Structure: don't set out all the law at first then tack on answer of facts at the end. First and foremost, answer the question if it's targeted, otherwise go to the breach first and so on for each claim. If you think there are no issues with e.g. causation, say so with a brief reason why not (one sentence). Go slow and figure out what to write before I start writing.

0. Lay out potential plaintiffs and defendants and type of harm

1. Owed a duty of care vis-à-vis the plaintiff (Anns 1: foreseeability, proximity, neighbour. Anns 2: policy considerations). *Do you owe duty of care for harm caused by omissions? Do public authorities owe duty? Can someone be vicariously liable for someone else, so that they owe the duty of care instead of the actual wrongdoer? In what situation does a duty of care arise for economic loss? Specific situation: to what extent do Councils have a duty of care in respect of defective buildings?*

2. Breached their standard of care (What is the standard of care (reasonable person)? Was there a breach (did they live up to that standard?)

3. Causation (Caused the damage in fact. But for the defendant's negligence, the plaintiff wouldn't have been hurt). *Intervening causes – does something break the chain of causation meaning defendant isn't liable? Supervening causes. Did defendant cause damage on balance of probabilities?*

4. Remoteness/legal causation (Is the type of harm too remote for the plaintiff to be liable for – *Mainguard)*

5. Defences (Are there any defences the defendant can use to get rid of liability, like contributory negligence?)

Breach – Standard of care

Whether someone breached their standard of care i.e. whether they were "negligent" must be assessed **objectively** – ***Vaughan*** *v Menlove* (1837) (hay barn) and you can't make the defendant have more burden because you are sensitive (***Bourhill***).

Ordinary standard: standard of care is assessed objectively against the **reasonable and prudent** person of **ordinary intelligence** in the **same circumstances**. "...the man on the top of a Clapham omnibus." ***Bolam*** *[1957]*

Special Skills/professional: When professing to have a special skill, the test is the standard of the ordinary skilled person exercising and professing to have that special skill." ***Bolam*** *[1957]* standard of professionals who make judgment calls not unrealistic ***Lai*** *[2006]*

Standard at time of incident: Standard based on current knowledge at that time. ***Bolam.*** Denning LJ: "We must not look at the 1947 incident with 1954 spectacles." It was held that the micro-cracks were not foreseeable given the prevailing scientific knowledge of the time so not negligent. ***Roe*** *v Minister of Health [1954]*

Learners: if you need certain knowledge to do a task, there is no lowered standard for learners ***Nettleship v Weston*** *[1971]*

Standard not too onerous: the law does not impose an unattainable standard for people to live up to. It imposes a standard that a reasonable person with reasonable skills and knowledge should uphold. – (tomato case): ***Hamilton*** *v Papakura District Council 2002;* ***Smith*** *v Littlewoods Organisation [1987].* Not superman. ***Arland and Arland v Taylor*** *[1955]*

Balancing: hit by ball: how foreseeable was the risk of injury and how expensive/difficult would removing that risk have been? Where the hazard could have been removed with little effort and no expenditure, no problem arises, standard is breached. Too expensive to build fence to protect off chance a ball goes over and hits someone. Standard not breached. ***Bolton v Stone*** *[1951]*

Child: Children need to come up to the standard of an ordinary child of that age in those circumstances: (metal in eye of child 13 ½ yo): ***McHale v Watson***, ***Gough*** *v Thorne (1966)*

A child who engages in dangerous adult activities, such as driving a car or handling industrial equipment, must conform to the standard of the reasonably prudent adult. ***McErlean v Sarel*** *(1987)*

If risk is higher (dangerous goods): Things inherently dangerous in themselves have a very high standard of care. The more dangerous the act, the more care must be taken. Standard of care is still ordinary and prudent man exercising reasonable care, but reasonable care of dangerous stuff involves exercising a high degree of care. ***McCarthy*** *v Wellington City [1966]*

An ordinarily prudent employer would supply goggles to a one-eyed workman whose job was to knock bolts out of a chassis with a steel hammer when the workman's eye was close to the bolt." ***Paris*** *v Stepney Borough Council [1950]*

Reasonable person with unknown medical condition: A reasonably competent driver unaware he is suffering from a condition that impairs his ability to drive. To not take account of the defendant's condition would be to impose strict liability. ***Mansfield*** *v Weetabix Ltd [1998]*

Trying doesn't count: It doesn't matter if the pilot was desirous of using all care; the objective test is whether he in fact exercised the care and attention which were customary and proper. ***Bailey*** *v Taylor [1936]*

Driving: The standard is always that of the reasonably prudent driver. If conditions worse driver must adapt. ***Russell v Harris*** *[1960]*

Ships: Needed a bargee on board during daylight *US v* ***Carroll Towing****, 1984*.

