GP: A person may use reasonable force to evict the trespasser provided that it is a proportionate measure Bird v Holbrook (1928):
- Hackshaw v Shaw – P tried to steal petrol from D’s property and was shot. The intention was to hit the tyre of the car and the property was shot. Court found that there were no warning signs on the property and it was disproportionate to the right that were being protected – there were also signs of maliciousness.

Abatement of Nuisance

Nuisance = something created on another property or noise etc. Abating a nuisance is considered to be a privilege, not an absolute right. The general principle is a people can only do what is necessary to avert the harm.

GP: A person can only do what is reasonably necessary to abate the harm and cannot go beyond the parameters of the law.
- It requires a strong justification and could be unlawful

Entering Land of Another

GP: Entering the land of another to abate a nuisance requires notice to owner, unless there is immediate danger to life or health Trailing v Ware [1957] VSC.

Trailing v Ware – After a heavy storm, D’s property began to flood and caused damage to P’s property. P trespassed on D’s property to abate the nuisance, which resulted in significant damage to D’s property. The question for the court was whether the manner in which the nuisance was abated was reasonable.

Court found that it was not within the legal parameters that the court could accept – mere property damage was not sufficient. Court held that there must be a strong justification where notice is not given i.e. immediate danger. Generally, losses that occur after abatement are not claimable.

Damages claimable:
- All losses before abatement
- Uncertainty regarding losses sustained after abatement
- Cost of abatement to be borne by person taking steps in abatement

Squatters

Squatters are trespassers that are in possession of the land. GP: A person may evict squatters provided that reasonable force is used and proportionate to the actual harm McPhail v Persons Unknown (1973):
- Need not go to court but it is recommended
- Need to use a legal process if persons trespassing had a lawful right previously

Level of force must be reasonable and cause no damage to the persons or property McPhail v Persons Unknown – Squatters changed locks to property and did not leave after many requests. Court affirmed that an owner is entitled to evict a squatter without judicial intervention

Defence against Trespass to Person

GP: A person can defend against an attack with force, provided that it is reasonable and proportionate to the actual harm.
- Self-defence defences can be rejected if force is excessive

Fontin v Katapodis (1962) HCA – Employee accused customer of stealing and threw glass, which severely injured the customer. Court held that it was not a reasonable force in S.D. and was disproportionate to the actual harm.

Underley v Swanell (1997) NSWCA – Man and woman were physically violent with each other. The question for the court was whether the force used was reasonable.

Court held that the woman’s injuries indicated that the man was not just acting in self-defence. It was confirmed that D retains the onus of proof that the particular force was necessary.

Penalty Clauses/Liquidated Damages

GP: Penalty clauses are acceptable if there is a genuine pre-estimate of damage and not punitive in nature.
- where the amount is extravagant and unconscionable, it is more likely to be a ‘penalty’
- where the aim is to terrify the contracting party to comply with the contract, it is more likely to be a ‘penalty’

Provided that the amount is the equivalent of a pre-estimated loss, the clause will generally be enforceable Dunlop Pneumatic V Tyre v New Garage [1915] (prior to consumer legislation) – D agreed not to sell products below list price. K provided that if seller sold below list price, the penalty would be 5 pounds. The question for the court was whether the penalty clause was enforceable.

Court found that it was sufficient to be a genuine pre-estimate of loss for the breach and therefore it was enforceable. The fact that it was a set price for all breaches did not hinder the case as it would be impossible to precisely determine the loss of each and every product.

