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NICK'S LAW NOTES

tort law

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Intentional Torts

All intentional torts are actionable per se.

Battery

A battery is an act which causes unwanted contact with the body of another without lawful justification. Battery is an intentional tort, and therefore negligent contact is not actionable battery (Letang v Cooper). The act must be sufficiently direct; throwing an object would suffice (Scott v Shepherd). Hostility is not required (In Re F), and the slightest contact, not using force nor causing injury, would suffice (Cole v Turner). Not every act of Df which causes physical contact with the Pf amounts to actionable battery (Collins v Wilcock, a case which involves the physical restraint of a woman by an officer, Goff LJ formulated the test of justified physical contact which is "generally acceptable in the ordinary conduct of daily life".

Assault

An assault is an act which directly and intentonally causes reasonable apprehension of immediate battery without lawful justification. Words may cancel out the effect of an act (Tuberville v Savage), and if the threatened battery is unlikely to happen, as when police are restraining rioters, then there is no assault (Thomas v Mine Workers); however, a person restraining another may not be sufficient to prevent assault (Stephen v Myers).

False Imprisonment

An act which directly and intentionally causes Pf's freedom of movement to be totally restrained without lawful justification constitutes false imprisonment. The restrain must be total (Bird v Jones); knowledge of restrain is not necessary (Murray v MOD). Once a person is under lawful detention of prison, *ex hypothesi* the detention cannot constitute false imprisonment even if the prisoner is deprived of limited freedom which he is entitled to under the prison regime (R v Parkhurst Prison). Prison authorities' continued detention of Pf after correctly calculated date of release constitutes false imprisonment (R v Brockhill Prison).

For persons who initially consented to imprisonment but withdrew consent afterwards, there is no false imprisonment if 1) Df provide a reasonable condition to exit (Robinson v Balmain Ferry – Pf wished to take ferry across a harbor but changed his mind and refused to pay upon exit – held not liable as Pf could still have taken next ferry out or pay the 1 penny to exit – merely called upon to leave wharf in the way he had contracted to leave it) or 2) a contract providing contractual terms to exit exist (Herd – Pf miner employed by Df entered mine shaft and found it unsafe, requesting to be brought to surface before end of his shift).

A lacuna in the law may be found in scenarios involving **negligent false imprisonment**. No claim in negligence is allowed until there is real personal injury, and no claim in trespass to the person is allowed because there was no intention (In re F).

Wilkinson v Downton

A deliberate and willful act which is calculated to cause harm and does actually cause harm would be liable under the Wilkinson v Downton rule, notwithstanding that such harm was indirectly caused. Actionable damage under the rule includes psychiatric harm (Janvier), but not distress (Wainwright v Home Office).

Steps

Type of harm: actual physical harm or recognizable psychiatric illness

Fault: subjective intention, imputed intention or objective recklessness

Role today: able to recover for both physical and psychiatric harm under negligence, but this applies in caes where proving a duty of care is difficult.

Harassment

There is no common law tort of harassment in the UK, but Singapore has recognised the tort in Malcomson v Mehta, defining it as "a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person."

Key elements are 1) acts which persistently annoy or cause distress to PF (cannot be one-off incident); 2) intention (actual or imputed); 3) hostility not required (even good intentioned acts may constituet harassment; and 4) actionable per se.

No common law of harassment, only statutory offence under sections 13A and 13B of Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184). **Does not apply to harassment by telecommunications**.

Creation of a tort of harassment to fill lacuna which other areas could not: **private nuisance** extended only to people with locus standi; **negligence** required recoverable damage caused; and **Wilkinson** required harm as well.

The UK position was first identified under Khorasandjian v Bush (Pf was daughter of owner of property – harassed by Df with phone calls – CA allowed for Pf with no **locus standi**, entitled to a **quia timet injunction** to restrain a private nuisance in the form of harassment by persistent unwanted phone calls). It was subsequently **overruled** by Hunter v Canary Wharf, where the courts held that the harassment action is not subsumed under private nuisance and that Khorasandjian has to be seen in the light of statutory provision on harassment. In UK, there is a UK Protection from Harassment Act enacted in 1997, under which s 1(1) states that a person must not pursue a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other.

Defences to Trespass

VOLENTI, ILLEGALITY AND CONTRIBUTORY NEGLIGENCE

The defence of volenti, illegality and contributory negligence may be applicable in trespass to the person (Murphy v Culhane).

LAWFUL AUTHORITY

Self-evidently, lawful authority is a good defence to false imprisonment (*Murray v MOD*), and an arrest made in good faith by a policeman is sufficient notwithstanding the fact that procedures were not followed (*Percy v Hall*).

NECESSITY

The right of a competent adult to bodily integrity is fundamental and unqualified, and extends to refusing medical treatment, even in a life-threatening situation. Therefore, a necessary life-saving Caesarean operation conducted against the wishes of the mother is a battery (*St George Healthcare Trust v S*). Even the valid opinions of mental

patients must be respected. However, a mother's refusal to ensure a safe delivery via caesarean out of religious reasons will not be considered because it is necessary to save a viable foetus.

BEST INTEREST OF PATIENT

When a patient is unable to make a decision, either because of incapacity, minority, or unconsciousness, a doctor may act in a patient's best interest, which is a good defence to battery. This includes when a patient in a weakened condition who is unable to make a genuine decision (*Re T*). The doctor's actions, when a patient is beyond treatment, may include discontinuing treatment even when it means that the patient will die (*Airedale NHS Trust v Bland*).

SEF-DEFENCE/DEFENCE OF OTHERS

Self defence may be a good defence to trespass, but the force employed cannot be excessive (*Cross v Kirby, Ashley v Chief Constable*).

CONSENT

Consent is a good defence to trespass, and may be express of implied (*Cole v Turner*). It must not been given under duress. This excluded economic duress in the past (*Latter v Braddell*) but that will likely not be the case now.

Theoretically consent must be capable of being withdrawn anytime, subject to practical requirements. Therefore it is respectfully submitted that the cases of *Robinson v Balmain* and *Herd* were wrongly decided.

Duty of Care – General

*In Singapore, the Spandeck test is used to determine the imposition of a duty of care regardless of the type of damage. This approach does not necessarily mean that all types of damage will always be treated equally within the duty of care rubric. Rather, it is the circumstances in which the loss has arisen which dictate whether something more is required to warrant the imposition of a duty of care.

Case	Nature	Proximity	Policy	Significance
Spandeck (2007)	PEL	Cir, Phy, Causal (Sutherland) VAR/RR (Hedley Byrne)	Anns (see Animal Concerns)	Prima facie duty at proximity stage
Ngiam Kong Seng (2008)	PSY	Primary victim: whether he/she was close to the zone of danger + McLoughlin (but doesn't have to fulfil all) Secondary victim: McLoughlin (need to fulfil all)	""	
Amutha Valli (2009)	PSY	VAR/RR? (implicit, don't mention it) to primary victim I think it is safer to say that **there are sufficient facts available to establish duty**. Don't have to use legal principles.	""	Difference in practice and in theory? In theory, Spandeck and McLoughlin apply to all, but how does it apply to **primary victims**?
Man Mohan (2008)	PSY	McLoughlin	""	
Animal Concerns (2011)	PEL		Caparo strict, must have a positive public policy; Anns very expansionist, no negative consideration	
Skandinaviska (2011)	PEL			

Difference between factual foreseeability and legal foreseeability: factual foreseeability (Palsgraf, Ngiam) has a naturally wide ambit and asks whether Df can foresee his act causing harm whereas legal foreseeability asks whether the law can foresee such act causing harm.

Miscellaneous: It is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party because 1) there could exist an express clause in the contract excluding a tortious duty of care (Robinson v Jones) or 2) the contractual framework may be so structured as to demonstrate that the parties intended thereby to exclude the imposition of tortious duty of care (Animal Concerns). Could this be useful in CN? (Go Dante Yap?)

UK Approach

Neighbour Principle

Test based on **reasonable foresight of harm**

Wide concept that required further refining

Home Office v Dorset Yacht: neighbour principle ought to apply unless there is some jusitifcation or valid explanation for its exclusion → led to Anns two-stage test

Anns Two-Stage Test

1) Proximity
2) Policy considerations (to negate, limit or reduce scope of duty)

Considered to have opened floodgates

Criticised and overruled by Murphy v Brentwood: **incremental approach** to determine duty of care

Caparo Three-Part Test

1) Reasonable foreseeability of harm
2) Proximity of relationship
3) Fair, just and reasonable
4) *Exclusionary rule against recovery of PEL*

Adopted incremental approach.

Evaluating Policy Considerations

- Donoghue v Stevenson, Anns consider policy **expressly**
- Caparo, Murphy consider policy **impliedly**, merged with other considerations such as proximity and whether it is fair, just and reasonable

Singapore Approach

Spandeck Two-Stage Universal Test

- Factual foreseeability of harm (low threshold test; pragmatic reasons: claims would not fail this, and if they do, it would not be logical to raise them in the first place)
- 1. Legal proximity (Sutherland factors)
    - Physical (closeness in time and space)
    - Circumstantial (special relationship; assumption of resp./reliance)
    - Causal (whether it was obvious that tortfeasor's conduct caused losses)
    - Supported by twin critera of a) voluntary assumption of responsibility, b) reliance by one party to his detriment + knowledge of reliance
- 2. Public policy
- Incremental approach

Historical Development of Spandeck Test

- Ocean Front: Applied Anns, relied on Junior Books, "proximity as determinant of duty of care and its scope", rejected English exclusionary approach towards PEL
- Eastern Lagoon: Expressly rejected Anns but applied substantively similar test

- PT Bumi: Judge favoured two-stage approach to PEL cases
- The Sunrise Crane: PEL apply two-stage test, physical injury apply Caparo three-stage
- Sunny Metal: Andrew Phang attempts to reconcile Anns and Caparo

Factual Foreseeability

Two cases to note:

- Bourhill v Young (Pf some distance away from aftermath of accident – came upon it, suffered nervous shock – held that Df not liable as it was not reasonably foreseeable that she would be affected)
- Palsgraf v Long Island (Guard pushed passenger, causing parcel to explode; parcel explosion caused scale at the other end of train station to fall on Pf – held that there was no foreseeability of harm)

Proximity (General)

- Hill v Chief Constable of West Yorkshire (Pf's daughter murdered by serial killer, sued **police** for failing to catch earlier – no duty because no special relationship between daughter and police to ensure that daughter is safe – held not liable)
- Capital and Counties v Hants CC (**Fire brigades** in general not held liable unless they worsen situation – duty is to the public, not person who called (based on *general reliance*))
- Kent v London Services (Pf pregnant, asthma attack, called ambulance which only arrived 40 mins later – miscarriage – **ambulance** held liable; assumption of responsibility/reliance to Pf's destriment establishes proximity – unlike fire bridages, duty is to the person who called (based on *specific reliance*))
- Alcock v Chief Constable of South Yorksire (**rescuers** - Relational/Physical/Causal)

Policy

1. DF IS A PUBLIC AUTHORITY

- In general, **there is public policy immunity** for discharge of public duties unless **1) special relationship** or **2) assumption of responsibility to particular defendant**
- Hill v CC W Yorkshire
    - Defensive policing; "defensive frame of mind"
    - Limited resources
    - Flood of claims in suing for crimes that should have been discovered earlier

2. NERVOUS SHOCK SUSTAINED BY RESCUERS

- Frost v CC S Yorkshire
    - Rescuer argument: Had to be primary victim (they were not because they were not in actual danger of physical injury or reasonably believed that they were in danger)
    - Employment argument: Would open up claims in similar categories i.e. doctors, hospital workers exposed to gruesome sight
    - Justice argument: Policemen already have benefit of statutory schemes which are better than relatives in Alcock who have nothing

3. LEGAL PROFESSION: IMMUNITY FROM SUIT

Singapore position – **no immunity except in criminal trials** where finality to prosecution is critical (Chong Yeo v Guan Ming Enginnering, where courts decided that Rondel does not represent Singapore law)

UK position – **no immunity at all** regardless of type of suit

- Lawyers used to enjoy immunity from suit concerning their conduct of cases in court (Rondel v Worsley). However, this case was overruled by the HL in Hall v Simons [2000].
    - Reason was that public policy was not immutable, and had changed since 1969 (public policy reasons for immunity are, in practice, no longer relevant (see Muggers for detailed info))

Australia position – **complete immunity** for barristers from **negligence actions** (D'Orta-Ekenaike v Victoria Legal Aid)

4. EXISTING CONTRACTUAL STRUCTURE

- Marc Rich (Classification society NKK (non-profit) initially recommended permanent repairs to shipowner of damaged vessel – shipowner objected – NKK persuaded to recommend temporary repairs instead, which later result in ship sinking and loss of cargo – courts held that although there was sufficient proximity, imposition of duty would not be just, fair or reasonable)
    - Finding a duty of care would substantially alter international trade i.e. classification societies have to take up third-party insurance, indemnify against losses etc
    - Non-profit organisation. Finding a duty would lead to defensive practices
    - Floodgates

5. WRONGFUL LIFE (CLAIMS BY CHILDREN)

Claim by child that he would not have been born if not for negligence of Df.

PP: allowing claim would

1) Undermine sanctity of life
2) Expose medical practioners to liability
3) Open doors for action on wrongful life to be brought against mothers for failing to abort
4) Impossible to assess damages in comparing disabled child to non-existent child

Singapore position - JU

- Affirms McKay, claims in negligence for wrongful life is absolutely barred
- However, JU only discussed this in summary fashion. Future court may want to consider this afresh, and consider English cases.

UK Position – McKay (failure to diagnose Rubella in child – mother would have gone for abortion if she had known – courts held that no duty owed to child – claims for wrongful life are never actionable)

Australia position – Harriton v Stephens (similar facts – wrongful life not actionable)

6. WRONGFUL BIRTH (CLAIMS BY PARENTS)

Claim by parents that doctor's negligence has burdened them with unwanted child

UK position – Stated in McFarlane with Rees addendum

- McFarlane (negligent sterilisation led to birth of unwanted child – **claim for upbringing of children barred**)
    - **Corrective justice** (someone who has harmed another without justification must compensate the other – wrongful birth will succeed) vs **distributive justice** (distribution of burdens and losses among members of society; not morally acceptable to claim handouts to look after a perfectly healthy albeit unwanted child – wrongful birth will not succeed)
    - Essentially, distributive justice is preferred: a child can never be taken to be a burden
- Rees v Darlington (creative solution - lump sum for loss of parental autonomy awarded, without proof of loss)

Australia position – Cattanach v Melchior (similar facts to McFarlane except that Df was in private practice – HC held by a bare majority that **claims should be allowed**)

- Benefits from child are not legally relevant
- Distinguish: **Df in private practice**
    - 3rd party insurance
    - No issue of overburdening public authority
    - Not very persuasive because heavily divided

Duty of Care – Omissions

General

Courts have generally been reluctant to impose liability for a pure omission, regarding it as less culpable as a positive act, and because of the practical problem of identifying defendants, especially in a rescue situation. For example, in Smith v Littlewoods, the Df was held not liable for failing to prevent vandals from using his vacant property to set fires (which spread to Pf's property) as he had no knowledge of vandals' activities. One method of circumventing the pure omissions rule is semantic: by classifying the omission as part of a larger positive duty or treating the omission as an item in a chain of active negligent conduct (Kelly v Metropolitan Railway).

Exceptions

However, even in pure omissions, courts will impose liability in certain circumstances, such as 1) where there was an express or implied assumption of responsibility (Stansbie v Troman – decorator left house unlocked resulting in theft, Barrett v Mod), 2) where there exists a special relationship of reliance between Pf and Df, e.g. parent/school and child (Carmarthenshire CC v Lewis), 3) where Df exercises control over third parties committing wrongful acts, e.g. jailer and detainees (Home Office v Dorset Yacht), police and criminal in custody (obiter in Hill v CCWY) or 4) where defendant exercises control over land (Goldman v Hargraves) or things (Haynes v Harwood, Topp v London County Bus).

On the question of whether there is a duty to protect, the case of Cole v South Tweed held that there is no duty to protect patrons against risk of physical injury resulting from consumption of alcohol. Likewise in Singapore, it was held in Childs v Desormeaux that social hosts owed no duty to patrons to protect patrons against risk of physical injury resulting from alcohol consumption. It may be different in the case of commercial hosts because there is an expectation by the public and patrons that they are trained to monitor consumption.

There is a duty to rescue in Australia. In Lowns v Woods, Pf's son suffered an epileptic fit and sought help from Df doctor. Df doctor refused and Pf's son ended up with nervous shock. The court held the Df liable due to the Medical Practioner's Act and Df's own admission that had he received call he would have been obliged to help. While Australia places society's expectation of the behaviour of a doctor over individual autonomy, the position in Singapore and UK are unclear.

