TORTS EXAM NOTES

ACC

S317 bars tortious action in the Courts for compensatory damages that are covered by ACC (to stop double-dipping). If ACC doesn't cover it, you can still sue for it.
S319 - you can still sue for exemplary damages.

Queenstown Lakes District Council v Palmer
Facts: Palmer's wife fell overboard and died. He witnessed her death. Sued for compensatory damages for mental injury and exemplary damages.
Held: pure mental injury was not covered by the Act, so he is not barred from suing in Court. "the scope of the Act is coterminous with cover provided by the Act."

Section 20(1) – cover under the Act
- Injury suffered in NZ after April 2002
- A personal injury defined in s26(1)
- An injury defined in s20(2)

Section 20(2)
- Accident (s25)
    - Specific event
    - Not gradual
    - Not sunburn
    - Not chemical absorption over time
- Treatment injury (s32)
    - Registered professional or at direction of registered professional
    - Caused by treatment
    - Not a necessary part of treatment
    - Not a normal outcome
    - Resource allocation issue = no cover
    - Not caused by underlying condition
- Work-related gradual process/disease
    - Show it was caused by employment s30(3)
    - S30(3) and (4) list some presumed disease
- Mental injury
    - Not covered usually
    - Work-related
        - Specific event or direct outcome of a series of events
        - Experienced directly
        - Not stress
    - Physical-related
        - Direct consequence of an injury covered by ACC
    - Crime-related
        - Schedule 3 lists which crimes give you cover

Allenby v H
Facts: plaintiff went to get medically sterilized. Did not work, got pregnant. Sued for physical injuries.
Held: Yes pregnancy and birth is a personal injury, as a result of treatment (abnormal), and so it counts a treatment injury. ACC covers.

TV3 v Fahey
Facts: TV3 wanted to air a segment that accused Fahey of misconduct. They sent an undercover person in to try to catch him in the act on camera. He sought an interim injunction to stop the segment being aired.
Held: injunction not granted. Freedom of expression is a very important interest and therefore the threshold for an injunction is very high. Damages are normally an adequate remedy.

Hosking v Runting
Facts: Mr Hosking was an NZ celebrity. Runting was asked to get some photos of the Hosking children for a magazine. Runting took photos of the kids with mum on a public street.
Held: no injunction, tort not made out. Information was not private and the disclosure was not highly offensive.

[125] "In theory, a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness of the breach. However, it is quite unrealistic to contemplate legal liability for all publications of all private information. It would be absurd, for example, to consider actionable merely informing a neighbour that one's spouse has a cold."

[126] "Similarly publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm. In the *Restatement* the requirement is "highly offensive to a reasonable person"; the formulation expressed in Australia by Gleeson CJ (drawn from the United States cases) and referred to by the English Court of Appeal in *Campbell* imbues the reasonable person with "ordinary sensibilities". In a similar vein the Privacy Act, in s 66 defining interference with the privacy of an individual, requires "significant" humiliation, loss of dignity or injury to feelings."

[**256**] While I recognise the value and the importance of these factors, and would not wish to encourage litigation at a low level of impact, I would myself prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy. In most cases that expectation is unlikely to arise unless publication would cause a high degree of offence and thus of harm to a reasonable person. But I can envisage circumstances in which it may be unduly restrictive to require offence and harm at that high level. That might be so if, for example, the publication served little or no public good, save an abstract upholding of the liberty theory. I accept that it will always be necessary for the degree of offence and harm to be substantial, so that freedom of expression values are not limited too readily. At the risk of being thought guilty of a verbal quibble, I would prefer the qualifier to be a substantial level of offence rather than a high level of offence. That seems to me to be a little more flexible, while at the same time capturing the essence of the matter.

[**259**] Holding the balance fairly between plaintiffs and defendants in this field is not likely to be easy. The law should be as simple and easy of application as possible in the interests of those who have to make decisions about what to and what not to publish. I would therefore summarise the broad content of the tort of invasion of privacy in these terms. It is actionable as a tort to publish information or material in respect of which the plaintiff has a reasonable expectation of privacy, unless that information or material constitutes a matter of legitimate public concern justifying publication in the public interest. Whether the plaintiff has a reasonable expectation of privacy depends largely on whether publication of the information or material about the plaintiff's private life would in the particular circumstances cause substantial offence to a reasonable person. Whether there is sufficient public concern about the information or material to justify the publication will depend on whether in the circumstances those to whom the publication is made can reasonably be said to have a right to be informed about it.