Duty of care

In NZ the courts look at whether it is **fair, just and reasonable** to require the defendant to owe a duty of care to the plaintiff. This is generally assessed under the two headings of **Anns,** which are **1. proximity and foreseeability and 2. policy** (*South Pacific, Rolls-Royce).*

Anns 1. Proximity: relationship of proximity (physical or relational). **Foreseeability:** acts you can reasonably foresee would injure your neighbour, or someone who is so closely affected by my acts that you ought reasonably to have them in contemplation as being

affected when think of acting or not acting – Lord Atkin, ***Donoghue***.

Anns 2. Policy considerations limiting scope of duty. Social or legal implications.

Overall NZ courts will look at whether it's **fair, just and reasonable** to impose a duty of care? *South Pacific; Rolls Royce*. In novel duty situations outcome is partly determined by judicial discretion, so hard to be certain – Cooke P ***South*** *Pacific*

Bourhill v Young [1943]

No duty. Motorcyclist owed duty to people he could reasonably foresee would be harmed by his acts/omissions. Mrs Bourhill was not within the area of potential danger (no proximity) either. Overly sensitive.

McCarthy v Wellington City NZ [1966]

Yes duty. A person storing dangerous explosives on his premises owes a duty of care to keep them secure to all persons foreseeably likely to be injured as a result of a breach of that duty.

North Shore CC v A-G [2012] NZ [The Grange]

No duty: All judges said it was arguably foreseeable that either the Council or homeowners would suffer loss if the BIA made a poor job of discharging its functions. But majority found that there was insufficient proximity between the BIA and the Council or homeowners to justify a duty of care.

Omissions – Liability for acts of third parties

Law is cautious to impose liability for omissions (*Smith v Littlewoods, Couch*). Esp pure nonfeasance. This is because it is saying one party is liable for failing to prevent the deliberate act of another party *(Smith*). But some exceptions.

3 types of omissions: 1) Not acting in the course of positive conduct where there is an obligation to act with care – *misfeasance.* 2) Passive inaction when there is no prior duty to act – *pure nonfeasance.* 3) Non-performance of a *statutory duty* by public authorities.

Generally law only imposes liability for misfeasance. Pure nonfeasance is not generally covered legally. The common law doesn't like to impose an affirmative duty to act. So in ***Stovin v Wise*** Lord Nicholls says you don't need to reach down and save a child drowning.

Pure nonfeasance: The failure of the defendant to respond to outcries is immaterial. No legal right was infringed. – ***Osterlind v Hill*** – Canoe case where guy drowned.

Policy For & Against pure nonfeasance ***Stovin v Wise***

Political: Less of an invasion of an individual's *freedom* for the law to require him to consider the safety of others in his actions than to impose a duty to rescue & protect.

Moral: A duty to rescue/ assist in danger could potentially apply to a large & indeterminate class of people. Why should one be held liable over the other? *"Why me?"*

Economic: There is no justification for requiring a person who is not doing anything to *spend money* on behalf of someone else.

There are exceptions to pure nonfeasance not being liable!

1) If you own the land and have some **control** over it (*Goldman v Hargrave*)

2) If you induce someone to rely on the fact that you will act but you don't

→ elements: Reliance, control and assumption of responsibility underlie cases where there are positive duties to act.

EXAM HINT: → If there is an omission, pure nonfeasance, look for whether the parties are in a special relationship that gives one control over the other (maybe if there is a child and adult), whether one owns land and has control over land, whether in a contractual relationship that creates proximity so there is duty to not omit to do stuff, whether induced someone else to rely on them and they omitted to act.

Control of Land: *Goldman v Hargrave* – lightening fire case – an occupier of land is under a general duty of care, in relation to hazards, whether natural or man-made, occurring on his land, to remove or reduce such hazards to his neighbour.