The doctor's actions, when a patient is beyond treatment, may include discontinuing treatment even when it means that the patient will die (Airedale NHS Trust v Bland).

Duty of Care – Nervous Shock

General

Where psychiatric harm is consequent upon actual physical injury of Pf arising from Df's negligence, damages for psychiatric harm is normally recoverable. However, if the psychiatric harm is not consequent on physical injury, there are certain legal restrictions to the claim in negligence.

UK approach

The UK approach in the law of negligence relating to nervous shock makes an important distinction between primary and secondary victims (Dulieu v White, Page v Smith), and the distinction was subsequently applied in Alcock and Frost along with the McLoughlin factors. Primary victims comprises persons who, because of the defendant's negligence, were 1) placed in foreseeable danger of physical harm (Page v Smith), or 2) reasonably believed themselves to be in danger of physical injury, (Dulieu v White, Frost v CCSY).

Claimants who witness accidents, but are not themselves at risk of injury, are classified as secondary victims. A secondary victim, to recover, must prove 1) that a person of customary phlegm would foreseeably have suffered psychiatric injury, 2) that the psychiatric injury was caused by a 'shocking' event, 3) that there was a sufficiently close relationship between him and the accident victim, and 4) that he perceived the accident or its immediate aftermath through 5) his unaided senses, though explicit 'live' television or radio broadcast may suffice. (Alcock v CCSY). If 1) is satisfied then a sensitive victim may recover to the full extent of his injury (Brice v Brown). For 2) the law will presume closeness between spouses, and between parents and children. In other instances the onus is on the plaintiff to prove the closeness of the relationship. For 4) the viewing of victims in the hospital before they were treated is sufficient (McLoughlin v O'Brian) but the identification of victims at a mortuary is not (Alcock). Even for rescuers, they have to be primary victims in order to claim (Frost, Chadwick).

Singapore approach

The Singapore approach with regards to nervous shock cases follows Ngiam Kong Seng (ruled out at FF), which applies the Spandeck two-stage test of proximity and policy, which are together preceded by the special question of factual foreseeability, with additional refinements i.e. having to prove a recognisable psychiatric illness at the threshold inquiry stage and using the McLoughlin factors of relationship, physical and causal proximities to determine proximity. It is also to be applied incrementally, with reference to facts of decided cases.

> MCLOUGHLIN FACTORS
>
> *Relational*
>
> In Alcock at [19], it was held *per curiam* that the class of persons whose claims could be recognised was not limited to the narrow range of relationships such as husband/wife or parent/child. It is required, however, that the relationship must be within the defendant's contemplation.
>
> The underlying rationale for denying bystander claims is that they should be assumed to have sufficient fortitude to withstand the "calamities of modern life" and that to allow recovery would open floodgates (McLoughlin at 422). With respect to the first proximity requirement, it was stated that, "The closer the tie (not merely in any relationship, but in **care**) the greater the claim for consideraiton". However, Lord Ackner

and Lord Oliver in Alcock opined that a bystander may be able to claim in exceptional circumstances where the horrific event in question would probably be traumatic for even the most phlegmatic spectator.

Physical (proximity to accident in time and space)

1) sight or hearing, 2) immediate aftermath

The second proximity requirement extended to a situation where the claimant suffered shock upon the direct perception of the aftermath. Where the victims were perceived **less than two hours after the accident in the same condition** as they were at the scene of the accident itself, covered with the oil, grime and pain as in McLoughlin, this constitued the "immediate aftermath" for the purpose of determining duty. In Alcock, Lord Ackner and Lord Jauncey stated, however, that a **visit to the mortuary some eight or nine hours after the disaster did not constitute an aftermath**.

In Singapore, this rule is applied in a less strict fashion as per Pang Koi Fa, where the courts held that Pf was proximate in both time and space to the tortious event i.e. death of her daughter as **Pf had witnessed the gradual deterioration of her daughter's condition**.

Causal (means by which shock was caused)

In McLoughlin, the question was left open as to simultaneous tv would suffice to satisfy the requirement. In Alcock, it was held that witnessing of accident through television was not sufficiently proximate. Lord Keith stated that the television broadcast was not to be equated with the viewer being within "sight or hearing" of the event or of its immediate aftermath. Lord Ackner noted that pictures of "suffering by recognisable individuals" were not shown and, thus, adopted the same position as Lord Keith. However, he also stated that **simulateneous broadcasts could not be excluded in all cases**.

It has also rejected the UK approach in distinguishing primary and secondary victims set out in Page v Smith. In applying *Ngiam*, it has been held that extreme grief is not a recognisable psychiatric illness (Man Mohan). The harsh Alcock conditions have also been relaxed locally when a claimant suffers psychiatric injury as a result of witnessing the effects of a negligently performed medical procedure. In Pang Koi Fa it was held that the psychiatric injury suffered may occur gradually, and the witnessing of the deterioration of the patient following the procedure would be sufficient. Additionally, in Singapore, Section 21 of the Civil Law Act (Cap 43) provides for a claim for bereavement (i.e., grief, distress at the loss of a loved one) by specific close relatives of a person who dies as result of an act of negligence.

Psychiatric harm consequent upon witnessing the destruction of Pf's own property is claimable (Attia v British Gas). Similarly, in Owens v Liverpool Corporation, mourners at a funeral procession recovered damages for psychiatric harm suffered when the negligent driver of a car collided with the hearse and caused the coffin bearing the body of their close relative to be displaced. Recovery for psychiatric harm caused by apprehension of contracting disease in the future is not claimable (Rothwell).

Finally, in the case of Amutha Valli (ruled out at FF), it was said in the dicta that in using public policy, courts should articulate these concerns under PP rather than subsume these concerns within the proximity, which may then lead to an overall distortion of the legal test to determine the existence of a duty of care.

What about example of reckless driver brushing past Pf, without touching, causing psychiatric harm? How do you reconcile this under Spandeck?

Pang Koi Fa did mention expanding the three McLoughlin factors and not to apply them religiously. In that case they considered expanding the first limb of proximity to consider parties who felt as if they were responsible or had contributed to the death or injury of the victim of the negligent act. I will warrant a stab at the suggestion that should the two limbs of proximity be satisfied quite clearly i.e. you were technically involved in accident and you actually experienced it - the Singapore court might be **willing to expand the relational proximity**.

> **Alternative view in Pang Koi Fa – relaxation of the McLoughlin factors**
>
> The plaintiff's claim also succeeded on the alternative view that the **defendant had through his negligence put the plaintiff in the position of thinking that she had been responsible for her daughter's death**. In establishing this alternative ground it was necessary to prove the primary requirements of reasonable foreseeability and relationship of proximity, but the requirement of the three proximities was modified somewhat to reflect the situation envisaged. Hence the class of persons who may recover may not merely be limited by the ties of love and affection, but may carry the additional requirement that the defendant through his negligence had put the plaintiff in a position of being morbidly pre-occupied with the thought that he or she had been responsible for the injury resulting to the primary victim. As for the final requirement of the means by which the shock was inflicted, the shock may result not merely from a direct perception through sight or hearing of the accident or its immediate aftermath, but included concomitantly the sudden and horrifying realisation, which one would expect a reasonable person in the position of the plaintiff to have, that he or she was responsible for the damage or injury caused

Example paragraph – No duty of care for breaking bad news

There are policy considerations against making people liable simply for communicating information, as seen in the local judgment of *Ngiam Kong Seng*, which quotes the Australian High Court in stating that "in the absence of a malign intention, no action lies against the bearer of bad news for psychiatric harm caused *by the manner in which the news is conveyed*" [emphasis added] and "the discharge of the responsibility to impart bad news fully and frankly would be inhibited by the imposition in those circumstances of a duty of care to avoid causing distress to the recipient of the news".

Duty of Care – Pure Economic Loss

General (Main)

Due to the possibility of indeterminate liability, courts have generally been unwilling to allow recovery in tort for pure economic loss outside of the Hedley Byrne principle. In Singapore and Australia, however, the courts are willing to allow recovery for defective property and relational economic loss as well. Thus, only economic loss which are contingent upon some physical loss will be recoverable in tort, as shown in the cases of Spartan Steel and Candlewood Navigation. Although the line drawn is arbitrary and, as Edmund-Davies LJ rightly pointed out in Candlewood, the incidence of physical loss is 'purely fortuitous', such a 'bright line' is necessary to prevent indeterminate liability.

General (Extra)

Consequential economic loss

The law allows for financial loss consequent upon physical damage to either person or property as long as the loss is unavoidable and flows inevitably from physical damage subject to duty to mitigate (British Westinghouse, Payzu v Saunders – Contract cases). The problem comes in when financial loss is not associated with any physical injury or physical damage to property, known otherwise as 'pure economic loss'.

Reasons for restrictive approach

The courts in general are reluctant to allow recovery in tort for pure economic losses because of 1) the fear of imposing indeterminate liability, or imposing "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (Cardozo CJ in Ultramares), 2) the 'laissez-faire' idea that in economic competitions one often gains an advantage at the expense of another and that certain forms of economic harm is not only acceptable but encouraged, and 3) the recognition that where there has been a contractual relationship, the courts do not want to encourage claimants to circumvent lack of contractual remedy by allowing claim in tort.

Exceptions

However, there are three scenarios where pure economic losses may be recoverable.

- The first scenario is in property defects where defect lowers economic value of property. This is **rejected in UK** (Murphy v Brentwood – exclusionary rule) and **accepted in Australia** (Bryan v Maloney) and **Singapore** (Ocean Front and Eastern Lagoon notwithstanding that both claimants were MCST). However, whether this exception applies to **chattels** remains undecided (PT Bumi, How does The Sunrise Crane come in?) and courts have cautioned extending the rule in situations where parties have contractually allocated risks.
- The second scenario is Hedley Byrne situations of negligent misstatements, which require a special relationship involving notions of voluntary assumption of responsibility and/or reasonable reliance. It is **generally accepted in all jurisdictions**. It is also often extended to cases of professional relationship where there may not have been direct reliance by claimant but puts claimant in an unfair position (e.g. White v Jones, Smith v Eric Bush, Spring v GA)
- The third scenario lies in relational economic loss where claimant suffers losses due to damage to 3rd party or 3rd party's property. This is **rejected in UK** (Candlewood Navigation, Leigh & Sillavan), **accepted in Australia** (Caltex Oil), and accepted in Canada (Canadian Steamship). It remains undecided in Singapore.

A) Property defects

Example paragraph – Property defects

The relevant test to apply in such a situation is the Spandeck two-stage test of proximity and policy, which are together preceded by the threshold question of factual foreseeability. It is to be applied incrementally, based on facts of decided cases. For pure economic losses accrued from defective properties, Singapore departs from UK's exclusionary rule in Murphy v Brentwood and adopts Australia's approach in Bryan v Maloney, as seen in Ocean Front and Eastern Lagoon.

Rule

The law regarding recovery in tort for pure economic losses suffered as result of acquiring a defective item of property has been approached differently in various jurisdictions. Singapore adopts its approach from Australia and rejects UK's exclusionary rule, holding that recovery for defect properties is allowed as per Ocean Front and Eastern Lagoon. The relevant test to apply is the universal Spandeck test where legal proximity is determined by physical proximity, circumstantial proximity and causal proximity, along with the twin criteria of voluntary assumption of responsibility (to prevent/avoid causing injury) and reasonable reliance.

Application

Policy reasons of 1) **land scarcity in Singapore** and 2) financial outlay in acquiring residential property often represents **significant life savings** favour this approach too. However, courts have cautioned extending the Ocean Front and Eastern Lagoon principle to situations where parties have contractually allocated risk (PT Bumi). Based on policy reasons, only property defects to residential buildings are recoverable and not commercial (Woolcock).

Example paragraph - Chattels

In *PT Bumi*, it was held that the principles in *Ocean Front* and *Eastern Lagoon* do not represent a general approach. In the case, a defective engine was held to only be a chattel, which the principles in *Ocean Front* and *Eastern Lagoon* were not meant to cover. However, the court also stated that this did not mean all chattel would be not included.

In UK, however, the House of Lords in Murphy v Brentwood unequivocally stated that defects as to quality, defects that are potentially dangerous to other people or buildings, and defects that are potentially dangerous to the property itself, are all instances of pure economic losses are not claimable in tort. The only exception, made by Lord Bridge, was when a defective property endangers passers-by and neighbouring property.

Murphy has been criticised for its negative attitude towards encouraging investments in safety, and the Australian High Court in Bryan v Maloney departed from it. It held that builders of residential property owe a duty even to subsequent purchasers to take reasonable care in ensuring that property is defect-free. Mindful of the problem of indeterminate liability, the court expressly restricted recovery to dwellings and excluded chattels.

B) Negligent Misstatements

Misrepresentation Act, s 2(1)

Allows for recovery for purely economic loss caused by negligent misstatements but only where there is a contractual relationship and it does not matter whether it was made fraudulently or not, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. Thus, still have to rely on common law for non-contractual parties.

General

Liability in tort for negligent misstatements was first recognised in Hedley Byrne v Heller, where it recognised the following factors in determining whether a duty of care would arise between Pf and Df: 1) the skill and judgement of maker of statement; 2) whether there is reasonable reliance on the representation by the representee; and 3) whether maker of the statement voluntarily assumes responsibility for making the statement. As a general rule, a duty of care is unlikely to arise in respect of statements made on social or casual occasions (Yap Boon Keng Sonny at [158]; Chaudry v Prabhakar).

Example paragraph – Negligent misstatements

To establish a duty of care with regards to pure economic loss, the Spandeck test is used, with a threshold requirement of factual foreseeability and a 2-stage test of proximity and policy considerations. The indications of proximity for economic loss in Singapore was set out by the Court of Appeal in Spandeck v DSTA - that of a voluntary assumption of responsibility and reliance. These 2 factors of proximity were also present in to establish a duty of care to avoid economic loss sustained on reliance of the negligent misrepresentation of the defendant in Yap Boon Keng and Hedley Byrne. Some factors that will affect the finding of the twin criteria include the purpose of the statement (Caparo), the context in which the statement was made (Hedley), as well as any special skill possessed by the defendant that the plaintiff relied on (Hedley).

However, there might be policy considerations that negate a finding of a duty of care, as unlike Caparo, the advice was given as a favour and the courts might not want to find a duty of care to defendants dispensing free advice. However, the courts might view Charles as a **vulnerable claimant** similar to Smith, which coupled with **Singapore's aim to be a financial hub**, might convince the courts to find a duty of care for this situation, and let Charles's claim for pure economic loss resulting from negligent misstatements.

Stricter interpretation

Caparo Industries v Dickman interpreted the Hedley Byrne principle more narrowly and, apart from considering proximity, required consideration of 1) the purpose for which the advice is made, 2) whether there is actual or imputed knowledge that advice will be communicated specifically or generally, and 3) whether there has been reasonable reliance.

> **Caparo**: Pf relied on Df auditor's report of a coy to increase their shareholding in that coy. Coy subsequently had far worse financial situation than was reflected in Df's report. HL held that no duty is owed based on stage 2 of the *Caparo* Test they established. Insufficient proximity between the auditors and the Pf: Absence of reasonable reliance and voluntary assumption of responsibility. Must be within the contemplation of the auditors that their report would be used by Pf to buy more shares. Purpose of the audit report was for shareholders to make proprietary decisions NOT for shareholders to increase their holding.

Extension of Hedley Byrne principles

Smith v Eric S Bush extended the Hedley Byrne principle such that where the relationship between the maker of the statement and the recipient is "akin to contract", e.g. solicitor-client, banker-customer relationships, a duty of care is likely to arise. No direct reliance was required in this case.

> **Smith v Eric S Bush**: Pf bought a house on reliance of the Df valuer's report that the house was safe. Pf suffered PEL after the house was damaged due to a defect. Pf and Df were not in a contractual relationship so Pf sued in tort. HL held in favour of Pf. Df knew or ought to have known that his report will **be relied upon** by Pf to buy the house. Disclaimer made by the Df doesn't apply cos of the UCTA: disclaimer was unreasonable in the circumstances. Also considered that the relationship was akin to a contract. If there were a contract Pf certainly would've gotten damages under breach of an implied term.

It may be noted that the Hedley Byrne principle is not confined to negligent misstatements and that it may apply to negligent provision of services as stated in Henderson v Merrett Syndicates. Arguably, this Hedley Byrne principle has also been extended in Spring v Guardian Assurance to the giving of employment references in which the recipient of the reference is not the Pf employee but rather the prospective employer (**third party**).

