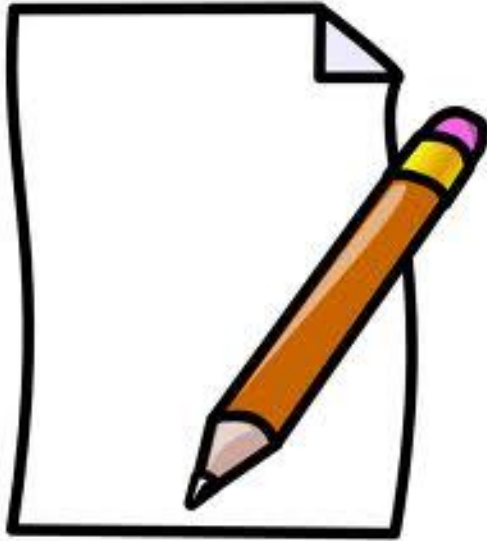


Sharing Session on **SPORTS LAW**

Tortious Liability in Sports

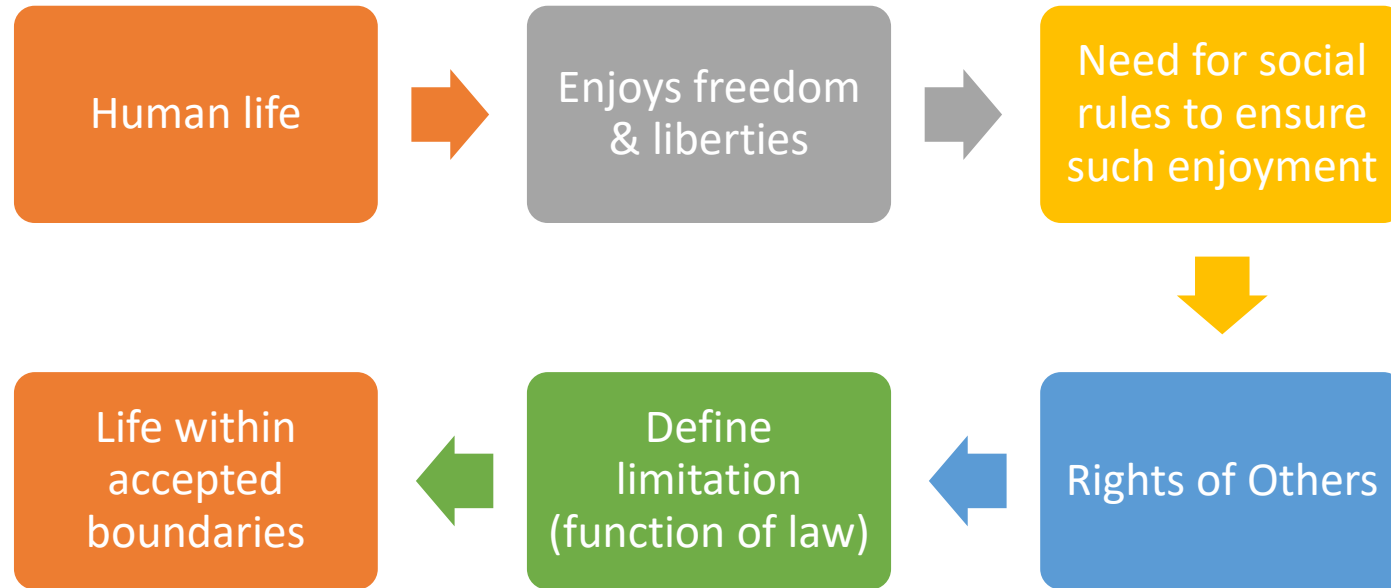
Dr. Mahyuddin Daud

Outline



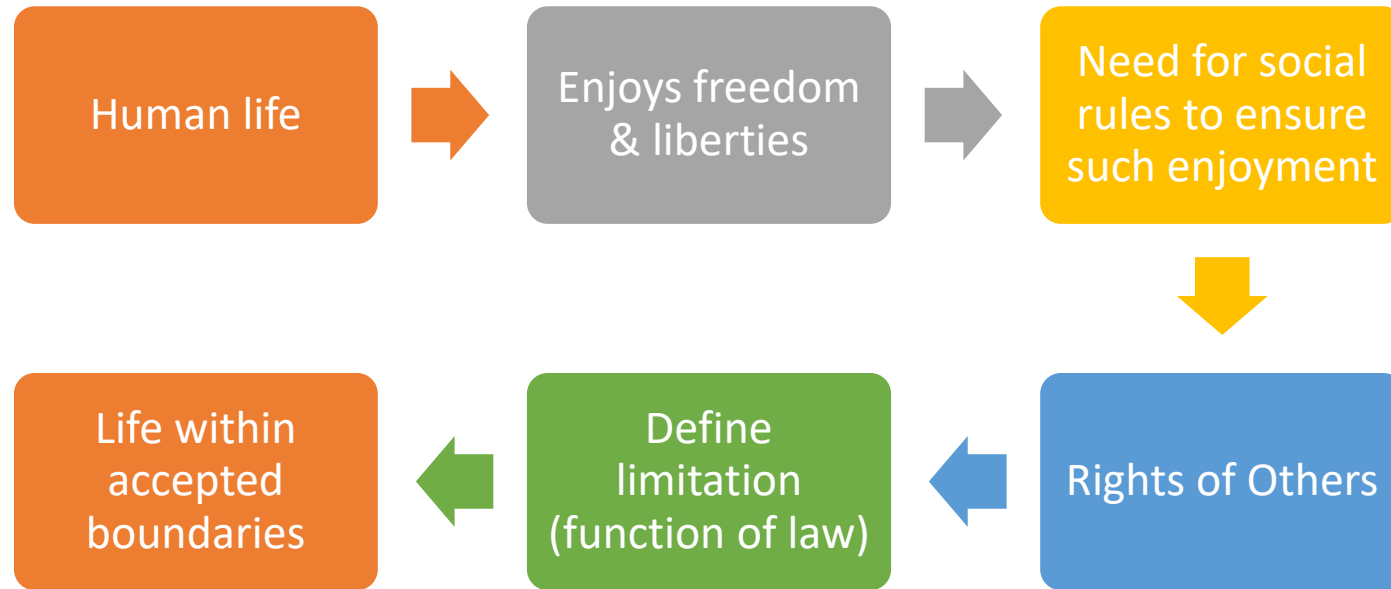
- Definition
- Elements of Tort
 - Legal Wrong
 - Legal Damage
 - Legal Remedy
- Aims and Objectives of Tort
- Negligence

Introduction



- The objective of law of tort is to ensure those who suffer wrongs can be compensated and future incidents can be prevented through **civil legal mechanism, i.e. civil law**.
- It does not include non-civil law such as administrative law and criminal law.

Introduction



- If this LIMIT is **BREACHED**, a RIGHT has been **WRONGED**, and it amounts to **INJURIES or LOSS or DAMAGE**.
- Damage: in the forms of monetary/financial, property, reputation or bodily injury.
- Those who are responsible in causing this DAMAGE, would therefore be **LIABLE** to compensate the losses to those who suffer personally. This is governed by **LAW OF TORTS**.

Breaching the “Limit” = Wrong = Tort



Definition

- Literally: “wrong”
- Technically:
 - A **wrongful act** or omission by a person, not authorized by law
 - Such act/omission encroaches to other’s **interest** which is protected by law → i.e. **“legal injury”**
 - Such encroachment may/may not result in actual or physical **“damage”**
 - The person wronged is entitled to a legal **remedy**
- Tort as “law”: a branch of **private law** that deals with the types of tortious acts and the matters incidental thereto such as the remedies.