AW Gardner v Jack Guy Ltd HC Auckland 1990

In Whangarei someone owned a shop in a mall. Builders working on nearby store left holes in walls. Burglars gained access to this hole and stole stuff from plaintiff's shop. the shop was negligent and WAS liable for omitting to act (cover the hole). It was reasonably foreseeable that if hole was not boarded up a burglar could have entered it. Like in Smith it said if you create a danger you are liable for it, in this sense a danger was created by leaving hole.

No danger created: *Smith v Littlewoods Organisation Ltd [1987]:* No duty. Abandoned cinema case, vandals broke in, lit fire, no action, lit another fire causing damage to neighbouring properties. No general duty to prevent third parties from causing deliberate damage. *An occupier of land who negligently allows a source of danger to be created on his land, and can reasonably foresee that third parties might trespass on his land and interfere with that source of danger, spark it off and cause damage to the person or property of those in the vicinity, should be liable to persons damaged by that act of the third parties.* (like in *AW* but not in this case.) E.g. stores fireworks kids come cause a fire which burns down neighbour's house, maybe liability as dangerous nature of the fireworks, interference was foreseeable.

Danger created: *Haynes v Harwood [1935]:* left horse carriage on street and bolted away after boy threw stone at them. It was reasonably foreseeable the horses would do that by any source of danger so owner was liable in negligence. Created source of danger.

Relationship of control: *Carmarthenshire CC v Lewis [1955]*: local authority owed duty of care over a school boy who went onto the road and caused a truck driver to swerve and die. Boy was under the authority's control. Special relationship gives rise to control.

Dorset Yacht [1970]: There was a special relation in that the officers were entitled to exercise control over the boys.

Contract: *Stansbie v Troman [1948]:* responsibility for omission was held to arise from a contract. In that case a decorator, left alone on the premises by the

householder's wife, was held liable when he went out leaving the door on the latch, and a thief entered the house and stole property. Assumed responsibility.

Public authorities: do they owe a duty of care?

In law generally not liable for injury caused to someone by a third party, including pub authorities, even if damage foreseeable. *Exceptions:*

1. Special relationship of *proximity* between the pub authority and plaintiff, making plaintiff at special risk (*Swinney, Couch, Reeves, Dorset* – NOT *Hill* and *Michael.)*
2. Wrongdoer is under the *control* of the defendant (*Dorset Yacht*).
3. Pub authority has *assumed responsibility* to plaintiff on which the plaintiff has relied (*Kent v Griffiths* – ambulance case where they said ambulance would arrive sooner, *Couch*).
4. If pub authority makes a *situation worse* can be liable (*Capital & Counties v Hampshire CC, 1997).*
5. *Policy reasons* saying there should be a duty under Anns 2 (*Swinney* – informants should be protected). Court can make new exceptions.

Home Office v Dorset Yacht [1970] UK (HOL)

Home Office owed a duty of care to the yacht owners. 1. yes proximity: officers were in a special relationship with the yacht owners as when people are escaping from situations they damage property in the vicinity to escape. So property owners on island in proximity to boys and foreseeable that guards being negligent would damage property. Damage caused beyond immediate vicinity of island too remote. 2. no policy reasons. The officers were not acting under discretion, they acted out orders given to them negligently.

Michael v Chief Constable [2015] UK (SC):

No duty of care to Ms Michael for phone operator saying her call wasn't life-threatening to other police dept. Many areas of life are subject to state protection and regulation. If organisational or individual failure, the body concerned is not ordinarily held liable for deliberate harm caused by someone else. Policy reasons limiting duty, *Anns 2*.

Stovin v Wise [1996] UK (HOL): No duty. Crash as road users' view was obstructed by a bank of soil. Council owed no duty of care to users of the highway in respect. No statutory duty so generally no common law duty (just power to do something, not duty). Anns 2 policy considerations limiting duty: imposing a duty of care would expose highway authority's budget to judicial inquiry Defensive behaviour. Can do what they want with $ if discretion.

Hill v Chief Constable of West Yorkshire [1989] Young woman murdered. Mother sued police in negligence for not investigating murder correctly & getting criminal before killing daughter. No duty of care as: Anns 1. no sufficient proximity: police owe no general duty of care to all members of the public or members of a wide class (young females). Unless Miss Hill was in a specific situation and at 'special risk' beyond her just being a young female, she had no special relationship with the police. Anns 2. Police also shouldn't be responsible as a matter of public policy. Defensive conduct and waste police's money on liability.