> **Henderson v Merrett Syndicates**: Pf were underwriters in Lloyd's of London. Sued Df agents who were managers of syndicates for negligence mismanagement resulting in massive economic losses. HL held that the *Hedley Byrne* principle of assumption of responsibility extends to services. HL also held that as long as there is no conflict parties will be allowed to choose between a cause of action in tort or contract.
>
> **Spring v GA**: Pf was a former employee of Df. Pf sought a referral from Df. Df negligently provided a wrong referral which caused Pf PEL. HL held Df liable. Applied *Hedley Byrne* test: Assumption of responsibility and reliance. BUT the case was different from *Hedley* cos here the party who received the information (new employers) were different from the party who suffered the detriment. (Pf) HL held the same approach applies even if the party who suffers the detriment is not the receipient of the info: Sufficient proximity – Reasonably foreseeable that Pf would suffer because of Df's negligence.

Additionally, in White v Jones, where testator cut daughters out of will but later changed his mind and where defendant solicitor negligently delayed drawing up of will such that amendment was not made when testator died, the courts further extended Hedley Byrne to situations where there is no direct reliance by claimant.

> **White v Jones**: Pf sued Df solicitors for negligently failing to amend Pf's father's will before his death. HL held that *HedleyByrne* principle of assumption of responsibility should apply to this case as well. The lawyer/client relationship is quasi-fiduciary.

Example paragraph

A defendant owes a duty of care when he has assumed a responsibility akin to that of a fiduciary relationship, as in the case of *White v Jones*. The testator cut his daughters (the plaintiffs) out of his will but subsequently relented and told the defendant solicitor to draw a new will. The defendants did not draw the will in time and the testator died. There is also reliance on the defendant as the plaintiffs' economic wellbeing is dependent on the proper discharge of the former's duty.

In Singapore, the Hedley Byrne principle is affirmed in Yap Boon Keng Sonny, where the judge observed that the Df architect was aware that the plaintiff, who was inexperienced in construction matters, was relying on him for expert advice, and the mettings between them were professional rather than social in nature. Therefore, the twin criteria of voluntary assumption of responsibility and reasonable reliance are fulfilled and a special relationship exists between Df and Pf. More recently, it was applied in Go Dante Yap to establish promixity via the Hedley Byrne principle of assumption of responsibility.

Disclaimer

Liability under the Hedley Byrne principle may be circumvented by the insertion of a disclaimer, subject to the provisions of the Unfair Contract Terms Act ("UCTA") (Henderson v Merrett). Such a disclaimer would not work where consumers are involved (Smith v Eric S Bush) or where the disclaimer is too unreasonable as per UCTA s 2(2).

Exam Tips: How to answer hypotheticals

1. Always remember to state that in Singapore, Spandeck is used to determine whether a duty exists regardless of type of damage. Doesn't mean that all types of damages will be treated equally within duty of care rubric; must look at circumstances which caused loss to arise to see if something more is warranted in the imposition of duty. Hedley Byrne principles fall under proximity limb of Spandeck two-stage test and that policy will be used to restrict, limit or reduce scope of duty, class of persons or type of damage.

2. When applying Hedley Byrne principles, use following template:
    a. Special skill and judgement of maker → Spring v GA extended 'special skill' to include 'special knowledge'
    b. Reasonable reliance
        i. Spot if there is social/casual context and use Chaudry v Prabhakar
        ii. Apply Caparo extension and look at purpose, knowledge of transaction by Pf to see if it is reasonable
    c. Voluntary assumption of responsibility (Criticisms from Caparo and Smith v Eric Bush; emphasis from recent cases i.e. Spring, Henderson, White v Jones)
3. Identify if it is negligent misstatement is 1-1 or general public
    a. 1-1
        i. Hedley Byrne principles (see above)
    b. General public
        i. Mention Caparo first to draw analogous parallel and distinguish it from Hedley Byrne and Smith v Eric Bush where Df knew that advice would be relied upon by specific individual
        ii. Must show that Df knew that his statement would be communicated to the person relying on it, either as an individual or as a member of an identifiable class, and that the person would be likely to rely on it, otherwise no duty will be owed

Standard of Care and Breach of Duty

Objectivity – Individual attributes

Generally, the standard of care is the objective standard of a reasonable person using ordinary care and skill (Blyth v Birmingham Waterworks). Though objective, the standard of care may vary depending on the circumstances of the case, and, in this sense, there is a "subjective element" (Glasgow Corporation).

Inexperience will seldom vary the standard (Ng Keng Yong, Nettleship v Weston) unless in exceptional circumstances (Cook v Cook), but 1) the Australian case has been overruled in Imbree v McNeilly and 2) Singapore adopts UK position). Children are expected to meet the standard of a reasonable person of their age and the test to be applied is whether an ordinary and reasonable child in Df's position would have appreciated the risks of injury to the Pf (Mullins v Richards, following McHale v Watson), but parents may be liable (Carmarthenshire CC v Lewis; Phipps v Rochester Corporation). A person professing a skill and a professional will be held to the standard of a reasonably competent professional having that skill (Philips v William Whitley) unless the job is widely and competently performed by amateurs, in which case the standard will be that of a reasonably competent amateur having that skill (Wells v Cooper). A lower standard of care is expected in **sporting events** (Woolridge v Sumner) because the sportsman is expected to be concentrating on winning, and that in the 'agony of the moment he may make a mistake. Leeway is usually given **for errors in judgments** as long as it was reasonable for it to be made in times of emergency (Wilsher – Lord Mustil: give allowance to a situation of emergency/"battle conditions"; Carmarthenshire CC v Lewis – faced with sudden need to attend to another child, HL found teacher's act natural and reasonable).

Nick: Consider Philips in light of a contractual relationship where risks have been allocated by parties.

General proposition in Australia, at least as expressed by Mustill LJ in Wilsher, is that the "notion of duty tailored to the actor, rather than to the act which he elects to perform, has no place in the law of tort".

Standard of care is based on test of reasonable man as objectively determined based on what was reasonably foreseeable at the material time of the event, and not after. No benefit of hindsight (Denning LJ in Roe v MoH, "We must not look at the 1947 accident with 1954 spectacles"; Singapore cases of PlanAssure and JSI Shipping cautioned against the "benefit of hindsight", "*ex post facto* knowledge" or "retrospective plausibility".

Balance of circumstantial factors

A defendant is deemed to be in breach of his duty of care if he did not, in all circumstances of the case, take reasonable care to prevent reasonably foreseeable harm. Breach is a non-binding finding of fact (Qualcast v Haynes). Factors relevant to the finding of breach include 1) likelihood and risks of harm (Bolton v Stone – low likelihood, 6 in 30 years; Miller v Jackson – higher frequency, 6 in 1 season; Haley v London Electricity Board – increased likelihood of injury to blind people), 2) gravity of the harm (Paris v Stepney Borough Council – Pf already blind in one eye, must take into account risk of greater injury and greater risk of injury), 3) costs of avoiding harm (Latimer v AEC, Wagon Mound No 2), 4) state of scientific knowledge at material time (Roe v MoH), and 5) justifiability of taking risk (Watt v Hertfordshire CC). No factor is conclusive by itself but will be considered in the totality of the situation.

Standard of care of professionals

Negligent medical treatment

The test for standard of care of professionals is the Bolam test, which states that a professional was not negligent if he has acted in accordance with a practice accepted as proper by a responsible body of professionals skilled in that particular area. It was subsequently confirmed in Bolitho, which included a test of logic. The Bolam test with the Bolitho addendum has been accepted and applied in the Singapore case of Gunaparthy, which further extended the threshold test of logic into a two-stage inquiry: 1) whether the expert had directed his mind to comparative risks and benefits and 2) whether expert had reached a "defensible conclusion" after balancing risks and benefits, which is further defined to mean that a) the opinion had to be internally consistent on its face and b) that it should not ignore or controvert known facts or advances in knowledge. Despite the usefulness of the Bolitho addendum to limit the pro-defendant slant of Bolam and its deferential attitude towards medical doctors, cases in which the courts have found that medical opinion did not withstand logical analysis are rare. One of them is Hucks v Cole.

Negligent non-disclosure of advice

The CA in Gunaparthy found favour with the majority in Sidaway that the Bolam test applied to pre-treatment advice but it refrained from taking a position against the doctrine of informed consent enunciated by Lord Scarman in Sidaway, thus leaving the question open for further elaboration in future. Two contrasting positions have been taken in the common law world: 1) Sidaway, which held that Df would not be liable if he does what his fellow professionals would have done i.e. not disclosing advice when fellow professionals would not have done so, and 2) Rogers v Whitaker (adopted Scarman's dissent in Sidaway), which rejected the paternalistic and practitioner-oriented approach of the English courts and emphasized material information and patient autonomy. Closer to Singapore and subsequent to the Gunaparthy decision, the Federal Court of Malaysia in Foo Fio Na has also departed from the Bolam test on the ground that it is "over protective and deferential". Sidaway can be seen in light

> *Consider*
>
> Instead of subscribing fully to the doctrine of informed consent or patient autonomy, an alternative approach suggested it that the Bolam and Bolitho tests may be retained, but the court should, in addition, inquire whether the doctor ought to have known that the patient would have attached significance to the risk of the medical procedure in question as well as whether the doctor had sought to communicate with the patient about the risk and benefits of the proposed procedures. (Paul Tan, "The Doctrine of Informed Consent – When Experts and Non-Experts Collide")

Other professions

Edward Wong extended the Bolam/Bolitho tests to other professions. Despite pronouncements in Gunapathy that the Bolam/Bolitho tests should be restricted to medical negligence, the Singapore courts have continued to apply them in other professions e.g. auditors' duties (JSI Shipping, PlanAssure).

Res ipsa loquitur

The legal burden of proof is generally on the Pf to show on a balance of probabilities that the Df had breached the duty of care. In some circumstances, however, the Pf may experience difficulties in adducing direct evidence of the negligent act or omission, e.g. lack of witnesses to the accident although there was clear evidence that an accident had occurred (Awang bin Dollah). Pf may then rely on circumstantial or indirect evidence. To apply the doctrine of *res ipsa loquitur*, three critera must be shown: 1) Df must have been in control of the situation/thing which resulted in the accident, 2) accident does not normally happen without carelessness, and 3) cause must be unknown (Scott v London & St Katherine Docks Co, applied in Tesa Tape with all three criteria cited).

Exam Tips

1. If it is a standard of care question, always establish duty first or make the assumption that duty has already been established.
2. Three types of questions
    a. **Objectivity**: concerns situations where law departs from a 100% objectivity test. Includes situations where law takes into account someone's age, inexperience, emergency, sports etc
    b. **Balance of circumstantial factors** (likelihood of harm, gravity of harm, justifiability of taking risks, etc)
    c. **Common practice**: professional standard (Bolam, Bolitho, Gunaparthy) and whether the tests extend to other professions
3. Is it **objective**? (Objectivity question)
4. Is it **fair**? (Cost-benefit analysis)

Causation

Factual causation

Causation tests

Causation involves 'causation in fact' and 'causation in law' (Sunny Metal). There are several tests for factual causation based on case law. The conventional test is the 'but for' test (Barnett v Chelsea; Pai Lily). In cases where there are multiple potential, known causes of damage with varying contribution, then the 'but for' test is modified to the 'material contribution to injury' test (Bonnington; Amaca).

In exceptional cases, where it is impossible for Pf to discharge burden of proof due to inadequacy of scientific knowledge and where there are compelling policy reasons, the 'material increase in risk' test will be applied (McGhee, Wilsher, Chew Swee Hiang - voice). **Where there is an 1) employer-employee relationship, 2) a determinate cause of Pf's injury and 3) recurrent negligent act**, it may be possible to apply the Fairchild exception. This is subject to interpretation given that Lord Bingham taking the **narrowest stand** to the Fairchild rule and limiting its application to precise facts of mesothelioma, Lord Hoffman taking a **broader stand** and limiting application to employees exposed to asbestos, and Lord Rodger adopting the **broadest stand** and allowing application of the rule where it is clear that a group of Df caused the injury but impossible to prove which Df caused it, the Fairchild principle can be applied to hold all of them liable, providing all of them had materially increased risk of injury to Pf.

Several issues with Fairchild in terms of compensation: award of full damages would place Pf in Fairchild in a better position compared to Pf in Holtby who was able to prove material contribution to damage, which seems unjust. Additionally, outcome in Fairchild appears inconsistent with the two hunters case in Cook v Lewis and the car accident case in Fitzgerald v Lane in which liability was apportioned among the Df. It may be argued that the premise of scientific uncertainty in Fairchild was analogous to the evidential or factual uncertainty present in Cook and Fitzgerald.

Clash of policy considerations and finding that injustice in not allowing Pf to be compensated outweighs any injustice to employers. Barker v Corus applied Fairchild with the exception that it apportioned liability according to relative periods of exposure (pro-defendant). This was subsequently reversed by s 3 of the UK Compensation Act, which returns the law to the position as it was after Fairchild, **specifically for mesothelioma cases**. In Singapore, if the occupational disease is contracted by a gradual process (cumulative), liability will be apportioned according to what is "just" as per s 4(6) of the Work Injury Compensation Act.

So, is Barker good law? Lord Rodger dissented on the ground that 1) allowing recovery for proportionate damages was tantamount to awarding damages for loss of chance, which had been rejected in Gregg v Scott. Furthermore, Barker's rule on proportionate liability has been 2) legislatively overruled in favour of full damages (UK Compensation Act). **BUT** Barker is also 1) consistent with the logic of the test based on extent or proportion of contribution to the risk of damage. Further, relaxation of causation rules in Barker 2) allows at least some damages to be awarded to Pf, which he would not have been entitled to at all under traditional rules.

> *Consider*
> Clear case for material contribution to injury: Bonnington (as long as it is more than de minimis)
> Clear case for material increase in risk: Sienkiewicz (as long as it is more than de minimis)
> Distinguish between them both: **known cause** vs **unknown** (scientifically unproven)

One way to distinguish which case/rule to apply: 1) **factual**, 2) **normative** (based on standards i.e. McGhee to Fairchild, dust to asbestos)

What if Pf was exposed to two different agents of harm? Lord Hoffman mentioned in dicta of Fairchild at [71-72] that if both "created a material risk of the same cancer and it was equally impossible to say which had caused the fatal cell mutation", the Fairchild principle can be applied too. He affirmed his view in Barker at [24] and stated that as long as the mechanism by which it caused the damage was the same, the rule can be applied. In answering this kind of question, **1st hurdle** is to draw distinction between the various Lord's dicta and **2nd hurdle** is to assume that both cause the disease in the same manner and have the same risks (thus, mechanisms are identical). It is also possible to use Wilsher/Amaca approach of relative risk in assessing the two agents of harm.

Situation-specific

Bonnington – *Material contribution to injury – cumulative disease, two causes, known contribution*
Pf ill after inhaling dust at Df's foundry. **Source of dust was two-fold and the Df was liable for only one of the sources. Pf was unable to prove that dust attributed to Df caused him the illness**. HL held that as long as Df's dust materially contributed to Pf's illness, they were liable. On the facts, HL inferred that Df's contribution was non-negligible.

Holtby – *Material contribution to injury – cumulative disease, two causes, known contribution*
Subsequent to Bonnington, in Holtby, the Pf claimed damages in negligence and breach of statutory duty in respect of exposure to asbestos dust. **For about half of his working life, he was employed by the Df, and for the rest of the period, he was employed by other employers**. CA held each employer liable for a part of Pf's damage based on corresponding time exposure to asbestos. Important note: occupational disease here is ASBESTOSIS, which is a cumulative disease.

McGhee – *Material increase in risk – cumulative disease, multiple causes, unknown contribution*
Pf contracted dermatitis and sued Df employers. **HL held Df liable even though it was not possible to prove material contribution. They materially increased the risk of Pf contracting the illness by failing to provide showering facilities** at the workplace, causing Pf to cycle home caked in the dust which caused the illness.

Wilsher – *Material increase in risk – multiple causes, unknown primary factor*
Pf (premature infant) suffered from RLF. **Df's (hospital) negligence was one of the many possible causes of the condition.** HL held that onus is on the Pf to prove that the Df materially contributed to the illness. The McGhee principle does not lead to a shift in the burden of proof. McGhee also interpreted as a material contribution to injury rather than a material increase in risk. **Sent for retrial for material contribution**.

Chew Swee Hiang v AG of Singapore – *Material increase in risk – multiple causes, unknown primary factor*
Applied **Wilsher**. In Chew Swee Hiang v AG of Singapore, Pf underwent surgery with warning that there was possible risk of hoarseness of voice. **Risk materialised and medical evidence showed that there were other possible causes for Pf's loss of voice. Thus, could not prove on a balance of probabilities** that doctor's negligent act was a more likely cause than other factors.

Amaca – *Material increase in risk*

Pf was a smoker who worked with asbestos cement pipes during employment. He died from lung cancer. Both tobacco smoke and asbestos exposure are capable of causing lung cancer. **Relative risk of contracting cancer was assigned to both smoking and asbestos exposure.** It was found that asbestos exposure did not cause cancer on a balance of probabilities.