Elements of the Wrongdoing



Wrong

- *eg*: Negligence
- Trespass to body, land or property

Damage

- Body injury
- Property damage
- Reputation loss

Remedy

- Monetary damages
- Injunction

Interests protected in Torts law

- Four kinds of interests protected against infringement under law of torts:
 1. **Person** (assault, battery, false imprisonment, negligence causing personal injury)
 2. **Property** (trespass to land, nuisance, interference with goods)
 3. **Financial** (deceit, passing-off)
 4. **Reputation** (defamation, malicious prosecution)
- COMPARE: The five necessities (*dharuriyyat khams*) under the Islamic jurisprudence's *maqasid syariah*
 1. hifdz ad-din (protection of religion)
 2. hifdz an-nafs (protection of life)
 3. hifdz al-aql (protection of the mind/reason)
 4. hifdz an-nasl (protection of lineage)
 5. hifdz al-mal (protection of wealth)

3 Forms in which liability in Torts may arise

- Primary and vicarious liability
- Negligence and strict liability
- Actionable per se and not actionable per se

Primary liability

A person is liable for his own act or omission in breach of a legal duty

A commits a tort against B, A is primarily liable to B

Vicarious liability

A person is liable for the act or omission of another person with whom he stands in some special relationship i.e. employer & employee

C employs A as a factory worker. In the course of his employment, A negligently dropped a tool on B's head causing injury. B can sue A for primary liability and also sue C for vicarious liability.

Forms

Actionable
per se

Torts where
defendant is
liable **without
proof of
actual
damage** to
plaintiff

i.e.
Trespass
to land,
trespass to
person

Not
actionable
per se

Defendant is
only liable if
**there is proof
of actual
damage** to
plaintiff

i.e.
Negligence

Negligence

Liability based
on fault

Defendant was
blameworthy
for the act or
omission done

Strict liability

Liability
independent of
any fault

Defendant is liable
for act or omission
regardless whether
he acted innocently

Definition of Negligence

Lexical

- Lack of proper care and attention; a careless behaviour.



Legal

- It means more than heedless or careless conduct, whether in omission or commission; it properly connotes the **complex concept of duty, breach and damage** thereby suffered by the person to whom the duty was owing

Per Lord Wright in Lochgelly Iron & Coal v M'Mullan [1934] AC 1.

- The **absence of such care, skill and diligence** as it was the **duty of the person** to bring to the performance of the work which he is said not to have performed.