P v D

Held: new defence of public interest established.
Elements:

- subject matter of the publication was of public interest
- communication was responsible
    - seriousness of allegation
    - degree of public importance
    - reliability of source
    - whether comment was sought from plaintiff and accurately reported
    - tone of publication
    - inclusion of unnecessary defamatory comments

Defence: consent
Defamation Act s22
Where plaintiff consents to publication. Clear and convincing proof of consent is needed which goes to the matter complained of being published in that manner, ie a person consenting to discussion of their conduct does not necessarily consent to defamatory statements.

Trespass to land

Elements:

- Direct unlawful entry
- Of a person or animal or thing
- Onto the land of another (possession is enough)

Note: actionable per se.

Defences:

- Some justifications for entry which can act as a defence
- Involuntary
- Unintentional
- Accident
- Necessity

Remedies:

- Damages
- Injunction

5 ways to commit trespass:

- Entry upon land in possession of another
    - E.g. walk onto someone's land
- Causing anyone or anything directly to enter upon land in possession of another
    - E.g. let your dog onto someone's land
- Remaining on land once your right to be there has been revoked
    - E.g. refuse to leave once you have been asked
- Allowing a thing to remain on land once the right to be there has been revoked
    - E.g. refuse to remove your vehicle from someone's land once you've been asked
- Direct interference with another's profit a prendre
    - Profit a prendre = right to take something out of soil or off another's land
    - E.g. stop someone from using a well that they have a right to use

Facts: defendant was a long-term lessee of building. Subtenant used the second floor to store goods. Goods were damages when a stranger left a tap on and blocked a sink causing flooding. Defendant had taken all care (including hiring a caretaker to check the building at night).
Held: defence applied – act of a stranger; third party completely outside the defendant's control. Also non-natural use element not satisfied because of sanitation requirements in cities. The sink was not a non-natural use. Expansion of the non-natural use element beyond what is naturally on the land to include what is an ordinary or not abnormal use of the land.

Read v Lyons & Co Ltd
Facts: plaintiff worked in a munitions factory in the UK during WW2. She was on the property when there was an explosion and she was badly injured.
Held: no escape of the mischievous thing. Also found that there was no non-natural use of land; making bombs during war-time is a natural use of land.

NZ Forest Products Ltd
Facts: farmer was doing a burn off. Very dry summer with unpredictable wind. Lived near two commercial forestry enterprises. He had a permit to light the fire. The fire spread out of control and it went towards the two commercial neighbours. They purchase private firefighting equipment and personnel to stop the fire. This was successful and so did not suffer property damage. Sued the defendant for the cost.
Issue: Plaintiff was concerned about possible damage to property due to defendant's actions and spend money to mitigate this. Sues the defendant for this cost. Can they recover under *Rylands*?
Held: If the forest had been damaged it is clear that the damage would have been recoverable. *Rylands* is concerned with interference with the use of the plaintiff's land and not its damage. Thus, damage is not necessary to prove. When the plaintiff takes reasonable steps to prevent damage he should be able to recover those costs.
The limit for recovery of mitigation costs - must be an escape or inevitability of escape if you do not do anything to prevent it.

Cambridge Water Company v Eastern Counties Leather
Facts: chemical solvent used by defendant tanners soaked into the ground and travelled 1.3 miles into plaintiff's water borehole and contaminated the water, rendering it unfit for use.
Issue: was the use of solvent a non-natural use of land? Was the damage foreseeable?
Held: It was not reasonably foreseeable at the time of the leak that the contamination of the borehole was a likely outcome if the solvent leaked. Foreseeability is of the type of harm that occurred. Do not need to have foreseen the escape. This is a non-natural use of the land; it is not enough that it is common in the industry to store chemicals. Not enough that it gives jobs to the community.

Hamilton v Papakura
Facts: plaintiffs were tomato growers using hydroponics (water-based method). The defendant local council had conducted some chemical spraying near a lake. Residue contaminated the lake which supplied water for the hydroponic tomato farm. The tomatoes were damaged because they were ultra-sensitive to changes in the water. The plaintiff sued under *Rylands* for the damage to the tomatoes.
Held: It was not foreseeable that the plants would be sensitive to very small changes in contamination levels leading to damage.