Fairchild – *Material increase in risk (exceptional)*

Pf sustained mesothelioma, a non-cumulative asbestos disease which may be contracted by inhaling a single fibre. The cause of the disease was definite: a single asbestos fibre. Pf unable to prove which employer was responsible for the fatal asbestos strand which caused the disease. HL took unprecedented step of holding all employers liable in full. Lord Bingham supported the "narrowest stand" and limits application to the precise facts of the case (mesothelioma and employers). Lord Hoffman's stand was slightly broader and allows for claims as long as it is within the asbestos industry. Thus, Lord Hoffman and Lord Bingham adopted the narrow proposition. On the other hand, Lord Rodger took a very broad stand and held that where it is clear that **a group of Df caused the injury but it is impossible for Pf to prove which Df caused it**, then the Fairchild principle can be applied to hold all of them liable provided they materially increased risk of injury to Pf.

Barker v Corus – *Fairchild exception*

Mesothelioma case where Pf worked for himself for a substantial part of his working life, so he was a source of the illness for himself. He then sued Df because he worked for him under exposure to asbestos for a short period. HL applied Fairchild but also held that unlike Fairchild the defendants were not **jointly and severally liable**. Df's liability was several only. Proportionate liability.

Recovery of damages

Nature of losses affects recovery of damages: where loss is indivisible (Bailey v MoD – brain damage), **full damages** will be recovered; where loss is divisible (Holtby v Brigham) or where there are multiple consecutive causes (Bonnington – pneumoconiosis; McGhee – dermatitis; but in both cases, proportionate recovery was not argued), **proportionate damages** will be recovered.

Where the supervening event is tortious and the second incident has not added to claimant's loss, perpetrator of first tort remains liable (Baker v Willoughby). Where the supervening event is non-tortious and natural, it will extinguish liability (Jobling v Associated Dairies). Former allows for full recovery, latter only allows for recovery up till manifestation of supervening non-tortious event. Policy reasons led to different results: if the court had accepted that the supervening tortious event extinguished liability in Baker, it would have left the defendant without compensation.

Loss of chance of recovery

In Hotson, In Gregg v Scott, the House of Lords confirmed the rule that the loss of a chance of recovering from or avoiding some injury or illness is not actionable in tort. Lord Hoffman in Gregg distinguished between (a) cases governed by the laws of causality such as in medical negligence cases in which traditional rule of proof of damage on a balance of probabilities should apply, and (b) cases dependent on the actions of human beings, such as in Allied Maples, in which loss of chance may be awarded based on whether person would have so acted.

On evaluation, Gregg appears to have a *prima facie* majority (3-2) rejecting claims for loss of chance of recovery but a close interpretation of the individual Lord's stand reveals a 2-2 split. Lord Nicholls and Lord Hope (minority) held that loss of chance is the same as physical loss, thus it is claimable. Lord Hoffman and Lord Hale (majority) believed that allowing loss of chance would lead to floodgates being opened, thus it should not be claimable. Lord Phillips concurred with the majority but his stand indicates that he would have considered allowing loss of chance if an adverse outcome had occurred in Greg. **Hence, it is possible that, under the right circumstances, loss of chance of recovery will be claimable.** Justifications for denying recovery for loss of chance of recovery are: 1) prevents defensive medicine from being practiced, 2) certainty in all-or-nothing approach (but this allows doctor to be flagrantly negligent if chance is <50%) and 3) indeterministic nature of medicine science (as compared to deterministic nature of economic loss). Also it is unclear what, if any, is the difference between the loss of a chance and an increase in risk, recognised to be actionable in McGhee.

> *Consider*
> Gregg v Scott (majority)
> 60 – 40: claimable as long as it falls below 50% threshold
> 75 – 25: claimable
>
> Gregg v Scott, with a case where there is **actual damage**, Lord Phillips will shift the majority over to the dissent. Therefore, as long as there is a loss of chance, it is to be equated with physical loss, thus claimable.

Loss of chance of economic benefit

Under Allied Maples, a claimant may recover for loss of opportunity to make a financial gain or avoid a financial risk. Where the loss of chance arising from defendant's negligent omission was dependent on the actions of a third party, the Pf only have 1) to show that **on balance he would have taken steps to put himself on course** for the gain and 2) prove that the chance of the contigency happening was a **real and substantial one**, rather than a speculative one.

However, where a third party was not involved, the Pf would have to **prove what he would have done on a balance of probabilities to avoid risk or make profit** (Stuart Smith LJ). The principles in Allied Maples have been applied locally in the case of JSI Shipping (2007).

However, Singapore case of Asia Hotel Investment (2005) seems to suggest that for loss of chance of economic benefit, you only have to prove that chance of contingency happening was real and substantial as opposed to speculative. Don't have to prove on balance of probabilities that Pf would have taken steps to put himself on course (strong dissent from Yong Pung How CJ).

Medical duty to inform

Both UK and Australia have recognised the doctrine of informed consent with regards to negligent non-disclosure of risk (Chester v Afshar; Chappel v Hart). Thus, patient has to prove that had the information been disclosed, he would have declined treatment on that day and by that doctor, and hence would have avoided the risk. Policy consideration of achieving justice required narrow modification of traditional causation principles to vindicate patient's right to an informed choice. Achieved corrective justice and aligned with public and medical expectations that the duty to inform

is crucial, and that duty would be hollow if claimant could not recover (Lord Hope in Chester). **Without abandoning Sidaway**, court held that a reasonable doctor would automatically disclose more risk today than in the past.

In Chester, 'but for' was passed on a 3-2 majority – **dissent** said that 'but for' advice, risk would still have eventuated because it was inherent; **majority** said that 'but for' advice, claimant would have delayed treatment and risk may not have eventuated on a different day. Everyone agreed that it was **essentially a policy decision**.

> *Consider*
> Tan KF argues that if **failure of medical advice is taken as one of degree and not of type**, then it is possible to consider using 'trespass-to-the-person' analysis, where severe failure of medical advice can vitiate consent because it is not informed amounting to battery, instead of going by causation route which cannot pass the tradition 'but for' test and which requires distortion of legal test to find a just and fair result.

Legal causation

The concept used in causation in law is that of novus actus interveniens, i.e. a new intervening act that takes place between the defendant's negligent conduct and the damage.

In general, various different tests and principles on the characteristics of plaintiff's or third-party acts – including the **reasonableness, recklessness, deliberateness, foreseeability and likelihood** of the third-party acts – which might impact causation of damage have been employed by the courts. However, it is not entirely clear which test prevails. The law in this area is in some confusion, and commentators like Fleming have noted that the ostensible principles applied in determining whether or not an intervention constitutes a novus actus are no more than a **cloak for the real motivation of judges**.

As a starting point, Df cannot rely on his own subsequent negligence to break the chain of causation that began from his own initial negligent conduct (Bolitho).

Acts by plaintiff
In considering whether the plaintiff's own act constituted a novus actus, courts have regard to the **reasonableness** of the plaintiff's act. An unreasonable act would likely constitute a novus actus (McKew) whereas a reasonable act under aggravated circumstances would not (Sayers v Harlow). McKew has, however, been criticized and it is submitted that Pf's act should count towards **contributory negligence and not causation**. A deliberate act would usually constitute a novus actus. A criminal conviction, for which mens rea is necessary, will generally constitute a novus actus, see e.g. Meah v McCreamer (No. 2) and Clunis v Camden and Islington HA, involving rape and manslaughter respectively. This may alternatively be explained by the maxim **ex turpi causa non oritur actio**. However, in the rare situation where the law imposes a duty to prevent the plaintiff from harming himself, the plaintiff's unreasonable, even criminal, act in harming himself will not constitute a novus actus. See Reeves v Commissioner of Police, where the **suicide** of a prisoner who was a known suicide risk was held not to be a novus actus since it was the very act the police had a duty to prevent. The rule has been extended to cases where suicide was a direct and foreseeable consequence of tortious act (Pigney; Corr v IBC – Pf's husband works as a maintenance engineer and suffered severe head injuries caused by malfunctioning machinery, then PTSD, depression and suicide. Df liable because suicide was foreseeable consequence).

Mindmap

General

Reasonableness – McKew | Sayers v Harlow

Deliberateness/Recklessness – Meah v McCreamer, Clunis

Exception: **Duty (control)** to prevent Pf from harming himself – Reeves

Extension: Suicide as a **foreseeable** consequence of tortious act – Pigney, Corr v IBC

Nick's Analysis: Relaxation of rule from duty (control) to foreseeability, which has a lower threshold

Acts by 3rd party

Example paragraph

Where it is alleged that the act of a third party, over which the plaintiff has no control, has broken the chain of causation, it must be shown that the act was something unwarrantable, a new cause that disturbs the sequence of events. It must be something that can be described as either unreasonable or extraneous or extrinsic (per Lord Wright in The Oropesa). Thus the Df will remain liable if the act of the third party is not truly independent of the defendant's negligence.

Chain of causation will not be broken if third party's acts are reasonable (The Oropesa – captain's act of ordering remaining crew into lifeboat and sending them to the other vessel, which subsequently capsized, was deemed **reasonable** in light of perilous circumstances, thus did not break chain; Knightley v Johns – police officer sending Pf down the wrong tunnel to close the entrance seen as an act of inaptitude which was **unreasonable**, thus novus actus). The more deliberate and intentional the third-party act, the more likely it will be taken to constitute a novus actus interveniens (Wright v Lodge – car broke down, Df lorry driver travelling at **excessive speeds** collided into car and injured Pf passenger; Rouse v Squires – first driver obstructed traffic, Pf offered help, second driver who was **not driving recklessly** knocked him down. Sufficient connected to initial act, no novus actus.)

However, where the act was the very thing that defendant was under a duty to prevent, it does not matter how unreasonable the act may be as long as it is foreseeable that act would cause damage (Home Office v Dorset Yacht – possibility of boys escaping and damaging nearby property is the very thing that the defendant ought to have foreseen and prevented againt). Where there is no duty to prevent a certain act, then the intervening act will be considered as a novus actus (Lamb v Camden – held that squatters' acts were novus actus because of policy that it was Pf's responsibility to keep squatters out of her own property or insure against theft. **This has been criticized by Jones as it could be decided on duty and causation instead of policy**: if there is duty, then per Home Office the squatter's act would not constitute novus actus, and if there is no duty, then there is novus actus; Ward v Cannock Chase District Council – no duty to safeguard chattels, so vandals' act of theft was novus actus; Topp v London Country Bus – bus driver left keys in ignition, thieves stole bus and ran down Pf's wife. Cf Home Office, bus compony had no control over thieves, thus no duty to prevent theft).

Mindmap

General

Reasonableness – The Oropesa | Knightley v Jones

Deliberateness/Recklessness – Wright v Lodge | Rouse v Squires

Exception: **Duty (control) to prevent** – Home Office | Lamb v Camden, Ward v Cannock, Topp v London Country Bus

Nick's Analysis: No relaxation of rule to foreseeability like in acts by Pf probably because 3rd parties are usually statutory bodies here and policy considerations discourage relaxation of rule.

What is the extent of unreasonable conduct sufficient to break the chain of causation?

Court of Appeal in PlanAssure at [100], upon citing Clerk v Lindsell, seemed to have accepted that in the context of personal injuries and physical damage claims, Pf had to have acted recklessly or deliberately in order for chain of causation to be broken. There was no explicit reference to TV Media's "wholly unreasonable" test.

Remoteness

General

The modern test of remoteness states that the type of damage has to be foreseeable (Wagon Mound (No 1)), replacing the old test in Re Polemis which was a causation-based test of direct consequence. The new test affords the courts considerable latitude to allow or deny recovery by viewing foreseeability **1) broadly**, where as long as type of damage is foreseeable, (a) manner of incurring harm is not decisive (Hughes v Lord Advocate – burns by conflagration recoverable when burns by contact foreseeable; Jolley v Sutton – 2 boys trying to repair abandoned boat, spinal injury) and (b) extent of damage need not be foreseeable (Vacwell Engineering – chemical contact with water known to produce toxic vapour resulted in explosion); and **2) narrowly** (Doughty v Turner – Df not liable for damage caused by explosion of molten liquid even though damage by splashing of molten liquid was foreseeable; Tremain v Pike – Df not liable for rare disease from contact with rat's urine even though disease through rat-bites and food contamination foreseeable).

Eggshell Skull Rule

The defendant has to take the victim as he finds him. This is otherwise known as the eggshell skull rule. As long as some personal injury is foreseeable, it does not matter that the exact consequences were unforeseeable (Smith v Leech Brain – **physical damage**, burnt lips leading to cancer leading to death; Robinson v Post Office (Pf injured at work and suffered allergic reaction to anti-tetanus injection – held by court that Df were liable for this reaction because need for such an injection was reasonably foreseeable and Df must take the victim as he finds him) – **physical damage**, wound sustained during course of employment, given anti-tetanus injection, allergic reaction, brain damage and disability; Brice v Brown – **psychiatric harm** – pre-existing personality disorder). Thus, Pf must take his victim as he finds him – that is, with his pre-existing susceptibility.

The eggshell skull rule is not just confined to pre-existing susceptibilities, and it also covers new risks or susceptibilities arising from initial foreseeable harm as well (Stephenson v Waite, Tileman – Pf suffered cut by wire rope, unknown virus entered wound and caused brain damage).

Wrong kind of loss

Law will not allow recovery for losses such as anxiety (Rothwell v Chemical & Insulating Co), knowledge of impending death (Hicks v CCSY), wrongful birth (McFarlane), wrongful life (McKay), and fertility treatment (Man Mohan Singh).

Miscellaneous

Difference between Wagon Mound (No 1) and Wagon Mound (No 2): WM1 dealt with the issue of remoteness whereas WM2 dealt with the issue of standard of care. WM2 also applicable to nuisance.

Difference between remoteness in contract and remoteness in tort: 1) "reasonable contemplation" vs "reasonable foreseeability" – test for remoteness in contract is "reasonable contemplation" of contracting parties (Hadley v Baxendale) whereas test for remoteness in tort is "reasonable foreseeability" (WM1) of loss (Robertson Quay). In contractual situation, parties would have opportunity to communicate with each other in advance, which is ordinarily absent in tort scenario; 2) Relevant time at which the reasonable foreseeability is assessed – in contract, whether the loss is reasonably foreseeable is ascertained at time the parties made the contract whereas in tort, the crucial time is when the tort was committed (Jackson v Royal Bank of Scotland).

Land-related Torts

	Private Nuisance	Public nuisance	Rylands	Negligence	Trespass	Harassment
Definition and key elements	An unlawful act which interferes with one's use and enjoyment of land. Regulates unreasonable interference with an owner's use or enjoyment of his right of land. Balancing act between legitimate but conflicting interests of landowners.	Actionable only if crime of public nuisance (which protects public rights) can be established.	Liability for harm caused by the escape of something from occupier's land put to non-natural use. Limited scope of application. Australia: subsume under negligence, UK and Singapore: sub-species of private nuisance	Fault based tort which enquires into legal relationship owed by tortfeasor to claimant and the quality of the tortfeasor's conduct.	A direct and intentional interference with one's land without lawful justification.	Course of conduct which consists of repeated words and actions which the actor knows or ought to know will cause emotional worry, distress or annoyance.
Locus Standi	Locus standi required (Hunter)	No locus standi required	Locus standi required (Transco, applied locally in Tesa Tape)	No locus standi required	Locus standi required	No locus standi required (Khorandijian, Malcomson)
Type of losses recoverable	Physical damage to immovable property. Remoteness rule on foreseeable type of damage applies.	Physical injury and damage to chattel allowed. Loss must be particular or above and beyond loss suffered by general public Sensitive claimant rule will not apply.	Previously: physical injury and damage to chattel allowed Under Transco: only damage to immovable property allowed, damage must be of foreseeable type.	Recoverable damage subject to rules of causation and remoteness.	Actionable per se	Actionable per se. annoyance and emotional distress

Private Nuisance

General

Private nuisance involves "an unlawful interference with a person's use and enjoyment of land, or some right over, on in connection with it" (Hunter v Canary Wharf). Only persons with locus standi (owner, co-owner, tenant) can sue in private nuisance (Malone v Laskey; Hunter, affirmed in Malcomson). A claimant must also prove damage and the type of damage suffered must be foreseeable (The Wagon Mound (No 2); Cambridge Water).

Who can be sued?

Generally, the potential classes of defendants in a private nuisance action are **1) person who created the nuisance, 2) occupier of the land from which nuisance emanates, and 3) occupier's landlord**.

> A **landlord** who leased the land to tenants will not be liable for nuisances arising on it unless (a) owner authorized the nuisance, (b) nuisance existed before the letting or (c) there was continued control e.g. express obligation to repair or reservation of right to enter.

Where the **defendant creates the nuisance**, liability is strict subject to the remoteness of damage principle (Cambridge Water).