Couch v Attorney General [2008] NZ (SC)

Yes duty. Arguable the pub authority could owe a duty of care to victim of injury from one of the criminals he/she was monitoring. 1. sufficient proximity between plaintiff and pub authority, so plaintiff could say they were an individual or member of a specific class known to the authority to be at risk (opposite of Hill). 2. no policy issues limiting enough to strike down case.

Swinney v Chief Constable [1996] UK (CA) Swinney was police informant; police were capable of owing a duty of care to her. 1. Proximity, There was arguably a relationship exposing her to particular risk that is different from one authorities owe to the public at large. 2. Policy: must protect the identity of informants, as it is in the public interest for people to come forward and help the police solve crimes.

Reeves v Comr of Police [2000] UK (HOL): Martin Lynch hung himself, he was prisoner. Guards negligently left cell window open so he could do it. Yes, duty of care owed: it was a statutory duty to look after prisoners and prevent them from committing suicide so also a common law duty. No novus actus interveniens as guards need to make a safe environment so have some responsibility. Cost was shared 50/50 as contributory negligence defence was used by police.

Vicarious liability

In common law people generally only liable for their own actions, but VL imposes liability onto a third party for the act of someone else (*Majrowski 2007*). Strict liability is imposed on the third party, so third party not at fault but still held liable (*Majrowski 2007*). Imposed due to policy reasons: company has more $; created a situation so should be responsible; employee under control of employer (*Various Claimants 2012*).

Directly liable: employer can be directly liable to victim if negligent in itself. No need for VL sometimes.

Independent contractors Principals generally not VL for independent contractors (***Cashfield** House Ltd 1995; S v A-G*).

Non delegable duties if a duty imposed on plaintiff due to relationship of proximity forcing him to take care, he cannot remove that duty by delegating its performance 3rd party. Can contract anyone to perform the duty but if someone injured, he will be held liable (*Cashfield*). Technically not VL as never got rid of duty, same tho.

TIP:→ Is the task being delegated to a contractor one that needs a higher standard of care? (*Armes* 2017 – like giving children to foster parents, or cleaning up Rena spill?). Then maybe non-delegable.

Is public authority under VL? There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence (policy reasons saying no, but still can be under them) – *A-G v Carter*.

Legal test to establish VL: 2 elements need to be satisfied to establish vicarious liability.

1. whether the **nature of the relationship** between the third party (who you want to hold liable) and the

tortfeasor is one that gives rise to vicarious liability. 2. whether there is a **sufficient connection** between the act and the scope of the person's role.

Element 1: nature of relationship

Employment: Generally employee/employer relationship gives rise to VL under element 1 (Mohamud v Supermarkets; Majrowski 2007).

Contractor: *Bryson v Three Foot Six [2005]:* The hobit Weta w/s. To figure out if employment relationship, Court must determine real nature of the relationship. Intention of parties relevant but not decisive. So was VL even tho contractor.

Akin to employment relationship: VL can occurs for relationship akin to an employment relationship (*Cox, Various Claimants*).

Test for akin to employment:

Armes v Nottinghamshire County 2017 UK (SC)

1) whether the wrong was committed in activity taken on behalf of defendants. 2) whether the wrongdoer's activities formed integral part of defendant's activities. 3) whether the defendant increased risk of wrongful behaviour by putting the wrongdoer in that situation 4) whether wrongdoer was under control of defendant 5) whether defendant is more likely able to compensate the victim than the wrongdoer himself/herself = VL relationship! ☺ Applied: In *Armes* Council VL for child abuse of foster parents as 1) undertaking activity on behalf of Council 2) integral part of child-caring services 3) placement of children with parents created risk 4) exercised degree of control through social workers. 5) Council better suited to meet award of damages.

Various Claimants, 2012, UK (SC): Yes VL: church organisation put men in a position which abuse occurred, abuser furthered charity's own interests, and charity created/enhanced the risk of victims.

Cox, 2016, UK (SC): Yes VL: prison liable for prisoner negligently injuring hired chef. Work done by prisoners was an integral to prison, prisoners were working for benefit of prison not own benefit. Risk created by prison.

Element 2: sufficient connection

Was this action conducted in the course of one's employment or role? (*Various Claimants, Mohamud*).

Child abuse: *Various Claimants, 2012, UK (SC):* Yes sufficient connection. Not within anyone's scope to abuse children, but actions were sufficiently connected to their job, i.e. wouldn't meet children and have that relationship unless they were hired in that position. So the organisation created a situation of risk and should bear the brunt of that risk.