Bolitho
Court must be satisfied that the expert evidence is logically defensible.
Common practice is not a defense if that common practice is negligent in itself.

Edward Wong Finance v Johnson Stokes and Master
Facts: lawyer used the traditional 'Hong Kong' method and transferred mortgage monies in return for an undertaking that the other side would transfer the documents. Other side did not transfer in return and mortgage monies were lost.
Held: lawyer was negligent because even though it was accepted practice it was not reasonable.

B v Medical Council (NZ)
"usual professional practice, while significant, may not always be determinative of what is acceptable professional conduct. The reasonableness of the standards applied must ultimately be for the Court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards are not permitted to lag."

Hucks v Cole
Facts: doctor failed to treat a patient suffering sepsis with penicillin. Expert evidence was that most doctors would not have done so either.
Held: this was a breach of standard of care. When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risk, the court must anxiously examine that lacuna – particularly if the risk can be inexpensively and easily be avoided.

<u>Res ipsa loquitur</u>
Three conditions:
1. The thing that inflicted the damage was under the control of the defendant or someone whom they are responsible for
2. Ordinary human experience is that the harm would not ordinarily happen without negligence
3. No evidence as to how or why the event took place (gap in evidence)

Ratcliffe
"an evidentiary presumption applicable in cases where the defendant does, and the plaintiff does not have, within his grasp, the means of knowing how the injury took place."

Purpose of the doctrine:
To avoid injustice to the plaintiff in having to prove exactly what happened when they are in no position to do so, e.g. they were anaesthetised.
To encourage the defendant to reveal what they know about the accident/injury (to rebut the presumption).

<u>Causation</u>

The defendant's breach must have caused the plaintiff's loss. The burden of proof is on the plaintiff to prove this (*Barnett*).

Facts: claimant was social services management dealing with lots of child abuse cases. Suffered a nervous breakdown, employer promised further support and a reduced workload. Employer did not follow through, second breakdown occurred.
Held: no logical reason for excluding the risk of psychiatric injury. The first breakdown was not reasonably foreseeable. But employer did owe a DOC in relation to second breakdown.

Hatton v Sutherland
Facts: claims by employees for psychiatric injury following stress at work.
Issue: was this TYPE of harm to this SPECIFIC employee, reasonably foreseeable.
Held: no special control mechanisms applying to claims for physical injury or illness arising from the stress of doing work. But issues of foreseeability, causation, and breach of duty arise. 16 factors identified – what does the employer know about that employee and their health state. Employers are usually able to assume employees have reasonable mental fortitude. What is being asked of this employee compared to others?

Attorney General v Gilbert
Facts: plaintiff retired on medical grounds. Then alleged that employer had failed to provide a safe work environment and take reasonable precautions to not expose him to risks of stress. Sued under employment contract.
Held: tort limit of recognisable psychiatric illness does not apply because this was a contract claim but there are still formidable obstacles for stress at work cases. Employer does not guarantee to protect from stress and upset. Whether workplace stress is unreasonable turns on the facts. Employment contract obligations require reasonable proportionate mitigations.

Fear of disease cases
e.g. negligent exposure to asbestos which causes mental trauma associated with the fear that you might develop asbestos-related disease.

Incorrect diagnoses/false information cases
e.g. given false diagnosis that you are suffering from disease or might die and suffer mental illness as a result.

Negligent misstatement

Where defendant has not acted negligently but rather has said something or written something (email or letter etc) carelessly. They were not lying purposefully but what they said was incorrect. The plaintiff has relied on the statement and suffered loss as a result.

Elements for proximity analysis of duty of care [Caparo]*:*
- Purpose for which advice was given is known
- Advice communicated to plaintiff specifically (or class which the plaintiff is a member of)
- Advice given with knowledge that it will be relied upon
- Plaintiff does actually rely on the statement to their detriment

Then plaintiff must also prove breach of duty, causation, and remoteness.

Defences:
- A disclaimer

Remedies:

The House of Lords in *Murphy* altered the position so that pure economic loss could not be claimed against council or builders. Claims for pure economic loss should be in contract law. Concerns about giving home owners a free warranty – not a free warranty, people pay for council inspections; people pay for it in their rates as well; also not guaranteeing the quality just taking reasonable skill and care to inspect that the building is up to the requirements.