An occupier will be liable for a **nuisance emanating from his land** although he did not create it if 1) he knows or ought to have known of the nuisance, and 2) he is in the position to prevent interference or damage (Sedleigh – trespasser fitted incorrect pipe grating, storm caused flooding to neighbour's property, Df knew of it and can remove; Goldman v Hargrave – natural occurrence, Df knew of it and can remove; Leaky v National Trust – landslide, applied Goldman | Lippatt – travellers occupying land, making damaging invasions into neighbouring land; Hussain – in which the landlord was not liable in private nuisance for racist attacks made by tenants because **1) control**: tenants' acts did not emanate from tenants' own property, and **2) knowledge**: landlords could not be taken to foresee racist attacks.

***Is the nuisance an isolated event?**

Generally, an isolated event is unlikely to constitute a nuisance. In Bolton v Stone, it was stated that a nuisance must be a state of affairs, however temporary, and not merely an isolated happening. A possible argument that Df might employ is that she only lights a bonfire on **rare occasions** and that this is a reasonable use of her land, but reasonable use of land by itself might not be a valid defence.

***Tangible damages**: property damage, chattels, personal injuries*

Physical damage to land or property will always be recoverable in private nuisance (St Helens Smelting; principally supported in Singapore in Xpress Print – excavation injured Pf's land), provided that damage was foreseeable. Chattels can only be claimable if consequent upon property damage and personal injuries are not claimable at all (Hunter). May want to mention OTF Aquarium for physical/property damage to land, but it is a peculiar decision where dead arowanas (which are chattels) are apparently claimable. Idea is that flood causes diminution in value to the land (property damage) and

***Non-tangible damages**: loss of enjoyment of land*

When the interference complained of is **non-tangible**, the courts will balance the rights of Pf to use and enjoy his land and that of the Df to act freely, and 1) consider several factors (e.g. locality, nature, frequency, duration) before holding it to be a nuisance (Halsey v Esso – cannot claim in private nuisance because car was not on his land – acid smut). Actionable interferences include **noise** (Halsey – tankers leaving depot; Kennaway v Thompson – speedboat racing; Selfridge – building noises; Dennis v MoD – aircraft noise), **smell** (Halsey), and where it **affronts public sensibilities** (Laws v Florinplace), whereas claims for **light or tv reception** have been rejected (Hunter; Bridlington Relay – interference with purely recreational facilities, such as television reception, did not constitute an actionable nuisance).

2) Social utility will not overtly prevail as a justification for private nuisance, but it may influence court's decision as to type of remedy (Miller v Jackson – denied injunction; Kennaway v Thompson – limited injunction).

Likewise for 3) intention of Df, while it may not by itself be decisive, malice may turn an otherwise non-actionable activity into a nuisance (Christie v Davey – music lessons vs banging; Hollywood Silver Fox Farm – hypersensitive claimant defence will be overruled by ill intent).

Damage suffered as a result of 4) Pf's sensitivity is not recoverable in general (Robinson v Kilvert – heat from Df's manufacturing process damaged Pf's sensitive paper, no claim; Bridlington Relay – watching tv was unusual, ultra-sensitive activity, no claim; Hunter v Canary Wharf – tv reception, claim still failed even though watching tv was no longer ultra-sensitive activity, policy: lawfully constructed according to planning permission, and Pf knew that tall structure was going to be constructed, should have voiced dissent before it went up, and the usual floodgates argument). However, where Df's activity would have interfered with an ordinary use of land anyway, he will be liable, notwithstanding the delicate nature of Pf's operations (McKinnon Industries – damage to plaintiff's orchids by fumes allowed because fumes would have damaged plants of ordinary sensitivity).

In these claims, the general rule is that they will be **claimable if you can prove damage to property value** e.g. lack of internet access may reduce property value given contemporary society's increasing reliance on it.

Defences

Prescription: The continuation of a private nuisance for 20 years will, in theory, entitle the defendant to claim a prescript right to commit the nuisance. Defendant must establish that the interference amounted to an actionable nuisance through the 20-year period, and not just that he has carried on the activity for 20 years (Sturges v Bridgman – noise did not constitute actionable nuisance until room was built, thus defence failed).

Coming to the nuisance: That the plaintiff came to the nuisance is not a defence (Sturges v Bridgman – Pf knew Df was making such noise, yet still choose to make extension consultation room, defence rejected; Miller v Jackson – cricket ground, applied Sturges v Bridgman, def rej; Dennis v MoD – no defence to say that Df was already conducting flying circuits when Pf moved into the area). It can be noted that the locality rule ameliorates the absence of "coming to the nuisance".

Statutory authority: An activity that was required or authorized by statute should not expose Df to strict liability in nuisance (Transco). This immunity is subject to the test of reasonable avoidance, taking into account the prevailing standards of locality (Allen v Gulf Oil Refining – noise, smell and vibrations from an oil refinery caused nuisance but defence succeeded – in assessing reasonableness wrt level of interference and avoidance, **prevailing standards of locality** are taken into account – not liable; Andreae v Selfridge – temporary nuisance carried out at night and interrupting Pf's sleep, thus defence failed). Most cases recognize that **planning permission** is not the same as statutory authority (Hunter v Canary Wharf). However, in Gillingham BC v Medway, where a commercial dock led to an increase in traffic, it was held that planning permission had the **effect of altering the character of the neighbourhood**, thus justifying the increased traffic. A more common approach though, is that in Wheeler, where planning permission to expand a pig farm was held not to have changed the character of the neighbourhood. Those affected by smell of the farm were thus able to sue.

Remedies

Damages: Remedy as of right. For tangible physical damage to land or immovable property, compensatory damages are easily quantified. For intangible losses, damages are to be referenced to **loss of amenity or diminution in value to land**. No damages for personal injuries and damage to chattel unless consequential loss.

Injunction. Discretionary remedy, unusual in most tort cases but common in private nuisance actions.

Abatement: Self-help remedy where Pf is allowed to take steps to remove the nuisance. Subject to tight restrictions and cannot be awarded when an injunction is already denied. Only negative acts allowed, no positive acts to improve position.

Rylands v Fletcher

Usually used in one-off events.

The rule in Rylands v Fletcher covers situations of damage arising from an escape of dangerous things from the Df's land in the course of a non-natural use of the land. The damage must also be foreseeable. It is a strict-liability tort, similar to nuisance. In **UK and Singapore**, Rylands is now regarded as a sub-species of private nuisance, thus the overriding requirements of private nuisance apply (Transco – Df authority's **water pipes** supplying water to flats broke and escaping water saturated nearby railway embankment, causing it to collapse and resulting in Pf's gas mains being exposed, held not liable; Tesa Tape – Df's **containers** fell over to Pf's property during storm, causing damage, held liable). It is also usually characterized by situations of a single interference causing catastrophic damage. In **Australia**, Rylands has been subsumed under negligence (Burnie Port).

Non-natural use of land

- **Rylands v Fletcher**:
  - Blackburn J "non-natural user" test – brought something onto his property "which was not naturally there"
- **Transco**:
  - Lord Bingham preferred the "ordinary" user test – if it is something "exceptionally dangerous or mischievous", can pass Rylands
  - Lord Hoffmann endorsed the "insurance" test – where the use of the land was such that the damage arising from the use was something that could reasonably be expected to be insured by the occupiers, use would be natural
- **Tesa Tape**
  - Cited Lord Goff in Cambridge Water that storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use

Escape of the "thing"

According to Blackburn J's formulation, the "thing" must have been brought onto the Df's land and collected there. With respect to the concept of "escape", the Court in Tesa Tape stated that the requirement refers to the "situation in which things on one's land find themselves in the neighboring land".

A "thing" likely to do mischief if it escapes

The thing that was brought onto the Df's land need not be inherently dangerous. As long as it is likely to cause mischief in specified circumstances.

Public nuisance

A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

- s 268 of Penal Code

Public nuisance is both a crime (Section 268 of the Penal Code) and a tort, and is essentially an infringement of a public right (Wandsworth). Act need not be unlawful in itself – the effect on the community makes it actionable (Gillingham v Medway). **Tortious public nuisance *must be derived* from crime of public nuisance**. Key element is that of Pf suffering a particular loss or special loss over and above as compared to general public (Tate & Lye Industries v Greaer London Council) or class of person (AG v PYA). No locus standi is required. Personal injuries (In re Corby Group Litigation – crime of public nuisance of not regulating toxin waste committed, public nuisance in tort allowed remedies for children born with deformities) and chattel damages are recoverable because no proprietary right to sue is needed. Crimes of public nuisance that were actionable include pigeon droppings (Wandsworth), acid smuts (Halsey v Esso), and rice husks and ashes (Haji Ahmad Rice Mill).

Steps to establishing public nuisance

1. Establish **crime of public nuisance** committed by Df (s 268 of Penal Code)
2. Damage suffered by Pf is **over and beyond** as compared to general public or class of persons (AG v PYA Quarries)
3. **What kind of damage**? Personal injuries (In re Corby) and chattels recoverable because proprietary interest not required

Trespass to land

The direct, intentional and unauthorized interference with land is also known as trespass to land. The relevant intention is the intention to be on the land and not the intention to trespass, which is why trespass can be committed innocently (Conway v George Wimpey – Pf travelled on a lorry which was meant only for Df's employees and got injured in subsequent accident, held that Pf not allowed to claim because he was a trespasser). Pf must have proprietary interest in land. The very act of unauthorized entry into land is actionable. Usually involves personal invasion to go onto land but in theory it can be applied to projectiles as well. Trespass to airspace is sufficient to constitute trespass to land (Kelsen v Imperial Tobacco). Trespass is actionable per se (MCST Plan No 549 v Chew Eu Hock Construction).

Exam Tips

- Nuisance type of questions always involve **4 approaches** to each issue – Private nuisance, public nuisance, Rylands v Fletcher, and negligence

Defences

Illegality

General

The Latin rendering of the defence of illegality, ex turpi causa non oritur action, literally means that no action can be founded on a wicked act. The old test for the application of the defence is whether the Pf's act or conduct in question shocks the "public conscience" (Kirkham), but it has been discredited on the ground that it **allowed too much judicial discretion** in determining the extent of the Pf's moral turpitude (Pitts v Hunt). However, it could also be said that **we do trust the courts to make these considerations** and that there is public consideration even at duty of care stage. The more persuasive rationale for the defence is that to allow the wrongdoer to recover damages would not promote and maintain consistency and integrity in the law (British Columbia v Zastowny).

3 Criteria for Defence

First, where the act or conduct constitutes a crime, the offence must be sufficiently serious. A minor statutory offence would not suffice to raise the defence (United Project Consultants). Apart from criminal offences, reprehensible or grossly immoral conduct would also satisfy the requirement of wrongdoing (United Project Consultants). Secondly, the damage suffered by Pf must be sufficiently connected to Pf's wrongdoing (Ashton v Turner | Saunders v Edwards – Pf's loss caused by Df's fraud is not connected with Pf's illegal act of tax evasion; Ooi Han Sun – Pf's illegal act of working without permit in Singapore is not connected to Pf's injury due to Df's negligent driving). Thirdly, where the reciprocal action taken is excessive and out of proportion to Pf's illegal act, the defence will not succeed (Revill v Newbery – Df use of shotgun against Pf's conduct of unarmed theft is disproportionate).

Joint Illegal Enterprise

On the whole, the defence has a very limited application in tort, but there are some clear cut cases such as in joint illegal enterprises where the defence can be employed (Ashton v Turner – Pf injured while getting away in a stolen car driven by Df – **duty negated by JIE**; Pitts v Hunt – Pf pillion rider knew Df was unlicensed and uninsured, both were drunk and Pf encouraged Df to ride recklessly, resulting in accident – duty owed, but **JIE made it impossible to determine a standard of care**).

Public policy and criminal acts

Claims by Pf who committed serious criminal acts usually fail on public policy grounds (Clunis v Camden – Pf mentally ill but not insane – illegality in killing someone in an unprovoked attack meant he could not succed – alternatively, it is a novus actus; Vellino – Pf jumped form window to evade police custody – CA held that Df police owed no duty of care, and even if there had been duty, claim would be defeated by illegality; Gray v Thames Trains – Pf suffered PTSD after train crash – depressed and stabbed someone – held that for policy reasons, Pf could not recover either lost earnings or guilt because of illegality – **HL rejected mechanical use of a formal test and Lord Hoffmann stated that the defence is based on a group of policy reasons)**. Lord Hoffmann's narrow rule states that one cannot recover damages which flow from a lawfully imposed sentence of imprisonment (relevant to loss of earnings claim), and his wide rule states that one cannot recover for damage which is the consequence of one's own criminal act (relevant to claim for guilty feelings and indemnity).

Duty to prevent Pf's illegal act

The very thing principle **prevents duty from becoming hollow** and is applied where Df has a duty towards preventing Pf's illegal act such as suicide (Reeves – since suicide was the very thing they were supposed to prevent,

police couldn't use illegality – based rejection of defence on the fact that suicide was no longer a crime; BUT in Singapore, suicide is a crime under s 309 of the Penal Code, whereas in UK suicide is not a crime, thus illegality cannot be denied on this ground.) or fraud (Moore – Df failed to detect fraudulent conduct in Pf's company - court rejected the argument that fraud was 'the very thing' Df should have prevented given that detection of fraud was only part of Df's duty and discovery would be rare – Lord Phillips: necessary to look at underlying public policy considerations behind defence of illegality, which in this case was because HL did not want to allow the one-man company to succeed in an action against its auditors for failing to spot the company's own fraudulent conduct, which it had deliberately hidden from the auditors).

In Singapore, United Project Consultants state that the "very thing" principle can only be used in cases where offence was "solely" attributable to Df's negligent omission. United Proj. also suggests that 1) while Pf's conduct has to be reprehensible or grossly immoral for defence of illegality to work, it is 2) not necessary for Pf and Df to be involved in JIE/or for act to be be criminal in nature (overruling Ooi Han Sun, in which Yong Pung How CJ implied that defence of illegality should only be applicable to JIE; followed Kirkham).

Essentially, remember that ex turpi causa defence **does not turn solely on whether act is illegal or immoral** but on whether **public policy**, which is invoked to reflect presumed views of society, **would demand that the nature of the act should deprive Pf of remedy**.

Consent

General

The defence of volenti non fit injuria is essentially premised on the Pf's consent to the risks of harm from he Df's negligence. Df has establish that Pf had 1) acted freely and voluntarily, 2) agreed, either expressly or impliedly, and 3) acted with full knowledge of nature and extent of risk.

> (Lord Denning MR in Nettleship v Weston: "**nothing will suffice short of an agreement** to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to wave any claim for any injury that may befall due to the lack of reasonable care by the Df." Agreed with by Lord Hobhouse in Reeves)

1. Voluntary

Employees are generally not regarded as having freely consented to the risks of employment (Bowater v Rowley Regis Corporation) unless they show a blatant disregard for their own safety (ICI v Shatwell). **Rescuers** are treated as having no freedom of choice, so volenti will not work against them (Baker v Hopkins – doctor who entered poisoned well not regarded as having consented to the risk).

2. Agreement

Consent can be express (two express forms: **1) contracting out**, under which Pf waives right to claim, and **2) exclusionary notice** (under which Df disclaims liability) (Bennett v Tugwell – before motor vehicle insurance, Df had a notice on dashboard disclaiming liability, so Pf's claim failed)) or implied (acceptance of risk, not mere knowledge; look at standard based on various scenarios such as driving/flying, sports, suicide, age).

For **implied consent**, **most important element is whether Pf had appreciated the scope of risk**.

Consent in driving/flying cases only applies where risk is glaringly obvious (Pitts v Hunt – Pf and Df got drunk together and went drunk driving, consent might have worked given extreme facts if not for Motor Vehicles Act; Nettleship v Weston – Pf did not consent to bear the risk of the crash because he checked before getting into car that Df driver was insured; Dann v Hamilton – Pf knew that driver was drunk before getting on the car but did not consent to specific act of negligence that caused injury – unless drunkenness was so extreme and glaring | **Morris v Murray** – Pf and Df got drunk together and went for a flight in Df's aircraft – drunk flying is seen as much more dangerous than driving, so volenti allowed).

Consent in sports relates only to inherent risks (Wooldridge v Sumner – photographer taken as impliedly consenting to inherent risks of horse racing BUT Diplock LJ expressly excluded volenti doctrine) and not to negligence of officials or regulatory bodies to provide adequate safety measures. (Smolden v Whitworth – colt rugby player injured due to **referee's** negligence in controlling scrum – consented to inherent risks but not to referee's negligence – also higher standard of care due to presence of inexperienced players; Vowles v Evans – player had not consented to risk created by **referee's** negligence in bringing an unsuitable player into scrum – broader proposition similar to S v W; Watson v British Boxing Board – boxers consented to inherent risk but not to **regulatory body's** negligence in providing adequate safety measures – ringside doctor took 30 mins to arrive and provide resuscitation treatment | Green v Country Rugby Football League - **domestic rugby body** not liable because Pf considered to have consented to inherent risks since he would have played anyway, given that whole family played rugby and knew of the risks; Agar v Hyde – **international rugby regulator** did not owe duty of care to domestic players and players accept inherent risks).