Employment: *Mohamud v Wm Morrison Supermarkets:* Yes sufficient connection. Gas station worker acting within the scope when assaulting a customer. He answered the customer's question (within scope) and followed him outside. Nothing to break the chain of events which would say wasn't working at that time.

Majrowski, 2007, UK (HOL): Harassment **at work** can make the company VL even if no fault of company (strict liability). VL arises when this harassment was committed during the course of employment.

Dubai Aluminum, 2003, UK (HOL): yes, company is liable for fraud of employee if it was conducted within the scope of one's employment. It's a policy reason, so people will inevitably mess up and commit fraud and it's up to the company to bear the brunt of that cost.

Negligent misstatement

Was the information created for the **purpose** which the plaintiff relied on it for? Did the plaintiff **rely** on it? Did the defendant **assume responsibility**? *(A-G v Carter).*

A-G v Carter (2003) (NZ CA): MOT inspecting a boat. Carter relied on inspections and said lost money. But purpose of inspection was safety not economic viability, so shouldn't have relied on these documents for that, so no assumed responsibility of MOT to Carter. Special skill can help show there was assumption of responsibility but not as crucial as is in the UK under Hedley Byrne. Just one element

Hedley Byrne – followed dissenting judgment in Candler: No duty here as express disclaimer. But normally negligent misrepresentation = duty when a party is seeking knowledge from another party that has specialised knowledge or skill and is trusted to fulfil the duty. And the party who is giving the knowledge knows that reliance was being placed on his or her skill or judgment. (Followed dissent from Denning LJ in *Candler*).

Economic loss

Pure economic loss: a financial loss arising from no property damage (*Spartan* in UK can't recover for this. In NZ we can).

Consequential economic loss: a financial loss suffered as a result **another harm** to the plaintiff (property or person) caused by of a negligent act or omission.

Relational economic loss: a financial loss suffered as a result of a negligent act or omission causing harm **to property owned by someone else** other than the plaintiff.

NZ's jurisdiction has never treated the situation between physical damage and economic loss as critical in determining whether a duty of care is owed. *North Shore (Sunset Terraces).*

Taupo v Birnie: NZ CA essentially allows recovery for pure economic loss. The CA doesn't say *Spartan and Steel* was wrong (UK case). NZ CA said even though flooding happened months previously, the $ losses were still consequential on flooding, which gave rise to property damage, which led to the bad will of the customers and loss of money.

New Zealand Forest Products [1986] NZL No policy reasons stop a duty of care from arising, as it in this case one known plaintiff, so would not lead to too many litigations. If there are policy arguments against they will need to deal with those issues when they arise on the facts.

Defective buildings

Invercargill CC v Hamlin: Builders and local authorities owe a duty of care to subsequent owners in building or inspecting dwelling-houses. Distinguished UK Murphy and followed Anns.

Causation in fact (but for)

'But for' test: But for the defendant's lack of care, would this damage have occurred? - ***Barnett*** *v Chelsea* affirmed in *Invercargill CC v Southland [2017] NZCA Barnett*: no causation. Nurse in breach of duty as told man to take Panadol and he died over night. But the nurse's negligence didn't cause the harm or damage which the plaintiff's husband suffered as he was poisoned so no treatment they could have given to him could have saved his life. Alleviated pain but couldn't save him. So but for the nurse's negligence he still would have died. No causation.

McWilliams v Sir William [1962]: No causation. Safety harnesses. Falls off scaffold. The damage would have occurred anyway as court said evidence is clearly that if harnesses were provided he wouldn't have used it anyway.

Bolitho [1998]: No causation. boy who goes into hospital suffering breathing difficulties. Nurse fails to call out doctor. Even if nurse hadn't been negligent harm would have arisen (as doc wouldn't have intubated anyway).

Invercargill v Southland Indoor Leisure Centre: roof collapses under snow. Defective building. CA says no causal link between negligence of the council and the damage. The trust's primary reliance was placed on its own experts (engineers). Did not rely on Council for anything material. But for negligence of council damage still would have happened as relied on own engineers.

JEB Fasteners [1983]; Tauranga Law v Appleton [2015]: Reliance on misstatements. Inadequate advice about risks of making an investment didn't cause plaintiff to suffer loss of that investment where the plaintiff would have proceeded with the transaction anyway.

