collector, employer failed to provide P with safe system of work and then D1 drove carelessly, P was not contributorily negligent, liable was apportioned 50/50 between Ds; in consideration whether there was CN by employee (i/w employer has failed to provide safe system of work) the circumstances and conditions i/w P had to do his work must be taken into account
- Caterson v Commissioner for Railways = jumping from moving train, was negligent to jump from moving train but within stress of moment it was not unreasonable
- Joslyn v Berryman = P allowed D to drive knowing D was drunk, P did not fully appreciate risks owing to own drunken state, accident was caused by D's negligence; standard P had to observe for own safety was that of a reasonable, sober person (objectiveness of approach for question of carelessness)

Carelessness Must Cause the Harm

- Not necessary that it be a cause of the accident
- Froom v Butcher = D collided with P's car, P's injuries were result of failure to wear seatbelt, damages reduced by 25%; P only 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, P not cause of damage, accident was caused by D's bad driving but damage was caused partly by failure of P to wear seatbelt, P's damage are reduced to such as extent as court thinks is just and reasonable

Law Reform Act

- Section 10 – apportionment of L in case of contributory negligence
- Form v Butcher = D as negligent driver must bear greater share of responsibility, prime cause of whole damage
    - Evidence shows failure made no difference => damages not reduced
    - Evidence show that failure made all difference => reduced by 25%
    - Some injuries that would have still occurred => reduced by 15%

Civil Liability Act

- Section 23 – standard of care in relation to CN
    - States standard of care that Ps are expected to take for themselves
- Section 24 – contributory negligence can defeat claim
- Section 34
    - Allows defence to operate as total defence
- Sections 47 & 46
    - Section 47 – presumption of CN is person who suffers harm is intoxicated
    - Introduce in D's favour, presumptions of CN which if not rebutted result in automatic, minimum deductions from P's damages
    - Removes from court any discretion to make a deduction at a lower level that stipulated statutory amount
    - Reverses evidential onus of proof by requiring P tp prove that they were not CN
- Section 48 – presumptions of CN if person who suffers harm relies on care and skill of person known to be intoxicated
- Section 49 – additional presumption for motor vehicle accident
- French v GBE Insurance = taxi-driver took P to wrong address and left him collapsed in inebriated state and then was hit by D2 & D3, court held no CN, P awarded full damages against D1 and D2 holding D1 (taxi) 80% responsible and D2 20%
    - CLA s47(2) – applies only where there has been a breach of duty giving rise to a claim to damages (which in this case did not fit any definitions of 'duty'), this was purely contractual
    - LRA s10 – P not guilty of CN purely from fact that he was voluntarily intoxicated
    - CLA s24 modifies LRA s10
        - Apportionment under s24 is not to be assessed having regard to claimant's share in resp and that the omission of any reference to responsibility was deliberate

Volenti Non Fit Injuria

- CL => total defence => same after statutory modifications
- D has consented to, or assumed the risk of suffering injury in question
- Volenti concerns consent
    - Whereas CN concerns lack of care for oneself
- Must be established that
    - P had actual, full knowledge and appreciation of risk being run and its extent
    - P accepted the risk freely

CLA ss13, 14 – easier for D to prove defence in some cases

- Section 14 – persons suffering from harm presumed to be aware of obvious risk
- Section 13 – meaning of obvious risk

CLA ss17-19 – new defence in respect of 'obvious risk' of 'dangerous recreational activities'

- Section 17 – application of div 4
- Section 18 – definitions for div 4
- Section 19 – No liability for personal injury suffered from obvious risks of dangerous recreational activities
- Fallas v Mourlas = *

Illegality

- CL => participation by P in illegal venture w/ D can result in P forfeiting any right to sue if injured
    - High level of criminality at least is necessary w/ some joint venture
- CLA s45 – criminals not to be awarded damages

Damages

- Injunctive relief
    - Trespass to land
    - Nuisance
    - Defamation
    - Wrongful disclosure of private information

- Usually damages => pecuniary and non-pecuniary loss
- CLA s65 – court may make consent order for structured settlement

Compensatory Damages for Personal Injury

- Damages for (non)pecuniary loss
- Pretrial => special damages
- Future losses => general damages
- Cannot claim aggravated, exemplary or punitive damages for personal injury
    - Unless D intended to cause the injury
    - Unless involved unlawful sexual assault or misconduct (s52)