Children and the mentally unsound are taken to be incapable of fully appreciating the scope of risk (Mullin v Richards – children; Kirkham – mentally unsound). In suicide cases, even if suicidal person can appreciate the full scope of risk, if there exists a duty to prevent it, volenti cannot be applied (Reeves).

3. Knowledge

Pf must have knowledge not simply of the existence of a risk, but full knowledge of both its nature and extent (Morris v Murray – question of whether Pf's intoxication was such that he could be said to be unaware of nature and extent of risk of going on a flight with a drunk pilot – subjectively ascertained that Pf had to know in fact of the risk | Dann v Hamilton, Nettleship v Weston – knowledge that driver is incapable of meeting expected standard of reasoanble driver does not render passenger in a vehicle volenti to his negligent driving).

Exemption

In any case the UCTA, s 2(1), has prohibited consent by contracting out, and the Motor Vehicle (Third Party Risks and Compensation) Act bars the defence for all motor accidents.

Relevant issue 1: Consent forms or contracts excluding liability for death or personal injury

1. Exclusion of liability terms: **Can UCTA s 2(1) be applied?**
    a. s 2(1): It is not possible through any contractual term or notice to exclude liability for death or personal injury due to negligence
    b. No: only applies to **business context**
    c. Yes: But under s 14(2), UCTA applies to **government bodies**

i. So it depends on how you define government bodies. Is a school a government body? Address issue of whether paying school fees changes relationship

2. When questions of such nature is encountered, **two-step approach**:
    a. **Firstly, consider if UCTA can be applied**.
    b. **Secondly**, if UCTA cannot be applied, use **'scope of consent' approach**
        i. Did the Pf fully apprehend scope of his consent?
        ii. Apply Canadian Steamship principle (contra proferentum)

Relevant issue 2: State of mind of Pf

1. Is Pf a child?
    a. Apply Gough v Thorne
2. Is Pf mentally unsound?
    a. Apply Kirkham
3. Principle is that children and mentally unsound **will not be able to fully apprehend risks**, thus cannot ascertain agreement, which is found through a subjective test

Contributory Negligence

General

Where harm is attributable partly to the fault of the Df and party to that of the Pf, damages will be apportioned to reflect the fault of both parties. Historically, CN was a full defence, thus courts were reluctant to award it (Butterfield v Forrester[x]). The "last opportunity" rule was subsequently used to get around the harsh complete defence (Davis v Mann[x]). This has since been replaced with the Contributory Negligence and Personal Injuries Act, which allows for liability to be apportioned under s 3(1) but does not totally extinguish a claim, and thus is preferred by the courts.

Essentially based on **reasonableness** and a good approach towards finding CN is to **quantify/qualify fault** attributable to both Df and Pf as much as possible.

Duty

The element of contributory negligence in duty is that duty is owed by Pf to himself and it is not any a duty owed to the defendant (Ng Weng Cheong v Soh Oh Loo (1993) – Pf injured while on pedestrian crossing by Df driving SBS bus – red man was on while right turn arrow was green – Df's view was blocked by other vehicles and did not see Pf until he was too close to avoid collision – held CN – owed duty to himself to cross with care).

Nick: can be seen under causation as well.

Breach

Under breach, standard of care in contributory negligence is theoretically assessed on the same basis as that of negligence, but due to the fact that duty is owed to the Pf himself and the danger is not to anyone else, courts will occasionally take a more sympathetic approach (Gough v Thorne (1966) – **young children cannot be guilty of contributory negligence** because they are not reasonably expected to take precautions for their safety; Jones v Boyce (1816) – Pf believed coach was overturning and jumped from it, injuring himself – coach did not actually overturn and Df pleaded CN – held not CN because Pf's actions were reasonable given circumstances – **note that CN was a full defence at that time**).

**Causation*

Under causation, Df must show that Pf's failure to exercise reasonable care contributed to the damage or accident. CN which goes towards causing an **accident** (Fitzgerald v Lane (1988) – Pf carelessly stepped onto road and struck down by car – collision propelled him forward and he got struck by another car – **50% damages**) is usually greater than that which merely contributes to **injury** (Froom v Butcher (1975) – Pf did not wear seatbelt and got involved in accident due to Df's negligence – additional injuries suffered could have been prevented by seatbelt – **CN for 0/15/25%**).

Remoteness

If Pf's act contributed to the type of injury Pf suffered, Pf will be CN (Jones v Livox Quarries (1952) – Pf rode on back of a vehicle contrary to express instructions and got involved in accident – foreseeable that reasonable care was not taken, injury is inadvertent – if Pf's injury is not of a foreseeable type i.e. got shot, damages would not be reduced – but in this case, choice of dangerous position contributed to his type of injury).

Imputed contributory negligence

Generally, CN cannot be imputed to someone else (Oliver v Birmingham (1933) – startled grandfather released infant's hand while crossing road, causing injury – cannot impute CN to child via grandfather's carelessness – but that was at a time when **CN was a full defence**). Exceptions apply when there is a special relationship i.e. employer-employee (Pf employer claiming against Df third party for damage to property, Pf damages will be reduced for employee's fault in contributing to the damage).

Apportionment of damages

CN towards accident will be higher than that towards damage.

CN towards damage

- Froom v Butcher (seatbelt) – if failure to wear seatbelt would not have made a difference, then **0% CN** - if damage would have been prevented altogether, **25% CN** – if failure to wear seatbelt made a considerable difference, **15% CN**
- Capps v Miller (crash helmet) – applied Froom 0/15/25 approach – **10% CN**

CN towards accident

- Revill v Newbery – **damages reduced by 2/3** for using shotgun against conduct of unarmed theft
- Ng Weng Cheong v Soh Oh Loo – **70% CN** for crossing road with red man
- Barrett v MoD – **damages reduced by 2/3** for deceased CN towards death by getting too drunk, passing out, and then choking to death on vomit

What about 100% reduction?

No, whole point of contributory negligence is that Pf has contributed to something that Df is prima facie liable for in negligence. It is illogical because granting 100% CN defeats purpose of defence – after all, if you have a cause in which Pf is 100% CN then Df would be considered not liable, and the claim should be resolved by other elements of negligence. Trial judge in Pitts v Hunt granted 100% CN but HL rejected that and eventually granted 50%.

Only when there is a breach of statutory duty can there be cases of 100% CN because absolute liability in tort is established due to statute even though Pf's act may have been grossly CN.

Remedies

A) Injunction

The main purpose of injunctions is to restrain Df from committing or repeating the tort or to remove the effects of the tort that has been committed. An injunction is a discretionary equitable remedy. A prohibitory injunction acts negatively against a tortfeasor to restrain him from repeating the tort in future. This is normally granted where the proprietary rights of the Pf are being interfered with and damages are an inadequate remedy for the wrong suffered. Mandatory injunction, on the other hand, directs that the tortfeasor carries out a positive act to put an end to a state of affairs resulting from his tort.

Prohibitory injunctions

Prohibitory injunctions have been granted for defamation (Lee Hsien Loong v SDP), trespass to land (Malcomson v Mehta), nuisance (Malcomson) and harassment (Malcomson). The prohibitory injunction may be granted with specific restrictions such as reduction in frequency of the impugned activity (Kennaway v Thompson) or the injunction may be suspended for a specific period (Halsey v Esso). The courts take into account public interest involved and weigh them against the private interests of the Pf e.g. in Miller v Jackson, CA refused to grant injunction to Df cricket club from playing cricket due to consideration that public interests of preserving the game was superior to individual privacy of Pf to peaceful enjoyment of his house (cf. Kennaway)

Mandatory injunctions

Mandatory injunctions are less common a remedy due to strict requirements: 1) there has to be certainty in the order to be made by the court i.e. Pf must know precisely what he in fact needs to do or perform under the injunction (Redland Bricks), and 2) courts do not grant a mandatory injunction where it would cause undue hardship to Df. Essentially, courts **weigh Df's burden to perform against benefit that may accrue to Pf**.

Final, interim, quia timet injunctions

Final injunction is one that is ordered at the end of trial after determination of liability. Relevant considerations include 1) risks of harm which have yet to materialise, 2) balancing rights of parties and 3) possibly public interest (Miller v Jackson, where courts ordered for damages instead of injunction; cf. Kennaway). **Interim injunction** is ordered before end of trial and before determination of liability. Purpose is to stop activity before hearing of case. If serious question to be tried, Pf doesn't even have to establish prima facie case. Factors relevant are stated in American Cyanamid [x]. **Quia timet injunction** is issued to prevent a tort that has yet to be committed. This is exercised sparingly and only where possibility of damage is very high and imminent.

B) Damages

Compensatory damages

The purpose of compensatory damages is to restore claimant to the position that he would have been in, had the tort not been committed, as far as money can do so (Livingstone v Rawyards, confirmed in Singapore case of Chartered Electronics Industries v Comtech). Pf can only claim for actual loss he suffered; any additional loss would amount to over-compensation (Patel v Hooper, where Pf couldn't claim for mortgage payments and insurance, which he would have had to pay anyway). Pf also had a duty to mitigate the losses resulting from the tort and that he cannot recover any losses which he might reasonably have avoided, and onus lies on Df to show that Pf failed to mitigate. Examples

include **wrongful birth** (Emeh v Kensington, where it was held to be unreasonable to have abortion to mitigate damages) and **fraudulent misrepresentation** (GE Commercial Finance, where it was held that Pf did not fail to mitigate by failing to investigate timeously). Additionally, in Ronan v Sainsbury's Supermarkets, although Pf recovered from his depression and took his time to finish his degree instead of returning to work, the court held that this was reasonable and that he did not have to mitigate his losses by returning to work immediately.

Aggravated damages

Aggravated damages may be awarded for the additional injury suffered by the Pf arising from the manner and motives of the Df's commission of the tort or his subsequent conduct. It is still compensatory notwithstanding having a possible penal effect. In Tan Harry v Teo Chee Yeow Aloysius, it was mentioned in the dicta that there are two elements relevant to availability of aggravated award: 1) Exceptional or contumelious conduct or motive on the part of Df, and 2) intangible loss suffered as a result. Aggravated damages have been awarded for defamatory statements (Lee Kuan Yew v Vinocur John), appalling treatment at hands of statutory authorities (Rowlands v CC of Merseyside) and distress resulting from misplaced trust (Appleton v Garrett).

Exemplary/punitive damages

Under Rookes v Barnard, exemplary damages are awarded in the following situations: 1) Allowed by statute; 2) Oppressive, arbitrary or unconstitutional acts by government officials i.e. police assault, false imprisonment; 3) D's act calculated to make profit even after payment of compensatory damages e.g. defamatory book, film. In general, however, Lord Devlin in Rookes v Barnard declared that exemplary damages were anomalous as it lays Df open to possibility of punishment without safeguards which criminal law provides for, thus confusing civil and criminal functions.

Nominal/contemptuous damages

Nominal damages are awarded to vindicate right in torts actionable per se where no damage has been sustained. Contemptuous damages are the smallest coin in currency awarded when Pf wins the case but court has no sympathy with his action (P may even have costs awarded against him). TPY v DZI considers the tort of enticement to be only worthy of contemptuous damages if it were to succeed.

C) Compensatory Damages for Personal Injuries

General

Purpose of compensatory damages for personal injuries is to restore Pf to pre-injury position, as good as money can do via multipliers and multiplicand (Wells v Wells). The burden is on Pf to prove injury and extent of loss (Evidence Act s 103(1)), and possible defences of contributory negligence and failure to mitigate may reduce damages. Nature of damages paid to Pf is lump sum and final (British Transport Commission v Gourley), but it has been criticised that this may prove to be either too little or too much (Wells v Wells; Wee Sia Tan v Long Thik Boon). Alternate option is in the form of provisional damages, (Supreme Court of Judicature Act s 16) periodic payments and structured settlements (could also be initial lump sum plus regular payments thereafter), but this method has its share of criticms too. Pf can use the money in any way.

Heads of damages

In relation to remedies, special damages are those which can be **calculated accurately** in monetary terms before the trial and must be specifically pleaded e.g. damage to property, medical expenses, pre-trial loss of earnings.

General damages are in theory those which **cannot be accurately calculated** in monetary terms before the trial, either because they are based on predicting what might happen (e.g. future loss of earnings) or because they are non-pecuniary in nature (eg. pain and suffering, loss of amenity).

Pecuniary losses relate to loss of money or things which can be valued in **monetary term** e.g. damage to property, loss of earnings, medical expenses.

Non-pecuniary losses relate to things which **cannot be assessed in monetary terms**, but where money is nevertheless the only practical form of compensation e.g. damages for pain and suffering, lack of amenity etc.

Pecuniary loss

LOSS OF FUTURE EARNINGS

Loss of future earnings is assessed from the date of the trial to the end of the Pf's prospective working life. Amount claimable is the **product of the multiplicand** (in dollars) and **multiplier** (in years or months).

Multiplicand is measured by the 1) difference between pre-accident income and post-accident income on an annual basis 2) offset by income taxes whereas multiplier refers to the 1) number of years till retirement 2) offset by number of years for vicissitudes of life and existence of lump sum award. **Factors influencing multiplicand include**:

1) Number of jobs the Pf was holding – where P might have had one of two jobs with different salaries, court may take average (Doyle v Wallace);
2) Probability of P remaining in present job or taking other jobs – where Pf would have gone on to a second job or intended to (with strong probability of employment), the latter profession could provide the appropriate multiplicand (Liu Haixiang v China Construction; Koh Chai Kwang v Teo Ai Ling)
3) Probability of Pf's salary changing over time – where loss of future earnings would likely decrease over total duration of award (improve of Pf's physical condition), multiplicand could be split into distinct periods (Low Chia Mei v Koh Kok Han)
4) Public policy reasons – illegal worker should not be compensated based on Singapore pay (Ooi Han Sun)

"Lost years" consideration: Where injury has reduced Pf's life expectancy, the multiplier is calculated according to pre-accident life expectancy minus living expenses he would have incurred during lost years which he would have lived through.

LOSS OF EARNING CAPACITY

Loss of earning capacity is 1) risk of losing job and 2) consequent disadvantage in competing labour market for another/equally well-paying job due to disabilities (Smith v Manchester Corp; accepted in Chang Ah Lek v Lim Ah Koon). Where Pf is awarded both loss of future earnings and loss of earning capacity, award for loss of earning capacity will be smaller as former award compensates Pf to some extent for reduced chances in the job market (Chai Kang Wei Samuel v Shaw Linda Gillian).

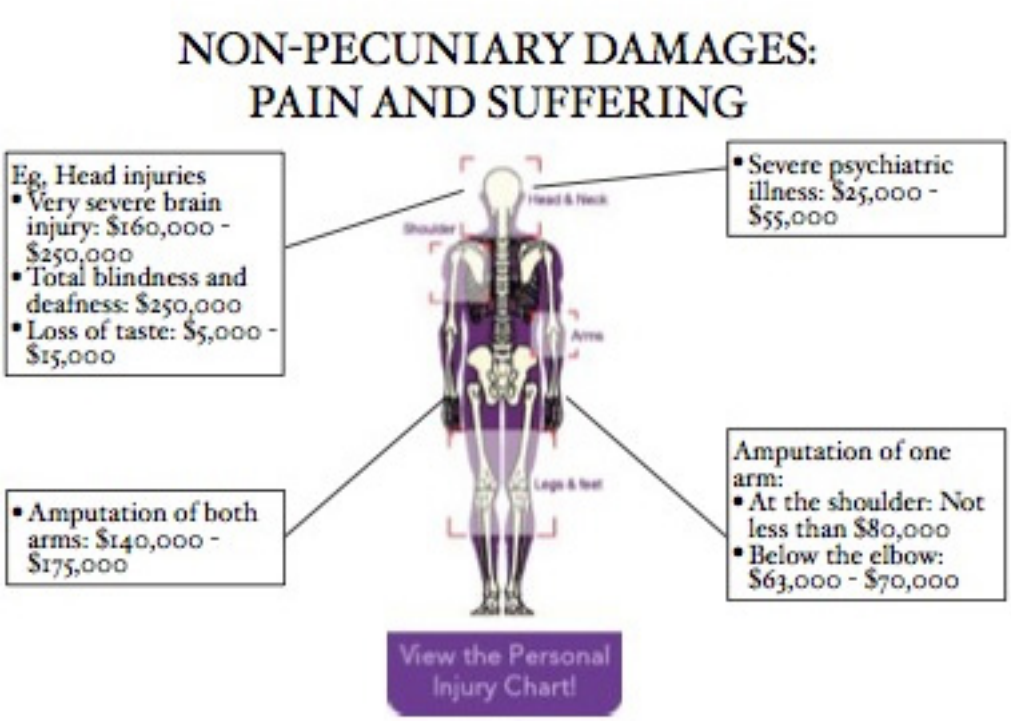
MEDICAL & REHAB; CARE SERVICES

Special, pecuniary losses can also be claimed for medical and rehabilitation costs (Lim Poh Choo v Camden) as well as cost of hiring a carer. For voluntary care services provided by relative or friend, it is claimable as well but Pf must hold the sum recovered on trust for the carer (Hunt v Severs).