If but for test doesn't work

Cook v Lewis [1951]: if 2 bullets hit a tramper and can't tell whose bullet killed him first, both are liable.

McGhee and NCB: McGhee was worked with brick kilns. Brick dust caused dermatitis. Sued employer for providing no showers to wash dust off, like reasonable employer. He couldn't show no shower caused dermatitis. But HOL said employer liable for materially increased risk of dermatitis by having no shower.
Policy: creator of risk should bear responsibility.
Defendant is responsible for exposure generally.

Wilsher v Essex: Boy has degen eye condition. 5 possible causes, so parents couldn't prove on a balance of probabilities the hospital caused the disease. There was only 20% chance it was them (1/5). So *McGhee* was distinguished as there was only one causative agent (brick dust) and we know the company was responsible for that, so identifiable defendant. In this case can't show that.

Fairchild v Glenhaven [2003]: Fairchild worked for a number of employers, all who negligently exposed him to asbestos. He got a disease from it. Was possible to say one employer caused the disease, it was impossible to say which. Under the normal causation test, none of them would be found on a balance of probabilities to have caused the harm. BUT the HOL: relaxed the but for test. The appropriate test of causation is whether the employers had materially increased the risk of harm to the claimants. Were liable as joint tortfeasors, more than one is responsible, can bring action against one, responsible for entire, then one sued bring action against other tortfeasors – in solidum principle.

Barker v Corus [2006]: Asbestos 3 employers. Said law attribute liability according to probabilities – overruled by legislation. → Fairchild only works if you have one causative agent, which is how *Wilsher* doesn't work as more than one way could have got disease.

→ Where two or more tortfsrs cause the *same* damage to one plaintiff the law allows the victim to sue all or any of the tortfsrs and obtain against each for the full amount of the loss - tortfeasor liability is *in solidum*

→ Where 2 or more cause *different* damage, each is liable for damage they caused. – ***Baker*** *v Willoughby*

IN NZ: it hasn't been decided if Fairchild applies as we have ACC which would cover work-related diseases.

Supervening causes: → Where supervening event is tortious and claimant has already suffered damage from first tort, the second tortfsr is only liable for the additional damage he caused

Performance Cars v Abraham [1962]*:* someone had already hit into the car and caused damage to paint, so someone else hitting car did not cause additional damage to paint. No causation.

→ If tortious act and non-tortious act, tortfeasor is responsible for damage they partly caused ***Wilson*** *& Horton v A-G* [1997] NZ.

Novus actus interveniens: breaking the chain of causation: someone has done something negligent. As a result of this negligence, something *else* happens that was NOT a foreseeable/likely/natural consequence of the original person's negligence. The defendant is NOT liable for a loss in this situation. – ***Carlslogie***. (In *Dorset* no novus actus as damage natural result of negligence.)

Carslogie Steamship [1952]: Collision with another boat and first boat liable for the damage it caused. But after collision there was a storm and the boat had to be dry-docked for 30 days. Plaintiffs wanted the first collision boat to pay for 10 days lost profit because that's what it would have costed without storm. But storm made ship unseaworthy, so can't claim for 10 days lost profits as ship wouldn't have been profitable anyway. Storm was *novus actus interveniens* so first boat didn't cause loss of profits, the storm did.

Baker v Willoughby: Baker crossing road and hit by car damages left leg. Before trial plaintiff gets caught up in armed robbery, left leg shot and amputated. HOL says: Supervening event didn't make him more disabled. He shouldn't have less damages from being worse off. Only if he sued second people they would have to pay less as he was already damaged (*Performance Cars*) but he still gets damages for pain caused by first injury. Justice.

Jobling: Supervening event was a medical condition. *Baker* is distinguished as non-tortious act. If claiming damages, only liable for pain and suffering which suffered up until the disease kicks in. Same ACC.

Damages should account for vicissitudes of life anyway and that he might later get illness.

50% chance: The plaintiff must establish on the balance of probabilities (greater than 50%, more likely than not) that the defendant's negligence caused the harm suffered. If plaintiff establishes causation (50%+) there is no discount for damages. Defendant is 100% liable.

Hotson v East Berkshire (1987) little boy 25% likely to recover. HOL said no causation as less than 50% chance

Greg v Scott (2005) Cancer undetected. Unable to recover for loss of chance as only 42% chance of not recovering.