It is necessary to look at the proportionality of the clause and determine whether it is aimed at terrifying the contracting party Ringrow v BP Australia (2005) HCA – Court accepted principles set out
There are 5 elements of rescission:

- Contract
- Vitiating factor in the formation of the contract
- Election to rescind the contract
- Restitutio in integrum (restoration of parties to pre-contractual position) is possible
- No bars to restitution (no defence)

**ELEMENTS**

**Vitiating Factors**

In order to rescind, there must be a vitiating factor in the contract:

- Misrepresentation
- Mistake
- Duress
- Undue influence
- Unconscionable dealing

**Transaction vs Rescission**

Termination:

- Breach of Contract
- ‘Innocent’ Party treats contract as no longer binding
- Further performance discharged
- Rights and obligations from partial execution remains
- Pay damages as if contract properly performed

Rescission:

- Formation of contract was affected by vitiating factor
- Contract voidable
- Choice to rescind (‘avoid’) contract
- No rights and obligations under the contract
- Return to original position

**Factors in establishing if a clause is a penalty clause**

HC accepted the principles laid out in *Dunlop Pneumatic Tyre v New Garage* but broadened the scope to allow particular payments to be ‘penalties’. A penalty can be a payment that results from a breach of K, even if it is a fee that is levied from something that occurs inside the parameters of the K.

**Mistake**

- Contract voidable
- No rights and obligations under the contract
- Return to original position

**Misrepresentation**

- ‘Practical justice’ included making allowances for the skills of the managers, labour they put into O’s and the profit, which they were entitled to. However, the majority of profits were returned to P and was given the master recordings, which put him back into the position he was in prior to the contractual relationship – he had ownership of his own materials and work.

**Common Law Restitution**

- Complete restitution is not possible if the property:
  - Has been destroyed; or
  - Has deteriorated; or
  - Has been acquired by bona fide 3rd party

**Common Law Restitution**

Equitable Restitution

Equitable restitution allows for substantial restitution *Brown v Smit* (1995) HCA – Equity is less strict because of the availability of ancillary remedies in equity to make adjustments between the parties. It is possible due to the ‘practically just’ element between parties, which can make allowances

Brown v Smit – P operated farm for 3 years, made improvements to property and spent considerable amounts of money. P tried to rescind contract due to misrepresentation. It was not possible to give property back in the exact state as he received it, therefore equity provided means for adjustment. P had choice of getting his money back for the property and pay occupational rent for his use of the property OR receive compensation for the improvement he had made to the property.

Substantial restoration is possible for a practically just outcome *Aliati v Kruger* (1955) HCA – Dentist bought fruit shop, there was a misrepresentation about the generated income and was not told that there was a major supermarket being built closely, which was impact business. D refused to give P money back, shop closed down, stock was sold and lease ended on premises.

D claimed on basis that he had rescinded K and wanted to enforce it. Court granted rescission and restitution by substantially restoring the parties to the position prior to entering into the contract – it was practically just.

Equitable rescission is a flexible remedy *O’Sullivan v Management Agency and Music Ltd* (1989) – O was musician and not was business sophisticated. M assisted in O popularising his music, but K was entered into under undue influence (vitiating factor). M kept O’s master recordings, major cuts of profits.

Court acknowledged that because of O’s sophisticated, he had relied on M entirely. Rescission was granted and adjustments were made. The ‘practical justice’ included making allowances for the skills of the managers, labour they put into O’s and the profit, which they were entitled to. However, the majority of profits were returned to P and was given the master recordings, which put him back into the position he was in prior to the contractual relationship – he had ownership of his own materials and work.

Court may order partial recession or rescission subject to terms where that is necessary to achieve what is ‘practically just’ for all parties. Equitable maxim – ‘he who seeks equity, must do equity’. If seeking assistance from equity, equity requires to do what is ‘right’.

Maguire v Makaronis (1997) HCA – Breach of fiduciary duty. Solicitor did not disclose to clients that they were granting a loan while they were doing P’s mortgage – this was an obligation that existed, which should have been complied with. There was a vitiating factor in the formation of the contract and P sought to rescind K.

Court held that where K for a loan is rescinded, ‘doing equity’ would imply that P would have to pay back loan with interest but have no further obligations between parties in continuing the K.