Non-pecuniary loss

PAIN AND SUFFERING

"Pain and suffering" refers to the physical pain and mental element of anxiety, fear and embarrassment that is caused by the injury (Au Yeong Wing Loong v Chew Hai Ban). It is, in theory, confined to physical pain and psychiatric harm but not mere sorrow or grief (Man Mohan Singh – for fear of double recovery due to award of bereavement available under s 21 of Civil Law Act). But in practice the lines tend to be blurred. The quantum is assessed by considering Pf's 1) awareness of pain, 2) capacity for suffering, 3) extent of pain and 4) nature of pain (whether it was continuous, intermittent, permanent), among others. This is subject to the prerequisite that Pf is aware of his condiiton. A Pf who is in a **1) coma** or who is **2) intellectually impaired** such that he has no awareness of what is happening will not be able to claim (Low Yoke Ying v Sim Kok Lee).



LOSS OF AMENITY

This relates to the deprivation of ability to lead a full and normal life (Manley v Rigby Portland Cement Co Ltd). Distinguished from pain and suffering in that recovery is possible even if Pf is not aware of his condition (West v Shepherd). This is a broad head of damage that includes change in personality, loss of senses, etc.

Single award is usually made for loss of amenities AND pain and suffering without indicating amount for each head because it is difficult to separate the two (Au Yeong Wing Loong). Courts only make a separate award for loss of

amenities in extreme cases e.g. total blindness, paraplegia, complete inability to have sexual intercourse (Tan Hun Hoe).

LOSS OF EXPECTATION OF LIFE

Claim for unhappiness caused by knowing one will die prematurely. It has since been abolished (s 11 Civil Law Act). For living Pfs, the amount awarded for loss of expectation of lfie is now not separately assessed but part of total award for pain and suffering.

Exam Tip

Always state the damages Pf is seeking to recover in hypotheticals e.g. special, pecuniary medical expenses of $X.

D) Death

CLAIMS BY DECEASED'S ESTATE

Under s 10 Civil Law Act, a person's estate may claim for any unresolved actions in tort which were subsisting at the date of his death. Only significant exception to this rule is defamation, where the reputation and htus damage die with the deceased. An action may also be available for the circumstances surrounding or immediately preceding a person's death (Ashley v CC of Sussex – deceased wrongfully shot by police – claim for battery, and pain and suffering during short interview between shooting and unconsciousness and death).

DEPENDENCY CLAIMS

Under s 20(1) of Civil Law Act, what would have been an action for personal injuries if the deceased had not been killed will give rise to an action for damages.

But under s 20(2), the claim is for the deceased's dependents, and not for the deceased's estate. If a person is killed in an accident (or is seriously injured and dies before the trial), his estate may not claim damages with respect to lost earnings after his death. But dependents may bring a claim in this respect for the proportion of the deceased's earnings which they could reasonably have expected to receive had he not been killed.

Death vs claims for lost earnings

Contrast with 'lost years' claim, where a P who is still alive at the date of trial but will die early due to his injuries may sue for lost earnings in the period after his impending premature death. Damages will be reduced to take account of the sum claimant would have spent on his personal outgoings in the 'lost years'. Pf may choose whether or not to leave this money to his dependents.

S 21 Civil Law Act: Can claim for bereavement of $10,000, but only available to (in descending order) spouses, children, parents, persons in loco parentis or siblings (Man Mohan Singh). Funeral expenses may also be claimed (Man Mohan Singh).

Death of a child

Young children: only bereavement and funeral expenses.

Teenagers not yet at work: attempt to calculate loss of dependency based on likely job prospects and salary.

Takes into account **local practices** e.g. in Singapore, grown-up child might be expected to contribute to his parents.

Ho Yeow Khim v Lim Hai Kuen – 17yo mechatronics trainee, almost completed training. Projected earnings based on mean salary of mechatronic graduate. Damages awarded to parents on the assumption that he would have contributed 40% (generous).

Man Mohan Singh: 17yo and 14yo sons, both still at school. More speculative than in Ho Yeow Khim. Potential future earnings calculated on basis of levels of further education they'd have been expected to achieve and the salaries payable at relevant educational levels.

Vicarious Liability

A) Vicarious Liability

Example paragraph

An employer is vicariously liable to a third party injured by the acts and omissions of its employee where the tort is committed by the latter in the course of his or her employment. This is notwithstanding absence of fault (strict liability) on the part of employer. Hence, vicarious liability is a form of secondary liability premised on the primary liability of the employee. Under vicarious liability, the employer and employee are jointly liable for the tort committed by the employee.

Rationale

Various underlying rationales for vicarious liability have been criticised for not being able to be fully justified. At a broad level, there are competing policy considerations between 1) social interest in providing recourse to innocent tort victim against financially responsible defendant and 2) hesitation to foist undue burden on business enterprise (Lister). Rationales are 1) employer has deeper pockets, seeks to compensate victim ("financial" basis); 2) deterrence against future harm ("control basis"); 3) employer stands to generate profits from employee's work, so should bear potential liabilities ("enterprise liability" basis); and 4) employer more able to insure against liabilities arising from legal actions by third aprties and spread the losses more efficiently ("loss distribution" basis).

Employer-employee relationship

Step 1: contract of employment or contract for services?

Step 2a: borrowed employees – use control test or integration test or both

Step 2b: independent contractor – general rule is no VL but courts can consider them to be employee if control/integration tests satisfied

CONTROL TEST

An employer-employee relationship is generally determined by whether there is control over employee's method of performance (Mersey Docks (1947) – crane and its driver hired out to stevedores firm – driver's negligence injured third party – lent worker – **skilled and unskilled worker** – generally, if worker is skilled, the main employer who trained the workers in the method of performance will be VL; affirmed in Awang bin Dollah (1997) – **what to do and how to do the work**).

ORGANISATION/INTEGRATION TEST

The organisation/integration test looks at whether borrowed employee or contractor is part and parcel of organisation by looking at factors such as the **powers of dismissal**, the **assumption of managerial responsibility** and **financial risk**, the **chance of profit**, integration into the enterprise the **mode of remuneration** and the **provision of equipment**, among others. **No factor is decisive** and the courts will find or reject an employment relationship based on the totality of the circumstances (Stevens v Brodribb Sawmilling (1986)).

CONTROL + ORGANISATION TEST

Example paragraph – Singapore

An application of both the control and organisation tests can be found in Grand Palace (1993), in which it was held that Df had "overall control" because they had the right to dictate **manner and mode of their parking** the cars of their customers (Mersey Docks; Awang). Additionally, jockeys have become "so much part of the organisation" i.e. **wore uniforms** (Stevens). Thus, jockey is a servant of nightclub and VL held for nightclub.

UK

In Hawley, Df held to have control: club manager "exercised detailed control not only what the door stewards did but how they were to do it". Organisation was established by the fact that 1) doormen wore **club uniform**, and 2) manager **treated them the same** as other employees.

Australia – Emanations of organisation

In Hollis, Df held to have control: 1) couriers had little control over the **manner of performing work**, 2) there was no scope for them to **bargain remuneration**, and 3) Df retained control of **allocation and manner of deliveries**. Organisation was established as well because **uniformed couriers** presented to public and to those using svc as "**emanations**" of D.

DURATION OF TIME

Viasystems (in *obiter*) considered that if an employee was 'seconded for a substantial period of time' he is likely to be responsibility of the main employer.

DUAL VICARIOUS LIABILITY

Dual vicarious liability can only be established if the right to control the method of performance of employee's duties is shared – focus is on the **control of the negligent act**. (Viasystems (2006)).

ULTRA-HAZARDOUS ACTIVITIES

In Honeywill, the Court held that an employer who engages an independent contractor to carry out "exra-hazardous or dangerous operations" would be vicariously liable. Biffa Waste has since restricted the rule and stated that it should only be applied to activities that are "exceptionally dangerous whatever precautions are taken". In that case, **welding** per se in the ball mill is not such an activity.

Exam Tip

1. Can either apply the tests OR apply policy considerations at first stage (per Hollis – VL is essentially policy)

Course of employment

Example paragrah – Modern approach

The traditional way of finding the connection between the act and the relationship is to use Salmond's test – where a wrongful act done by a servant is deemed to be in the course of employment if it is either (1) a wrongful act authorised by the master or (2) an unauthorised mode of doing the authorised act. The modern approach in Singapore is stated in Skandinaviska, which applies the Lister test of whether the employee's act is so closely related with his employment that it will be "fair and just" to hold the employer vicariously liable for his wrongdoing (Dubai Aluminium v Salaam[x]) along with the Bazley factors.

Bazley factors (used to interpret what is meant by "closely connected")

- **Opportunity** that the enterprise afforded the employee to abuse his or her power
- Extent to which wrongful act may have **furthered the employer's aims**
- Extent to which wrongful act was **related to friction, confrontation or intimacy inherent** in employer's enterprise
    - What kind of teacher will have greater power? School counsellor vs maths teacher – former will have greater power over student due to intimacy being inherent in the relationship
    - All teachers have pastoral responsibilities – any teacher can counsel. The school by creating an enterprise – created risk – manifestation of teachers as pastoral care guides – can always go to them with any problems you have.
- **Extent of power conferred on the employee** in relation to the victim
- **Vulnerability of potential victims** to wrongful exercise of employee's power

Policy considerations

- **Victim compensation**
- **Deterrence**
- Deep pockets
- Enterprise risk

Traditional approach

This approach originated from Bugge v Brown, where the act was found not to be a frolic, but an act which is intimately connected to the special relationship.

Careless acts, even if expressly prohibited, are still modes of doing the employers work (Ilkiw v Samuels, Rose v Plenty) unless the defence of consent applies (Imperial Chemical Industries Ltd v Shatwell).

For detours, the employee must be engaged in the employer's work, not a frolic on his own (A&W Hemphill Ltd v Williams – detour at request of Df's passengers was not a frolic | Crook v Derbyshire Stone Ltd – stopped en route for refreshment – company aware of practice – not regarded as performing employer's duties).

Regarding tortious acts committed while travelling to perform work, there is a distinction between the duty to turn up for work and the notion of already being on duty while travelling to it (Lord Lowry at 955-956, Smith v Stages; applied in QBE Insurance in Singapore).

1. An employee is not on duty travelling from his residence to work, unless obliged by a contract of service to use employer's transport.
2. An employee is acting in the course of employment when travelling between workplacesduring employer's time.
3. An employee is acting in the ocurse of employment when receiving wages for travelling time.

For **intentional acts**, especially criminal acts, regard is to be given to the scope of employment (**Lloyd v Grace** – fraud, VL liable; Lee Feng Steel – Singapore fraud cause, VL liable; Mattis v Pollock – nightclub owner employed Pf with known history of aggresion – employed Pf to intimidate – conflict ensued, resulting in stabbing Df, paraplegic –

held liable). This principle is subject to client's knowledge of the absence of authorisation of employee (RHB-Cathay Securities – third party aware that emplyee not acting with authorisation, no VL).

There is an **implied term** in the employment contract that the employee will exercise reasonable care and skill in his work, and when an employee fails to do so his employer can sue him for an indemnity (Lister v Romford Ice Ltd; applied in Singapore case of Lee Siew Chun v Sourgrapes).

Wrongful act

Skandinaviska states that all tortious acts (intentional and negligent) acts are covered and apply accordingly. Affirmed Majrowski v Guy's, where the courts held that VL can be imposed not just for common law wrongs but also equitable wrongs, breaches of statutory duty and criminal wrongs since the whole idea of VL is about policy and granting the Pf a remedy, it should not seek to discriminate some wrongs over others.

B) Non-delegable duty

In general, an employer is not liable for the acts of an independent contractor (dicta in Afro-Asia Shipping Company) unless he owes a personal non-delegable duty to the claimant. In particular, employer is not liable in negligence for engaging an independent contractor as long as the Df is able to prove that he 1) exercised reasonable care and skill in engaging the independent contractor (MCST 2297 v Seasons Park) or if the tortious act in question is a 2) collateral or casual act of negligence by the independent contractor (unless tortfeasor is employee) (Denning LJ's example in Cassidy v MoH of independent contractor negligently dropping a hammer on the head of the customer).

In Singapore, the stand on NDD is uncertain as Skandinaviska does not appear to take a stand. It should be noted that the courts in Woodland has cautioned against expanding NDD in novel categories and that it is better to expand liability in negligence.

Such a duty has been found between hospitals and patients, when the doctors are employed by the hospital (Cassidy v MOH; Farraj); for hazardous activities between an occupier and a neighbour (Burnie Port Authority); and between employers and employees (Oberoi Imperial Hotel v Tan Kiah Eng - Employee seriously injured by new laundry press in hotel – System altered by hotel technician outside of jobscope – Non-delegable duty to maintain a safe system of work).

> *Consider*
> Where the proximity factor of control is found, prima facie duty is found. When there is control, there is assumption of responsibility, even if it is not voluntary.

Whether or not a NDD is owed by a school depends on which view is taken:

1. (AUS) In Commonwealth v Introvigne (1982), a state was found to have a NDD owed to pupils in a school because of the **state's compulsory education system** (age is important; considered as a special vulnerability; **for 6-15 yo only, thus for 4-5 and >16, court may not find NDD**);

2. (AUS) In NSW v Lepore (2003), finding such a duty would be too onerous, and the courts are reluctant to find this in a case involving a **deliberate criminal conduct** by a teacher.

a. Gleeson CJ: **Disallowed**. Too onerous and demanding to extend NDD to school
b. Gummow & Hayne JJ: **Disallowed**. There is a difference between negligence and deliberate criminal conduct, thus distinguished from Introvigne.
c. Gaudron J: **Allowed**. Applied Introvigne, where courts held that because of compulsory state education (control) and immaturity and inexperience of pupils (vulnerability), school owed NDD to pupils.

3. (UK) It was further held in Woodland (2012) (10yo pupil drowned in swimming pool and suffered severe bran injuries – held that no NDD owed by school authority) that to hold a school liable to a pupil for injuries suffered outside the school potentially asks too much. This is **distinguished from the NDD between hospital and patients** because the safety and health of school pupil, though of great importance, is not the primary raison d'etre of the school's activities.

Analysis

In summary, there are three main differences between the concept and practice of vicarious liability and non-delegable duties. Firstly, non-delegable duties are direct personal duties of the employer whilst vicarious liability is indirect or secondary, i.e. premised on the tortious liability of the employee. Secondly, the employer remains personally liable for the breach of non-delegable duties notwithstanding the delegation of the performance of such duties to another person, whether an employee or independent contractor. Vicarious liability, on the other hand, is based on the *tort* committed by the *employee* in the *course of employment*. The third difference is the culpability factor. A finding of vicarious liability may not denote any fault on the part of the employer whilst a breach of non-delegable duties necessarily means the employer is at fault.

Non-delegable duty in Singapore (incomplete)

In 1992, it was held in Oberoi that an employer owed a non-delegable duty to an employee to maintain a safe system of work. The Singapore Court of Appeal further applied the principle of non-delegable duty in The Lotus M. Such direct duties may extend to cover psychiatric injuries suffered by employees in the course of employment arising from work stress (Hatton v Sutherland; Barber v Somerset County Council).

C) No-fault compensation

Accident victims do not need to prove fault to receive compensation. **Rationale** for no-fault compensation includes: 1) negligence lottery (so many elements, not sure if you will suceed, better to have the cash now); 2) ameliorate hardship/pay medical bills; and 3) reallocate costs from lawyers to clients (also good for Pf who cannot afford to commence legal action). **Criticised** because 1) it does not deter careless or unsafe behaviour, 2) inadequate compensation, and 3) arbitrary limits on coverage.

In **Singapore**, it is a no-fault alternative, so you can still elect to pursue common law tort claim. In **New Zealand**, it is a pure no-fault where tort claims are barred. In Singapore, we have the Work Injury Compensation Act which applies to all personal injuries by accident arising out of the course of employment and covers all employees indiscriminately. Payment has to be done within 21 days to injured employee. Exception: Employer exempted from paying compensation under WICA for injury to employees in a fight: s 3(5).