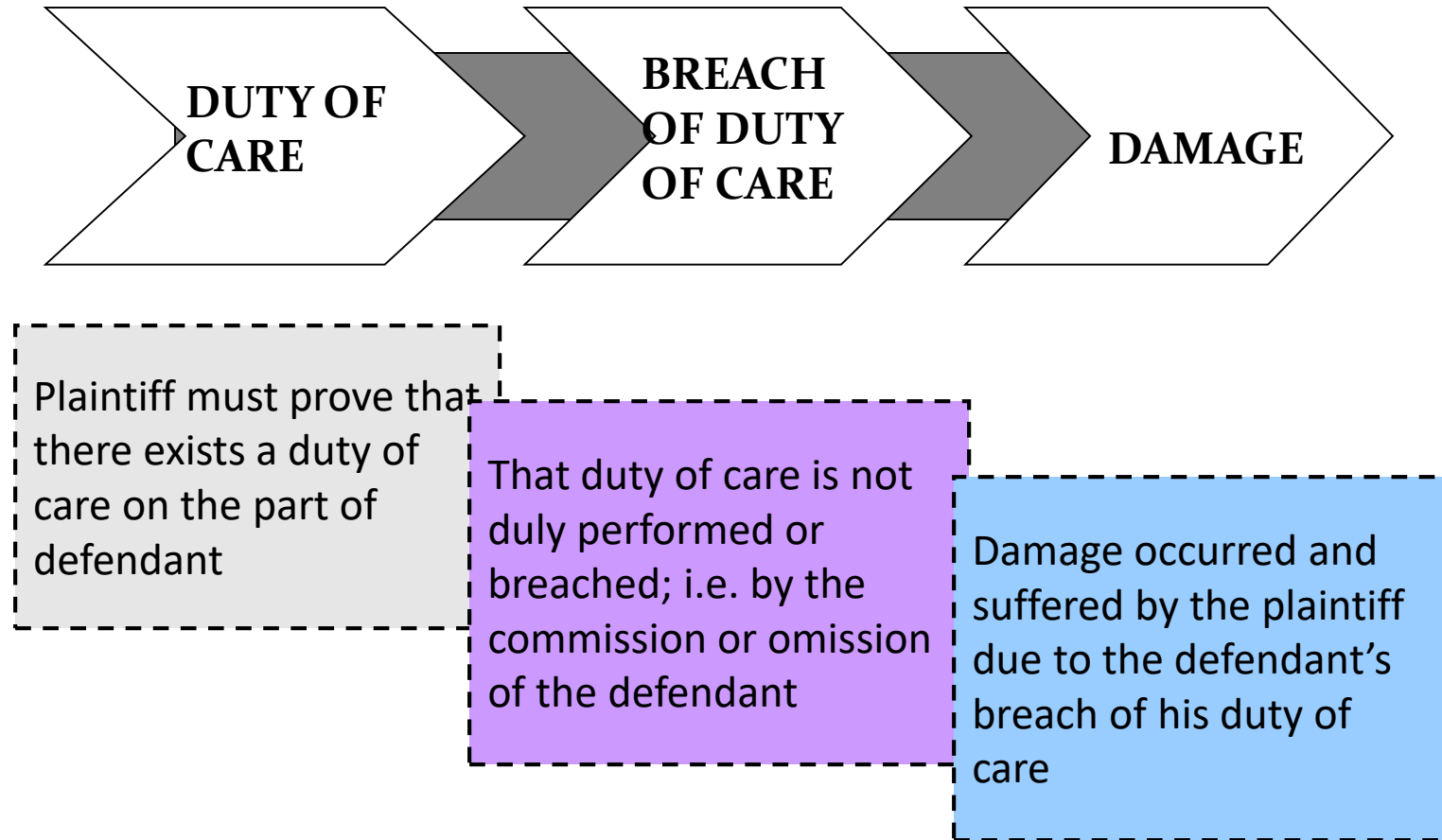
Per Willes J. in Grill v General Iron Screw Co (1860) 35 LJCP 330.



- “Negligence is the **omission** to do something which a **reasonable man**, guided upon those considerations which ordinarily regulate the conduct of human affairs, **would do**; or **doing** something which **a prudent and reasonable man would not do**”.

Per Alderson B in Blyth v Birmingham Waterworks Co (1856)

Elements of Negligence



“DUTY OF CARE”

Element of Negligence



“There is no liability for negligent conduct involving harm unless the law exacts in the circumstances of each particular case a duty to take care.”

*Gill J. in Jaswant Singh v Central Electricity Board
[1967] 1 MLJ 272*

How to identify the existence of a duty of care?



APPLYING NEIGHBOUR PRINCIPLE!

Are they neighbour to each other?

If yes → there is duty of care!

Donoghue v. Stevenson [1932] AC 562



- C, Mrs Donoghue went to a Cafe in Paisley with a friend. The friend ordered ice cream over which part of a bottle of ginger beer was poured.
- When the remainder of the ginger beer was poured, it was found to contain a decomposed snail. Mrs Donoghue became ill through having consumed contaminated ginger beer. She suffered severe shock and a gastroenteritis (gastric flu).
- C sued the manufacturer of the ginger beer. D argued there was no breach of duty whatsoever between them.
- Court established a Neighbour Principle.

Neighbour Principle



The rule that “*you are to love your neighbour*” becomes in law, you must not injure your neighbour;

and the lawyer’s question, “*who is my neighbour?*” receives a restricted reply.