**Bars to Rescission**

- 3rd party has acquired an interest in property – cannot restore parties to pre-contractual position
- Destruction of the property
- Affirmation – P has affirmed the K by their conduct
- Delay – can be construed as an affirmation of the K
- A clause within K that P has not relied on representation – will not apply to fraudulent misrepresentations, only innocent representations.
- Hardship to the defendant *Hartigan v Int Society for Krishna Consciousness* (1997) HCA – Court held that the ‘right thing’ to do was for V to take responsibility for what he had committed to (not going back on his promise) and do what he agreed to do (pay back past debts).

Restitution is not possible where there is bar. These include:

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A statute can provide for the recovery of damages to compensate both obligations under statute. Statutory damages differ from common law damages and any breach is of its own nature (sui generis nature).

Gates v City Mutual Life Assurance Society Ltd (1986) – It is for the courts to determine what the appropriate measure of damages are recoverable for the P who suffers loss or damage by conduct done in contravention of the relevant provisions.

Even a loss may be compensable in principle, it may not be recoverable, therefore it is necessary to consider the normative issues in recoverability, as well as the basic elements for a claim in damages, contributory negligence and certainty. The question is whether the loss is recoverable – in principle it may be compensable; however it may not be recoverable due to a relevant factor.

There are specific instances where normative issues may affect the concept of recoverability:

Gender bias should not affect an award of damages Wynn v NSW Insurance, Ralevski v Dimovski; Parker v Park [1979].

Wynn v NSW Insurance – High-earning woman injured and claimed loss of income. Consideration was given to the fact that the cost of children should be deducted from the actual amount that she could claim. TJ took into account that she was a woman in calculation of damages. On appeal, the court held that the cost of child care should not be taken into account as it would be gender bias.

Ralevski v Dimovski – Young boy suffered facial scaring as a result of an accident. Judge said that the scaring was bad even for a male. Here, the gender perception was that males do not care as much as females about their appearance. It was impermissible for gender bias, therefore the boy was able to claim.

Parker v Park – Court considered claims for compensation of a 15 yrd old female P, who had suffered massive brain injury at 8. P had no prospects of marriage or employment. In assessing the amount of damages and any breach is of its own nature (sui generis nature).

Deductions of a discount rate are available in some circumstances. The law of actionable civil wrongs exists not only to provide monetary compensation, but also to encourage appropriate conduct by the imposition of monetary sanctions. The law of torts role in distributive justice in and promoting safety should be maintained rather than denied.

A need for corrective justice in novel negligence claims is not a persuasive factor Harriott v Stephens [2006].

Once and For All Rule

Once and for all rule applies – P cannot claim more than once due to public policy. The need for a claim to be finalised overrides full compensation for some P’s. Fitter v Veal [1701] UK – P suffered injuries and made claim. After settlement, P discovered more injuries, however second claim was prohibited.

B.O.P Test

Balance of Probability test applies Tabet v Gett [2010] HCA – If P can show on the B.O.P (more than 50%) that there has been a loss, the court will treat it as an absolute certainty. Principle of B.O.P encourages distributive justice by either going 0% or 100% (if it has been established).

Deductions of a Discount Rate

Deductions of a discount rate are available in some circumstances Todvorich v Waller [1981] HCA – Good example of distributive justice. Where there has been a lump sum payment awarded for personal injury, the amount may be reduced by a statutory deduction percentage to take into account benefits of the community, affordability of insurance etc.

The Civil Liability Act 2003 provides a minimum statutory deduction to facilitate the ongoing affordability of insurance.

ELEMENTS FOR DAMAGES IN TORT

In order for a claim in damages to be successful, it must be established that
1. P has a tortious claim of action against D
2. D’s tort caused P’s loss (causation)
3. P’s loss is not too remote (remoteness)

Compensable Principles – Statute

A statute can provide for the recovery of damages to compensate P for Scandrett losses caused by a breach of a particular

Compensability

There are differences between compensable losses in torts, contracts and statutory breaches Marks v GIO Australia Holdings Ltd [1998].