May not be preferred route especially if compensation in monetary terms is perceived to be not commensurate with the suffering, harm & resultant disability (Ng Chan Teng v Keppel Singmarine Dockyard (SGDC-2007) – Civil claim was S$646,653 for 70% liability attributed to employer-tortfeasor – Under WICA, max is $225,000 for total permanent disability).

Hypothetical for Vicarious Liability

School-pupil relationship

Introvigne – yes, there is NDD
Lepore – no, there is no NDD because it is criminal conduct (and distinguish between physical injury and injury to physical integrity)
Woodland – injured while swimming. Doesn't want to impose NDD

Singapore – NDD only applies to employer-employee (Oberoi Imperial)
Scandinaviska – where there is VL, a duty of care can be found. Probe this a little more. In future cases, if this happens, what will the courts do with the Spandeck formulation? What **proximity factors** will the court consider? Label of NDD may not be used but duty can still be found – just a more onerous duty under Spandeck with higher standard of care.

Vicarious Liability

(i) Employer-employee relationship

- **State the law**: Mersey Docks; Awang (control over method of performance); Stevens (part and parcel of organisation as additional factor) – see **Grand Palace** (SGHC): both tests; Hollis (emanantions of an organisation)
    - **Cite cases which use both tests** for higher marks and completeness
- **Generally no V/L for conduct of independent contractor** – can still be deemed employer if there was control over "what" and "how" work was done (Hawley)
    - Flag out key issues and state general law
    - Good answer will quote various part of the **hypothetical**
    - Apply to facts – Did ISS have sufficient control? ISS "prescribed a general curriculum outline" but left "mode of teaching" to teachers. Cf Mersey Docks – is Daniel a "skilled worker"? How crucial is control? – see Awang ("what to do and how to do the work")
    - Additional factor – Is Daniel part and parcel of organisation? Invited to monthly teeachers' meeting, but sufficient to conclude from facts – require more information, like whether he has been staff privileges etc
    - Draw distinction between skilled worker vs unskilled worker (matter of degree – Mersey Docks)
    - Unlikely to satisfy first limb of V/L test
- (Alternate) **Policy consideration may be applied at first stage** – VL is essentially policy (Hollis)
    - Students will not know whether you are part-time teacher or full-time teacher, won't make the distinction. Analogy to Hollis: teacher is an emanation of the school as long as you are a teacher.
    - On policy reason of enterprise risk and deterence
    - Thus, satisfy first limb of V/L test

(ii) In the "course of employment" – closely connected test

- State the law: SGCA – Skandinaviska, applying Lister and Bazley – court to examine all the relevant circumstances – including policy considerations – and determine whether it would be fair and just to impose V/L on the employer
- Distinguish Skandinaviska facts from this scenario
    - Fraud vs sexual abuse – no direct analogy, but note comment at [88] involving sexual abuse of young and vulnerable children – that the CA in dicta approved of Lister and Lepore and Bazley – but what distinguishes those cases with this scenario is that those cases happened inside of school while this happens outside of school
- Then apply Bazley factors and policy considerations
    - May have unique Singapore policy considerations – change the outcome
- Conclude on likely position S'pore courts will take
    - Better answers would discuss qualifications in Lepore ("responsibilities of a kind that involve undertaking of personal protection, and a relationship of such power and intmacy") – is this a specific requirement or do all teachers fall int othis category?
    - Better answers will also discuss in greater depth: Lepore (**Course of employment has functional, geographical and temporal elements**) and Lister (**time, place, opportunity insufficient to satisfy requirement; need "special responsibility"**) – suggest that not all sexual assaults by teachers would satisfy test – will depend on a case-by-case basis on the elemtns of opportunity, time and circumstance
    - Possible analysis: Daniel is PE teacher, and not entrusted with the kind of responsibilities the perpetrators have in Lepore and Lister (headmaster, warden – "special responsibilities). Sex acts also happened outside school; but meetings arranged in school (Bazley first factor – opporuntiy)? Can Lepore and Lister be distinguished?
    - <u>One way</u> – Boy initiated relationship – some Bazley and victim compensation factor is fairly weak.
    - <u>Another way</u> – Deterrent effect is so powerful – deter teachers regardless of whether child initiated or not, plus you have gone through teacher training etc -
- Bazley factors
    a. **Opportunity** that the enterprise afforded the PE teacher to abuse his or her power
    b. Extent to which wrongful act may have furthered the school's aims
    c. **Extent to which wrongful act was related to** friction, confrrontation or **intimacy inherent in school's enterprise**
        i. What kind of teacher will have greater power? School counsellor vs maths teacher – former will have greater power over student due to intimacy being inherent in the relationship
        ii. All teachers have pastoral responsibilities – any teacher can counsel. The school by creating an enterprise – created risk – manifestation of teachers as pastoral care guides – can always go to them with any problems you have.
    d. **Extent of power conferred on the PE teacher** in relation to the victim
    e. **Vulnerability of secondary school children** to wrongful exercise of PE teacher's power
- Policy considerations: victim compensation, deterrence
    - How much was the victim at fault?

        - Two banks in Skandinaviska didn't apply caution to lending of money. Was the deterrent condition so strong to overwhelm the victim compensation factor since victim was the one who initiated

(iii) "Wrongful act"

- State the law: Skandinaviska states that all tortious acts (intentional and negligent) acts are covered and apply accordingly.

Non-delegable duty

- (i) NDD under established school-pupil category
- Discuss the authorities
    - Australia HC – Introvigne per Mason J (teacher negligent; playground accident) – duty to ensure that reasoanble steps are taken for their safety
    - Australia HC – Lepore – majority held no NDD for intentional torts (teacher commit sexual assault) – policy considerations against strict liability result – contra Gaudron J relying on proximity factors to find NDD
        - VL allows court to look at each factor
        - NDD doesn't – strict liability
    - HL – Lister per Lord Hobhouse and Lord Clyde (NDD possible in dicta in certain circumstances)
    - EHC – Woodland – NDD should be narrowly circumscribed – the policy considerations which justify the imposition of VL would all the more emphatically need to be present if liability of a non-delegable form is to extend in a given case beyond it
    - Inconclusive – perhaps NDD In school-pupil context should be limited to physical injuries from negligence? – In any event, Skandinaviska suggests at [105] that there is an overlap between V/L and negligence – perhaps Spandeck test may be used
        - How to apply Spandeck under this unusual circumstance?
- (ii) NDD as a more onerous duty under Spandeck?
    - Note that Skandinaviska did not refer to NDD, but this does not mean S'pore law does not recognise it. See SGCA in Seasons Park and Oberoi Imperial
    - Perhaps as a "more onerous duty" that imports a higher standard of care than an "ordinary duty" to avoid harm?
    - Skandinaviska suggests that negligence may also be argued in cases of V/L – especially relevant for acts of indepdennt contractor where D is not deemed employer
        - Can argue that if V/L fail, we can try and find a more onerous duty of care using certain proximity factors
    - State the law in Spandeck: universal test for all kinds of damage and factual scenarios – proximity + pp
        - **Proximity** – twin criteria of VAR & REL insufficient to fully examine such scenarios – SGCA (Spandeck at 134): can use other factors – see Woodland examining Farraj and Fitzgerald – identify possible proximity factors:
            - Assumption of responsibility, reliance, control, vulnerability

- Apply to facts – ISS assumed responsibility for **physical safety and bodily integrity** of pupils enrolled in school; parents and pupils rely on school; ISS has control over appointment, supervision and rules regarding teacher-student interactions; Patrick is a 14yo, young and vulnerable? What is scope of control? Vulnerability? Proximity between SCHOOL and PUPIL
- **Policy** – Identify relevant public policy considerations that may negate or support finding of duty (Animal Concerns) – at [77] – positive reasons only relevant for countering 'spurious negative policy considerations'?
    - *One view*: If there is no negative consideration brought up, don't need to introduce positive considerations
    - *Alt view*: Courts will, in any event, consider positive and negative policy considerations
- Apply to facts
    - NEGATE (1) Imposing indeterminate liability on schools for all acts of teachers (employees and independent contractors); (2) Rendering irrelevant laws of vicarious liability
    - SUPPORT (1) Protect young, vulnerable children; (2) Sexual abuse of cildren within schools, boarding houses and churches is a known problem, and these institutions are in the best position to take reasonable precautions to prevent harm ("Enterprise risk"); (3) Deterrence; (4) Imposing duty is not equivalent to strict liability as breach and causation must be proven

- Threshold requirement of factual foreseeability of sexual assaults

Miscellaneous: Caparo and Singapore's stand

- Objective ascertainemnt of policy factors
- Policy factors: desirability of finding a certain result in social circumstance; enterprise risk
    - Same policy consideration will be invoked in both V/L and negligence – subtle differences – but operation of two doctines are completely different – V/L almost strict liability – more careful to look at policy – whereas in negligence, more willing to impose duty based on policy since the there are other tests (duty, breach, causation, remoteness)

Psychiatric Harm

"The House of Lords has stated in the clearest possible terms in White v Chief Constable of South York Shire (1999) that the law on nervous shock or psychiatric damage is so illogical that only Parliament can come up with a solution." Discuss.

Introduction

Traditionally, where psychiatric harm is consequent upon actual physical injury to claimant arising from defendant's negligence, damages for psychiatric harm will be recoverable. However, where psychiatric harm is not consequent on physical injury, there are certain legal restrictions to the claim in negligence. Generally, the principles developed in *McLoughlin v O'Brian* (1983), of relational, physical and causal proximities, are used in determining whether a duty of care is owed to the claimant in nervous shock cases, and the ambiguity of each of the three element has been the source of much uncertainty as pointed out *White*. This essay seeks to examine the law on nervous shock in Singapore in relation to the *McLoughlin* factors and bring up the divergent approach used in the UK for comparison. In concluding, this author suggests that the current approach may introduce uncertainties, it is preferable to the enactment of a statute as the latter removes uncertainty at the expense of justice and flexibility.

Law on Nervous Shock in Singapore

The law on nervous shock in Singapore follows *Ngiam Kong Seng* (2008), which applies the *Spandeck* two-stage test of proximity and policy, which are together preceded by the special question of factual foreseeability, with additional refinements: 1) having to prove a recognisable psychiatric illness at the threshold inquiry stage, and 2) using the *McLoughlin* factors to determine proximity. It is also to be applied incrementally, with reference to facts of decided cases.

At the threshold inquiry stage, the questions of factual foreseeability and proof of a recognisable psychiatric illness are often straightforward questions of fact. The inquiry as to having a recognisable psychiatric illness was put to use locally in *Man Mohan Singh* (2008), where the Court held that extreme grief is not a recognisable psychiatric illness. This seems to follow the holding in *Brice v Brown* (1984) where the court held that 'nervous shock' means actual mental injury or psychiatric illness, and that "mere grief and sorrow are insufficient".

The main uncertainty is introduced when applying the three *McLoughlin* factors, and we shall now analyse them in detail.

1) Relational proximity

At the relational proximity stage, the Court seeks to find out if the relationship of the claimant to the victim was sufficiently close that it was reasonably foreseeable that he might suffer nervous shock. In *Alcock v Chief Constable of South Yorkshire* (1991), the House of Lords rejected the concept of limiting the class of persons who can claim to specified relationships such as spouses or parents or children, as held in *McLoughlin*, in favour of the close relationship test. This is both logical and just in that, per Lord Keith, it is the existence of the close tie of love and affection that leads to nervous shock. Thus, the spouse or parent will be presumed to have such close ties of love and affect, and siblings and other relatives will have to prove such ties. Presumably, it would be open to the defendant in the cases of spouses to rebut the presumption by proving, for example, that the partners have separated and have not been living together for some years.

This wide approach, however, is not free from difficulties. It seems that *Alcock* would allow recovery by a particularly close friend who can satisfy the criteria of love and affection, but how is a defendant to reasonably foresee the existence of such a close friend? Given the readiness of some judges to foresee a great deal and others to take a narrower view, this approach seems to introduce great uncertainty.

In Singapore, the rejection of a primary-secondary victim distinction, introduced in *Dulieu v White* and affirmed in *Page v Smith*, creates further uncertainty. In the hypothetical situation of a reckless driver brushing past the claimant, but not touching him, who subsequently developed nervous shock, it would appear as though the claimant would not be able to fulfil the relational proximity factor by virtue of him being a stranger. In the UK, the courts would classify the claimant as a "primary victim" who was in the "physical zone of danger" and thus allow for recovery. However, in Singapore, the rejection of this distinction between primary victims and secondary victims seems to suggest that the claimant would not be able to recover.

In addressing this issue, the dicta in *Pang Koi Fa* (pre-Spandeck) may shed some light. In *Pang Koi Fa*, the court did mention expanding the three *McLoughlin* factors and not applying them religiously. In that case, they considered expanding the first limb of proximity to consider parties who felt as if they were responsible or had contributed to the death or injury of the victim of the negligent act. Hence, a less-strict applicable of the *McLoughlin* factors may allow the claimant in the aforementioned hypothetical to claim since he may not have to satisfy the relational proximity or that he may satisfy an expanded form of relational proximity.

However, the question then is that it may open up the floodgates and extend liability "in an indeterminate amount for an indeterminate time to an indeterminate class" as per Cardozo CJ in *Ultramares*. Perhaps the availability of the subsequent proximities might serve to restrict the floodgates. Furthermore, in Singapore there is an additional limb of policy which the courts could employ to prevent frivolous claims.

2) Physical proximity

Another area that gives rise to problems of justice and uncertainty arises from the second requirement that the claimant's proximity to the accident or its immediate aftermath is close in both time and space. The necessity for such a requirement is obvious, in that the claimant should not be allowed to claim a long time after the accident, but just what is meant by being close in both time and place? In *Alcock*, Lord Ackner was not prepared to allow recovery to a plaintiff who saw the body of a brother-in-law at the mortuary some eight hours after the accident, while in *McLoughlin*, Lord Wilberforce stated that a two-hour delay period was at the margin of the time span for recovery. This appears to be an arbitrary timescale in that a person who has a Porsche or Ferrari may be able to recover, whereas a claimant who has to depend on public transport may not. Is a claimant who is away on business and, on return, identifies a dead spouse affected any differently from a person who is called from work to identify a dead spouse?

The harsh applicable of *McLoughlin* in *Alcock* was somewhat relaxed in *Pang Koi Fa*, where the courts held that the claimant was proximate in both time and space to the tortious event i.e. death of her daughter, as claimant ahd witnessed the gradual deterioration of her daughter's condition. Thus it would seem that in Singapore, at least, the courts take on a more sympathetic and less arbitrary view as compared to its UK counterparts.

3) Causal proximity

The third proximity in *McLoughlin* is that the nervous shock must be caused through seeing or hearing the accident or its immediate aftermath. The contentious issue here is with regards to whether simultaneous television broadcasting would suffice to satisfy the requirement. In *Alcock*, it was held that witnessing of accident through television was not sufficient proximate. Lord Keith stated that the television broadcast was not to be equated with the viewer being within "sight or hearing" of the event or of its immediate aftermath. Lord Ackner adopted the same position mainly because television broadcasting guidelines forbade transmission of identifiable individuals involved, and further stated that simultaneous broadcasts could not be excluded in all cases. This seems to suggest that if identifiable individuals were broadcasted, the third requirement would be satisfied.

In Singapore, the alternative provided in *Pang Koi Fa* was that the shock may also result from the sudden and horrifying realisation, which one would expect a reasonable person in the position of the claimant to have, if he or she considered themselves responsible for the damage or injury caused.

Finally, because the law on nervous shock is subsumed under the *Spandeck* formulation in Singapore, there is an additional limb of policy to be considered. As this follows after *Anns* second limb of policy, it is only used where there are policy considerations to negate, restrict or limit the scope of duty. This stance has since been challenged in the case of *Animal Concerns*, which stated that positive policy considerations should be considered along with the negative ones suggested in the *Anns* approach. Positive policy considerations could include deterrence and victim compensation. However, it is hardly a contentious issue and thus only adds to the flexibility of the *Spandeck* formulation and does not introduce much uncertainty.

Conclusion

In conclusion, it can be seen that the current state of the law on nervous shock is uncertain in some respects. The enactment of a statute could remove some of the uncertainty, but whether this would be at the expense of justice and flexibility is a problem. Should the law specify categories of relationship into which a claim must fit to recover? Should the criteria for proximity in time and space be defined? It may be that such a statute would bring welcome certainty and logic in this area of law in the UK where the illogical distinction between primary and secondary victims still held, albeit with many criticisms, but in Singapore the refined *Spandeck* formulation for recovery on nervous shock appears to be sufficient to provide certainty through its proximity limb and allow for justice and flexibility through its policy limb or through inherent policy adjustments made via the proximity limb. Thus, this author is of the opinion that a statute, while it may introduce greater certainty, would not promote flexibility and fairness, thus the common law approach still appears more favourable.