You must take reasonable care to avoid acts or omissions, which you can reasonably foresee, would be likely to injure your neighbour...

Lord Atkin in *Donoghue v Stevenson* [1932] AC 562

Neighbour Principle (cont'd)

Who, then, in law is my neighbour?

The answer seems to be—

“persons who are **so closely and directly affected** by my act that I **ought reasonably to have them in contemplation** as being so affected when I am directing my mind to the acts or omissions which are called in question...”

Lord Atkin in *Donoghue v Stevenson* [1932] AC 562



- Neighbour Principle involves an objective test – asking a hypothetical questions:
- Would a **reasonable man**, who is in the same circumstances as the defendant, foresee that his conduct will adversely affect the plaintiff?
 - If 'No' → P is not D's neighbour → No duty
 - If 'Yes' → P is D's neighbour → Duty arises

- Sporting organizations, administrators and facility managers usually have a duty of care to participants to take reasonable care to ensure that safe playing surfaces and equipment are provided

Lembaga Kemajuan Tanah Persekutuan v Mariam [1984] 1 MLJ 283

Salleh Abas CJ:

- The decision of Donoghue abandoned a long notion that tortious liability depends upon contractual relationship.
- Those cases... establish that a person owes a duty of care even to persons who have no contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission.
- The duty... was not derived from the contract.. But one which is cast by law in that because the danger created by him, he must take a reasonable care to ensure that visitors were not exposed to it.



Caparo Industries plc v Dickman [1990] 2 AC 605 House of Lords



- Caparo Industries purchased shares in Fidelity Plc in reliance of the accounts which stated that the company had made a pre-tax profit of £1.3M. In fact Fidelity had made a loss of over £400,000.
- Caparo brought an action against the auditors claiming they were negligent in certifying the accounts.

Held: No duty of care was owed.

There was not sufficient proximity between Caparo and the auditors since the auditors were not aware of the existence of Caparo nor the purpose for which the accounts were being used by them.