Tort

In contract, the wrong consists of the breach of K, therefore the P is entitled to be put in the position that they would have been in if the K had been performed as promised. P is entitled to recover damages for the loss of the bargain/promise Marks v GIO Australia Holdings Ltd [1998]. Todrovich v Waller.

Damages are payable for the loss of a non-performance of a K in the form of expectation losses Marks v GIO Australia Holdings Ltd [1998].

Equity

Losses caused by equitable breaches (i.e breach of fiduciary duty and confidence) are eligible for compensatory awards. In equity, both equitable compensation (remedy that operates in the exclusive jurisdiction of equity) and equitable damages (Lord Cairns Act damages) are available remedies.

A statute can provide for the recovery of damages to compensate P for Scandrett losses caused by a breach of a particular

Court found that from the time H indicated that she wished to rescind K, ISKC had ample time to prepare for the possibility of losing the asset. The extent of the hardship was not sufficient to counteract the unconscionable dealings or undue influence that led H to give everything away to them.

There are differences between compensable losses in torts, contracts and statutory breaches Marks v GIO Australia Holdings Ltd [1998].

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Compensability refers to losses that fall outside the scope of being recoverable – the law may not provide compensation for that specific loss. Factors that may preclude an award of damages include public policy considerations, such as wrongful life and wrongful birth; distress for contract breach.

Compensable Principles – Statute

A statute can provide for the recovery of damages to compensate P for Scandrett losses caused by a breach of a particular...
4. P has not breached duty to mitigate unnecessary loss (mitigation) and affects quantum
5. Established and adjust liability – need to satisfy all of above to obtain more than nominal damages

NOTE: when dealing with a negligence case, any discussion of causation or remoteness should start from the statutory position, not CL position.

1. CAUSE OF ACTION
In torts, the cause of actions could be trespass/negligence.

2. CAUSATION
There must be cause and connection between D’s wrongdoing and P’s loss. If there is no proof that the tort caused the loss/damage, D will not be held liable for that loss. The burden of proof is on the balance of probabilities and the onus of proof is on the P to prove the loss.

NOTE: when dealing with a negligence case, any discussion of causation or remoteness should start from the statutory position, not CL position.

Negligence - Civil Liability Act 2003

Section 11 of CLA sets out the general principles of a negligence claim (‘duty of care’).

S 11 General principles
(1) A decision that a breach of duty caused particular harm comprises the following elements—
(a) the breach of duty was a necessary condition of the occurrence of the harm (factual causation);
(b) it is appropriate for the scope of the liability of the person to extend to the harm so caused (scope of liability).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

NOTE: s11(4) reads with s11(1) – when looking at the scope of liability, the court must decide whether or not and why.

Adeels Palace Pty Ltd v Moubarak (2009) – (decided under NSW Civil Liability Act but important decision). P suffered serious injuries when shot at D’s restaurant on NYE. No security staff were employed. P sued for negligence and claimed D owed them a duty of care that had been breached, for failure to employ security staff and the breach was causative of the injuries sustained. High Court held that there was a duty of care owed but it was not necessary to decide whether there was a breach as if there was a breach, the breach did not cause the harm.

Proof of Causation
Causation must be proven on the B.O.P in light of all the established facts, including reasonable inferences from the circumstantial evidence – it cannot be presumed. Courts require P to establish the material cause of loss and its extent with a reasonable measure of precision.

Purkess v Crittenden (1965) – It is for P upon the whole of evidence to satisfy the tribunal of fact of the extent of the injury caused by D’s negligence.

Amaca Pty Ltd v Ellis (2010) – The estate of a smoker, who had died from lung cancer, pursued an action in negligence against employer for exposing the deceased to asbestos. P’s action failed. P could only establish that exposure to respirable asbestos fibers may have been a cause of his cancer, not that it was a probable cause.

In determining whether there has been factual causation, the court must apply the common law principles of causation. The appropriate tests for causation include the ‘but for’ test and the common sense approach March v Stramere (1991). Bennett v Min of Community Welfare (1992).