Hamlin (NZ)
Facts: Invercargill City Council negligently inspected foundations in 1972. In 1989 the defects were discovered. Home owner sued the council.
Did the ICC owe a duty of care to the owner? (Plaintiff was the first and original owner of the property).
Held: declined to follow the *Murphy* decision. A duty of care was imposed here. ICC had a large amount of control because council sign off is necessary. Therefore there is reliance by the plaintiff and the general community on the council to exercise that control carefully. Regarding the limitation issue, the time runs from when a reasonable person would have discovered the defects.

Limitation issues now governed by statute:
Building Act 2004 – longstop of 10 years to bring a claim.
Limitation Act 2010 – claim for monetary damages ceases 6 years from the date the cause of action accrues. The time can be extended by up to 3 years if you can prove late knowledge (ie a reasonable person would not have discovered the cause of action).
e.g. building starts to crack after 7 years (outside the 6 year limitation period). You get three years from the date of the cracks. But the Building Act 2004 overshadows this for a maximum 10 year time limit.

Rolls Royce New Zealand v Carter Holt Harvey
Facts: CHH contracted with Genesis/ECNZ to build a cogeneration plant. Genesis then subcontracted with RR to build part of the plant.
Contractual chain: CHH > Genesis > RR
Plant that was built was defective – not as good as it was contracted for.
CHH sues Genesis in contract. Also sues RR in negligence. Loss claimed is pure economic loss.
Issue: did RR owe CHH a duty of care?
Held: no duty of care. Applied the *Anns* test.
Proximity – nature of relationship between the parties.
Policy:
Pro-DOC - clear foreseeability, close relationship between the negligent act and the loss, no indeterminate liability concerns, parties aware of each other, special skill exercised by the defendant.
Anti-DOC – contractual matrix, no disparity in bargaining power, undermining contractual certainty
Outcome was no duty of care because of the policy factors.

North Shore City Council v Body Corporate 188529 (Sunset Terraces)
Facts: Buildings were leaky. Bad inspection by council.
Held: *Hamlin* is applied. Liable for economic loss as well as property damage and any personal damage. Extended liability to unit owners not just standalone home owners.
Key policy factor for why duty was imposed: council had control over the building being granted compliance. Therefore, no reason to restrict the rule to only standalone dwellings as

plaintiff was standing on the back of the vehicle and holding onto the stolen ladders. He sued his co-conspirator for compensation for his personal injury.
Held: plaintiff's own criminal wrongdoing was the cause of his injuries and the illegality defence applied to defeat the claim.

Leason v Attorney General
Facts: trespass into GCSB facility in Waihopai valley. Deflated satellite dome by cutting it. Sued for trespass. Illegality pleaded on basis of operation being used illegally to collect information in aid of wars overseas, leading to the deaths of civilians. This defence was unsuccessful.
Held: plaintiff's claim did not rest on the alleged illegality. There was no dispute around their lawful ownership of the land and facilities. Not an affront to the public conscience to uphold claim. Legal methods of protest are available. GCSB's allegedly illegal acts were not the effective cause of their loss, they had merely provided the occasion for the defendants to commit trespass.

Patel v Mirza (UK Supreme Court)
Facts: plaintiff paid defendant $620k for the purpose of illegal insider trading. The knowledge was not forthcoming so the defendant did nothing with the money but he also did not pay it back. The plaintiff sued for the return of the funds.
Issue: whether or not the plaintiff's claim should succeed or whether the defence of illegality applies
Held: Unanimously agreed that the claim should succeed and illegality does not apply in these circumstances. Disagreed on general circumstances in which a defendant could rely on illegality.
Majority – first question: would plaintiff's claim allow them to profit from their wrongdoing or result in the law becoming incoherent and self-defeating? If yes, then there is a second question: if the claim is allowed because (a) it would undermine the point of the statute addressed, (b) render other public policies less effective, or (c) have a disproportionate effect on the plaintiff given their wrongdoing. Only where the answer to question one is yes and to question two is no, does illegality apply.
Illegality is no longer a rule of law but now a matter of judicial discretion in the UK.