Caparo Industries plc v Dickman [1990] 2 AC 605 House of Lords

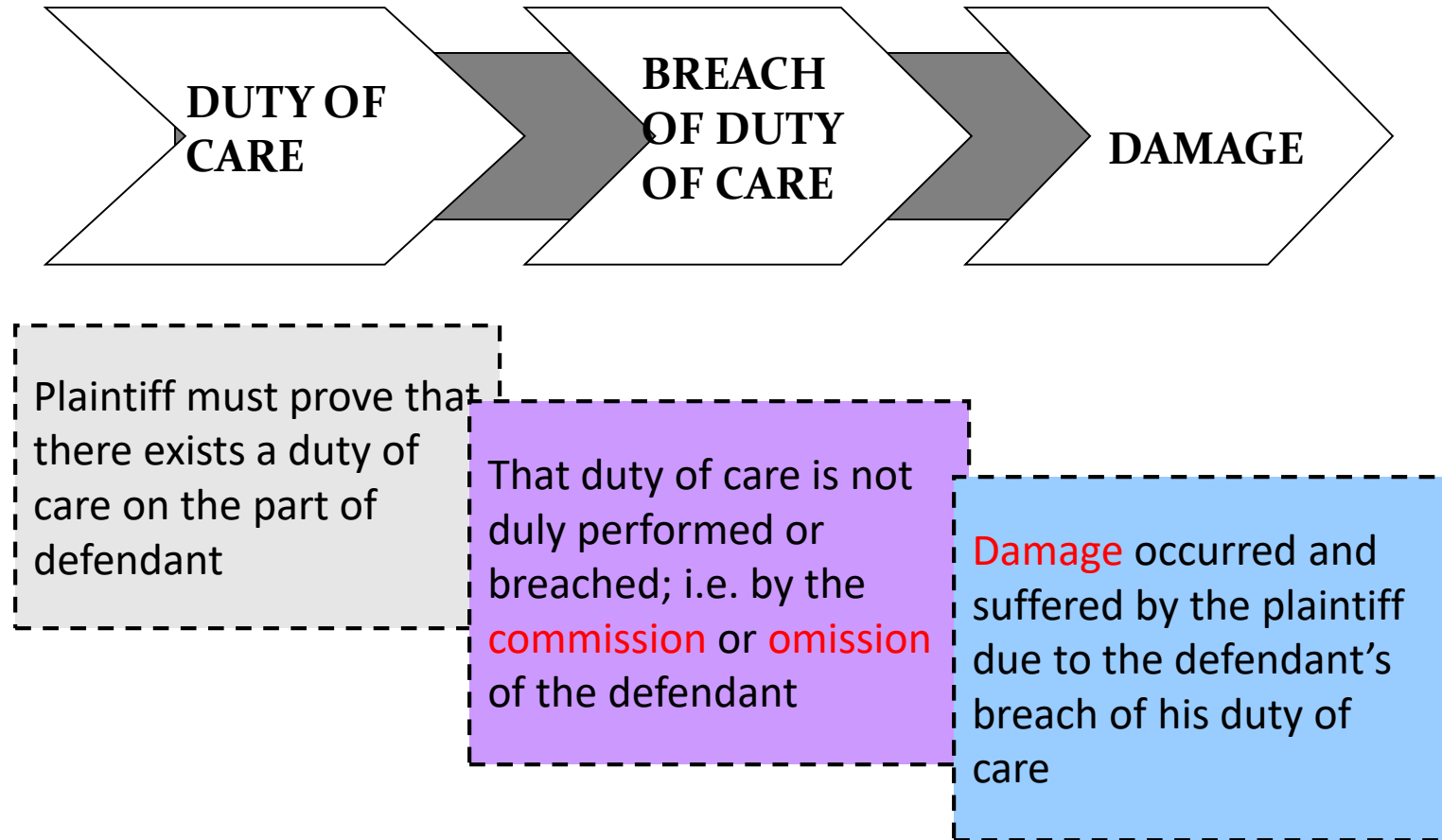
- Lord Bridge (on the Caparo test)
 - “What emerges is that, in addition to the **foreseeability of damage**, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of **"proximity"** or **"neighbourhood"** and that the situation should be one in which the court considers it **fair, just and reasonable** that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

Caparo v Dickman (1990)

- Three steps to establish duty of care are; *ie* to ask three questions;
 1. Was loss to the claimant **foreseeable**?
 2. Was there **sufficient proximity** between the parties?
 3. Is it **fair, just and reasonable** to impose a duty of care?



Elements of Negligence



When is a duty breached?

- A duty is said to have been complied at **certain point/yardstick/standard**.
- If this standard is **not successfully reached**, that means such duty has been **breached**.
- The next task to do is to identify that **Standard of Duty** that has to be complied with at the particular circumstances in which a duty of care arises.



The Objective Standard of a Reasonable Person

- Q: Who is this “reasonable person”?
- A: An objective standard of an ordinary person on the street.
 - In UK: “The man sitting on the back of the Clapham Omnibus”
 - See: *Hall v. Brooklands Auto-Racing Club* (1933) 1 KB 205
 - In AU: “The man on the Bondi tram”
 - See: *Papatounakis v Australian Telecommunications Commission* (1985) 156 CLR 7
 - In KL: “The one commuting on LRT?”

How to measure the Standard of Duty?



“Negligence is the OMISSION to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, OR DOING something which a prudent and reasonable man would not do” – *Blyth v Birmingham Waterworks* (1850)

Omission & Commission

Reasonable, not
Fantastic Possibilities

If the possibility of danger emerging is only a mere possibility which would never occur to the mind of the reasonable man, then there is no negligence in not having taken extraordinary precautions. People must guard against REASONABLE possibilities but they are not bound to guard against FANTASTIC possibilities. – *Fardon v Harcourt-Rivington* (1932)

An **objective standard** taking no account of the D's incompetence... he may do the best he can and still be found negligent. – *Blyth v Birmingham Waterworks* (1850)

Reasonableness;
not perfection!