It is necessary to look at the D’s negligence from a common sense perspective to establish causation to D liable March v Stramere (1991) – A truck was parked in the middle of the road, a driver was speeding and crashed into the parked truck. The Court considered who was to “blame” for the accident.

The court applied the ‘but for’ test in the common sense approach and found that if the truck had not been parked in the middle of the road, there would have been no crash, thus the harm would not have occurred. The court noted that there is no real difference in causation of fact and causation in law.

Bennett v Min of Community Welfare (1992) – A man in a juvenile detention center, advised with incorrect legal advice in relation to his legal position, thus his claim was statutorily barred. Court looked at the negligence from common sense perspective and found that the failure to provide correct legal advice caused the loss. The later advice did not supersede the first advice.

Bennett v Chelsea & Kensington Hospital Management Committee (1968) – Man arrived at hospital after having consumed arsenic. Doctor did not treat and sent him home, where he later died of arsenic poisoning. Court held that the man’s death was not attributable to negligence of the doctor, but to the consumption of arsenic. The ‘but for’ test was not satisfied.

NOTE: The phrase in which the question is framed, cannot be too broad or too narrow.

Chains of Causation
Where there are multiple causes of a loss, the but-for test may not suffice. March v Stramere (1991), Petrov v Hatzegeorouss (1991). It is necessary to consider the chain of causation and whether or not it has been broken.

It is not necessary to establish that D’s conduct was the sole cause of harm – only that it was a material or substantial factor in the harm March v Stramere.

Petrov v Hatzegeorouss – P suffered serious burns in spray painting area of D’s panel beating workshop by D’s lighter where safety regulations strictly prohibited naked flame.

Court held that the breach of the safety regulations caused the injury to P. Although the proximity of the flame to P’s clothes led it to ignite, the danger was created by having the naked flame in the workshop.

Novus Actus Interveniens (intervening act)
Causation may be broken by an intervening act. Whether the subsequent negligent act severs the causal connection is a matter of circumstance and degree March v Stramere.

Breaking the “chain of causation” may be caused by:
- Voluntary human action – Actions by P Haber v Walker (1963), Havenaar v Havenaar (1982)
- Coincidence (causally independent)
- Gross negligence by a third party (often medical negligence following personal injuries) Bennett v Min of Community Welfare (1992), Mahony v J Kruschich (Demolitions) Pty Ltd (1985)

Voluntary human action by a third person or P exercising free will may result in a break of causation Haber v Walker, Havenaar v Havenaar, Rickards v Lothian [1913]

Haber v Walker – Man was physically injured; he suffered severe psychiatric injuries as a result and committed suicide. The question for the court was whether the suicide was the cause of the loss or whether it was the original physical injury caused by D.

Court adopted the principle that suicide was not his free choice, but almost predetermined as a consequence of the injuries he sustained. The casual link between D and P’s loss was not severed by the suicide.

Havenaar v Havenaar – Man became an alcoholic to take away pain of the injuries. Court found that the casual connection was not severed between D and the actual loss suffered because of the relationship in the actions of P and the reasons why he resorted to alcohol (pain and suffering).

Rickards v Lothian – Pipes in a bathroom on floor above premises occupied by P were deliberately blocked by a malicious act, which resulted in property damage by overflow.

Court held that D was not liable in negligence for failure to install an overflow pipe on the floor of bathroom. Court reasoned that as the flooding was caused by a malicious and deliberate act, the perpetrator would have found a way to overcome the effect of the overflow pipe, and premises below would have still flooded, even if the overflow pipe had been installed.

Bennett v Min of Community Welfare – Court found that medical negligence is generally foreseeable.

If the consequences of a subsequent tort are reasonably foreseeable, then the original tortfeasor will still be held liable Mahony v J Kruschich (Demolitions) Pty Ltd – Employer was injured by negligence of employer. Employee was subjected to negligent medical treatment, and employer cross claimed against medical practitioner.

Court held that if a subsequent tort and its consequences are foreseeable to the first tortfeasor, then the consequences of the...