TORTS REMEDIES

NOTES: Application of CLA
- CLA (2003) applies for torts dating from Act and does NOT apply retroactively; s 4 CLA
- CLA applies to NEGLIGENCE torts only – ‘breaches of a duty of care in tort’; s 4 and sch

Limitation of Actions Act (Qld):
- s 10: Actions for breach of contract, or acts in tort not involving personal injury must be brought within 6 years from the date on which the cause of action arose
- s 11 Actions for negligence, trespass or nuisance (contract or tort) involving personal injury or death must be brought 3 years

To claim damages in torts P must prove on BoP that they;
Sellars v Adelaide Petroleum; CLA s 12
1. Cause of Action: Have a valid claim in tort law
2. Causation: Which has in fact caused P’s loss
3. Remoteness: Loss is not too remote or (for negligence) within ‘scope of liability’
Provided D cannot prove:
4. Mitigation: P has not breached a ‘duty’ to mitigate loss

To recover damages in the tort of _____ a plaintiff must ordinarily prove, on the balance of probabilities; Sellars v Adelaide Petroleum NL, that ‘but for’ the defendant’s negligence their loss would not have occurred. For claims in negligence arising after 2003, the ‘but for’ test is superseded by statutory provision requiring defendant’s negligence be a necessary condition of the plaintiff’s harm; s 11(1) CLA although this must also be proven on the balance of probabilities; s 12 CLA amounting to a more than 50% chance. Provided the loss is not too remote and D cannot prove P failed to mitigate the court will then likely award damages....

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1. CAUSE OF ACTION

- Defamation, passing off, trespass, nuisance, false imprisonment, interference w/ K and malicious prosecution – damages assessed ‘at large’ and actual damages is assumed
  o Establishing action but no actual damage = nominal damages only
- Negligence – proof of actual damages is essential element in cause of action itself (‘gist of action’)

2. CAUSATION

We have no problems if only one cause......
Common Law:
Test: ‘But for’ D’s wrong, would P have suffered loss or damages on BoP? Barnett
Provided no NAls; Haber v Walker (i) Human action properly regarded as voluntary and ii) Independent event which is so independent of original activity it must be regarded as coincidence
CLA Negligence:
S 11(1)(a) CLA: Was breach of duty a necessary condition of the occurrence of the harm? (Factual Issue – no police) on BoP; s 12

- (However, 2 tests appear to be very similar in terms of dealing with the issue; Adee’s Palace)

However, here there are multiple causes....

Problem 1: CONTRIBUTORY NEGLIGENCE by P
D must prove on BoP that P was CN
Law Reform Act (Qld) s 10(1): If P suffers damages as result partly of their failure to take r’ble care (CN) and partly of the wrong of any other person:
- a) A claim in respect of damage is not defeated by reason of CN
- b) But damages recoverable re wrong to be reduced to such extent as court thinks just & equitable having regard to P’s share in responsibility for damage

Presumptions:
- Where P is intoxicated: CN is presumed under CLA s 47(2) unless P can prove:
  o Intoxication did not contribute
  o Intoxication was not self-induced
If unable to rebut then court must deduct 25% (or more as appropriate) from damages award: CLA s 47(4)
– Where P relies on person they know is intoxicated; s 48
– Where P knowingly gets into car w/ intoxicated person: Claim is reduced by 50%; s 49

NOTE: Court may find P 100% CN if just & equitable to do so; s 24 CLA or 0% CN; March v Stramge

Problem 2: CONCURRENT CAUSES
– where there are 2 or more acts/events which would each be sufficient (in law) to bring about P’s injury
Joint Tortfeasors = people who have acted together to commit tort; Thompson or where one is vicariously liable for other’s tort and thus jointly responsible; e.g. employer/employee, principal and agent
Several Tortfeasors = people who have acted independently but who have caused same damage i.e. your driver goes through a red light but the other driver is also speeding and not concentrating

TEST: ‘But for’ test is inadequate – must be “tempered by the making of value judgments and infusion of policy considerations”.

Problem 4: EVIDENTIAL GAPS
In exceptional cases and according to established principle, a court may take other factors into account; s 11(2) CLA when determining causation. One such established principle - the Fairchild Exception – arises where multiple negligent parties are negligent but it is impossible to prove on the BoP which one caused the actual damage; Fairchild i.e. where P’s exposure to a single asbestos fibre could have occurred in the course of employment by multiple negligent companies. In such circumstances, it is enough to prove that a defendant’s negligence ‘materially increased the risk of harm’ for them to be liable for the plaintiff’s loss.

Division of Liability:
The exact proportion each company will be liable for, however, is not certain. In Fairchild, the court apportioned liability equally. Under this approach, each of your three former employer companies would be potentially liable for damages. Alternatively, in the more recent case of S.A. v Ellis, the court apportioned liability on the basis of each defendant’s proportional contribution to the increase of risk. With SA v Ellis currently on appeal we are unable to advise definitively.