Idiosyncrasies are
excluded!

The **degree of the care** required on the particular facts depends on the accompanying **circumstances**, and may vary according to the **amount of risk** to be encountered – *Glasgow v Muir* (1943)



Standard of Duty for Professionals?

Merely to describe something as an error of judgment tells us nothing about negligence; it depends on the nature of the error. If it is an error that such **a reasonable competent professional man**, acting with ordinary care, might have made, then it is not negligent. – *Dr Chin Yoon Hap v Ng Eu Khoon* [1998]



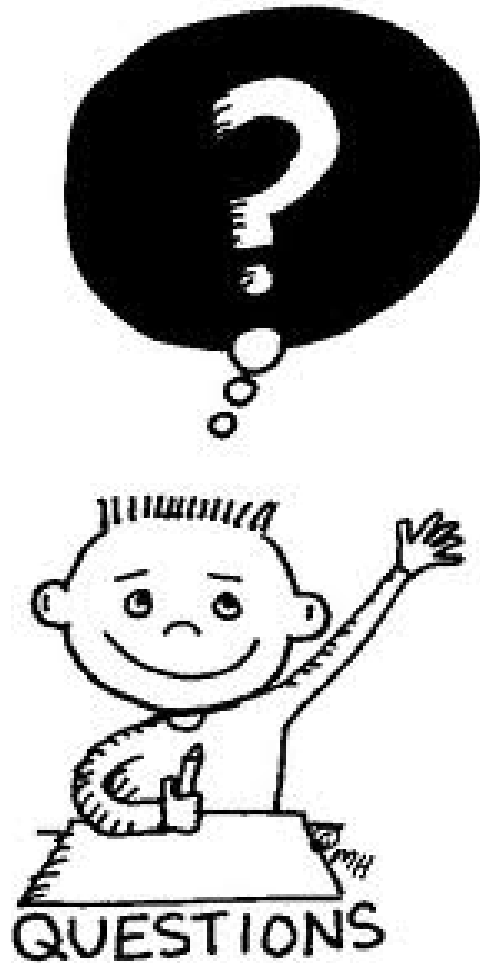
Error of Judgment?

Professional
Standard?

Which Professional
Standard?