Pre-Trail Losses

- Pain, suffering and loss of amenity
- Net financial losses comprising reasonable medical costs and losses of earnings
- Add interest
    - RB rate + 4% => 5.25%

Future Losses

- Speculative
- Both pecuniary and non-pecuniary loss
- Pecuniary
    - Loss of future earnings and cost of future care
    - Capped to exclude full compensation for those earning more than 3x national average wage (s54)
    - Loss of future earning capacity
        - s54 – damages for loss of earnings
        - s55 – when earnings can not be precisely calculated
            - (3) court must state assumptions on which the award is based, and methodology used to arrive at the award
        - Reardon-Smith v Allianz Australia Insurance = section 55 (3) is concerned to ensure that the assessment of damages proceeds in a manner which is sufficiently transparent that the basis of the decision is apparent, both to the parties and to an appellate court
            - Plaintiff must substantiate any claims for economic loss from irregular income. Semi-professional surfer only entitled to income he could demonstrate he would have made on the balance of probabilities.
    - Future care costs

        - Includes costs of medical treatment
        - Can include carer costs (Griffiths v Kerkemeyer)
            - P can claim for home care provided whether they pay for it or not
        - HCA rejected costs of meeting carer obligations that injured party previously was meeting under s59A (CSR v Eddy)
            - Not permissible to award compensation for services provided by a care giver which replace the services provided by the Plaintiff to a third party
        - s59 – damages for gratuitous services provided to an injured person
        - s59A – damages for gratuitous domestic services provided by an injured person
        - Kriz v King = s59 does not provide entitlement to damages, it modifies and restricts CL entitlement, once 6hr/6 months threshold is met => damages for gratuitous care can be awarded even if the services will later be less than 6 hours per week
- Non-pecuniary
    - General method of calculation
        - Loss of amenity => assessed by courts according to system whereby each injury is accorded a value on statutory injury scale (SIV)
            - Maximum levels at each level
            - s61 of CLA
            - maximum amount recoverable = $308,400 + (100-90)*$5010 = $358,500
        - P are awarded damages for any subjective pain and suffering on top of LoA
    - Multiple injuries
        - Use ISV of most serious injury + bump up ISV to higher level within normal range for that type of injury
        - Courts can pick ISV higher than maximum for dominant injury but should not pick a figure that is >25% higher
- Discounts on awards for future loss
    - Vicissitudes of life
        - Possibility that P might have suffered some later injury or decline in health through misfortune of any event
        - 5-15%
    - Being awarded compensation for losses that have not yet happened

- s57 of CLA => 5%

Deductions of Collateral Benefits and Failure to Mitigate Loss

- Collateral benefits
  - Deduct things like sick pay that p received from employer
  - Pp 721-726
- Failure to mitigate
  - P could have avoided by taking reasonable steps
  - Pp 702-703
  - Formal process under CLA
    - D serves notice on P of steps D believes P should be taking to avoid loss
    - s53 – notice requiring of damages

Limitation of Actions

- Compromise between P's rights and D's liberty to proceed freely

When Time Begins to Run

- Personal injury + property damage
- Tun when cause of action accrues
- Normally time when injury/damage is suffered, whether or not P knows about it => time of first significant damage (Cartledge v Jopling)
- QLD instead of startling clock later => allows for it to be kept ticking longer by allowing Ps to apply for extensions

Relevant Limitation Period

- Tort claims = 6 years
- Person injury = 3 years
- Limitations of Actions Act
    - s10 – actions of contract and tort and certain other actions
    - s11 – actions in respect of personal injury
    - s11A – no limitation period for actions for child sexual abuse

Extensions of Time

- P may apply for extension where they did not know about and had no reasonable means of finding out about some decisive fact that is material to claim
- Only when material fact came to light after a date within 1 year of end of normal limitation period
- Court can give extra year running from date of material fact either came to light or should have come to light
- Limitations of Actions Act
    - s31 – ordinary actions
    - s30 – interpretation
- Queensland v Stephenson = an applicant always has at least one year to commence proceedings from the time when his or her knowledge of material facts (as defined in s 30(1)(a), coincides with the circumstances that a reasonable person with the applicant's knowledge would regard the facts as justifying and mandating that an action be brought in the applicant's own interests (as in s 30(1)(b))
    - If you did not know and had no means of knowledge of relevant decisive material facts during the 3rd year, and then get them later, the court can extend the time