***Res ipsa loquitur:* proving the loss:** doctrine says if it is more likely than not that what happened was caused the defendant's negligence they are held liable. If flour barrel rolling out of factory hits someone, likely it's fault of nearby flour factory based on circumstances. ***Byrne** v Boadle (1863)*

Remoteness/legal causation

Is the kind of damage suffered by the plaintiff reasonably foreseeable at the time of the breach or too remote? *Wagon Mound No 1*

Mainguard Packaging [1990]: Mainguard could not claim for the fire damage (which was sent through telephone line) as the type of harm was too remote to be reasonably foreseeable by the driver of the truck scraping a pole. Law says defendant's action must be material and substantial causal link between what defendant has done and loss plaintiff has suffered. Not liable if contributed in terms of time and space to allowing damage to occur.

Lamb v Camden Council [1981]: water pipe ruptured by Council, tenants left, squatters came in. It's inconceivable that the reasonable man wielding his pick in the road in 1973 could foresee that his puncturing of a water main would fill the plaintiffs' house with uninvited guests in 1974. Harm too remote. Squatters novus actus (causation factual and legal not there).

Kind of damage foreseeable: Hughes v Lord Advocate [1963]: If the kind of damage is reasonably foreseeable, it does not matter that the damage came about in an unforeseeable way.

Taupo Borough Council v Birnie [1978] - Council's actions flooded home. Claims for property damage, loss of profits and lost bookings. Court held that all consequential losses are allowed if all are foreseeable. If type of harm foreseeable, the extent or severity does not need to be foreseen.

The 'Sivand' [1998]: Ship got stuck on bottom of seabed. Needed crane to lift it out. That type of expense could reasonably have been foreseen even though its extent and manner of arising could not have been foreseen.

Wagon Mound 1: Could not reasonably be expected to have known that the oil was capable of being set afire when spread on water.

Wagon Mound 2: it was foreseeable by an engineer that a gas leak followed by spark would cause the water to light on fire. Foreseeable risk so liable.

Eggshell skull: the unexpected frailty of the injured person is not a valid defense to the seriousness of any injury caused to them. Robinson v Post Office [1974]

Defences

Contributory negligence: where someone suffers damage partly due to own fault and party due to the fault of someone else, the damages can be shared between the two parties. **Contributory Negligence Act** 1947, s 3; *Reeves [2000].*

Volenti non fit injuria: voluntary assumption of risk. Can't sue later if you know risks, 100% defence. Volenti applies only to foreseeably assumed risk, so a boxer consents to being punched and foresees risks associated with that, but not being hit with an iron bar.

Ex turpi causa: if the plaintiff is doing something illegal and they must rely on this illegal action to bring a claim against the defendant in negligence, this claim may fail due to the illegal action. But ex turpia is not a 'rule of thumb' and is instead applied on a case by case basis in regards to policy considerations (*Gray v Thames* per Lord Hoffman). So if it's fair to impose a duty despite ex turpia then it will be – it's not like something illegal will 100% fail. This is why can be a red herring, as not real issue and distracts from real issue.

ACC:

Claims for compensation for personal damages is **barred s 317(1)** of the ACC Act 2001.

Mental injury: is not oft covered under this (so not barred) as only covered in certain circumstances. If mental injury is not caused by physical injury (s 21), crime, crimes sexual assault (s 21) or work-related, you CAN sue in torts as can't claim under the Act.

Exemplary damages: Claims for exemplary damages have been reserved under s 319 of the 2001 Act. Can get exemplary damages if defendant's conduct is outrageous and deserves punishment – Elias CJ, ***Couch***. In ***S v A-G*** said 3rd parties shouldn't normally get it because they shouldn't be punished for something they didn't do.

Secondary victim: *Oage v Smith (1996); Queenstown Lakes District Council v Palmer* no claim under ACC. As secondary victim it's whether harm is reasonably foreseeable of a person with normal mental fortitude *Bourhill v Young*. Not someone sensitive.

What injuries are covered? s 20: (a) personal injury caused by an accident **(c)** infection spread to family **(d)** personal injury consequence of treatment for another personal injury **(e)** personal injury caused by a work-related gradual disease **(f)** infection/disease treatment of injury **(g)** personal injury caused by a gradual disease or infection consequential on personal injury suffered by person which has cover **(h)** ...consequential on treatment given to the person for personal injury for which the person has cover **(i)** cardiovascular or cerebrovascular episode, treatment injury suffered by the person **(j)** cardiovascular or cerebrovascular (work related).