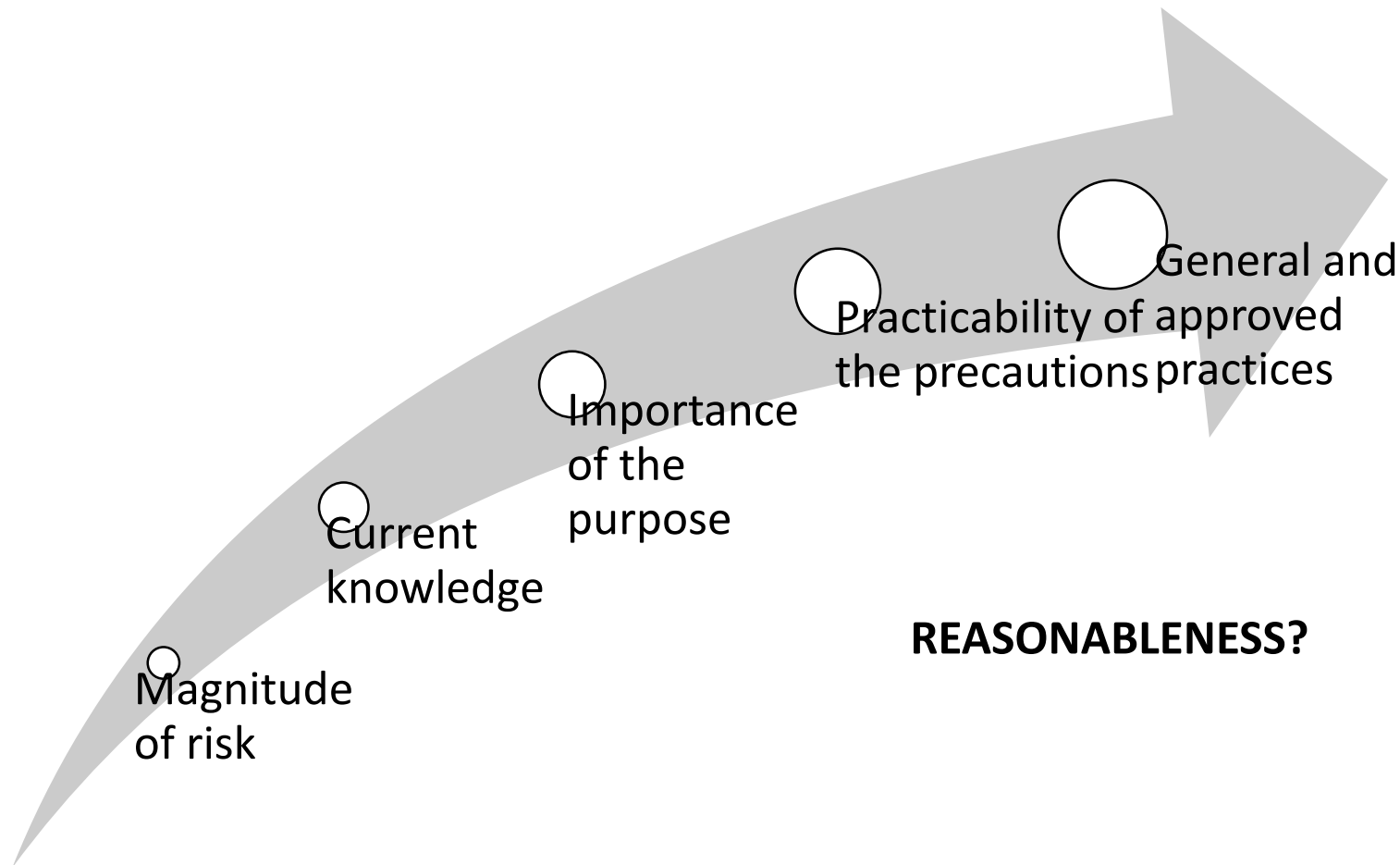
A man or a woman who practices a profession is bound to exercise **the care and skill of an ordinary competent practitioner in that profession** – be it an accountant, a banker, a doctor, a solicitor or otherwise. – *Swamy v. Matthews* [1968] 1 MLJ 138

There may be one or more perfectly proper standards; and if the medical man conforms with any one of those proper standards then he is not negligent – *Bolam v Friern Barnet Hospital Management Committee* (1957)



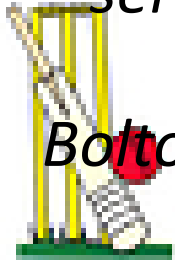
- An ordinary or unqualified person who holds himself out as possessing certain skill – Which standard applies: **ordinary or professional?**
- James Foong J. in *Steven Phoa Cheng Loon v. Highland Properties* [2000] 4 MLJ 200:
- **The law would judge him by the standards of a reasonably competent qualified person.**

In determining the “reasonable man’s standard
“of duty of care, consideration may be given to
several **factors**...



“Magnitude of Risk”

the law does not require the defendant to guard against every conceivable result of his actions. He must have regard both to the probability of injury resulting and to the probable seriousness of the injury



Bolton v Stone [1951]

- P standing on the h'way next to cricket ground – struck by ball hit out by a batsman – HoL said the likelihood of injury was so slight taking into account the distance, the 7ft fence and the slope – The ball must have travelled abt 100yards; this happened only about six times in 30yrs – D not negligent for not taking additional precautions.



Paris v Stepney B. Council [1951]

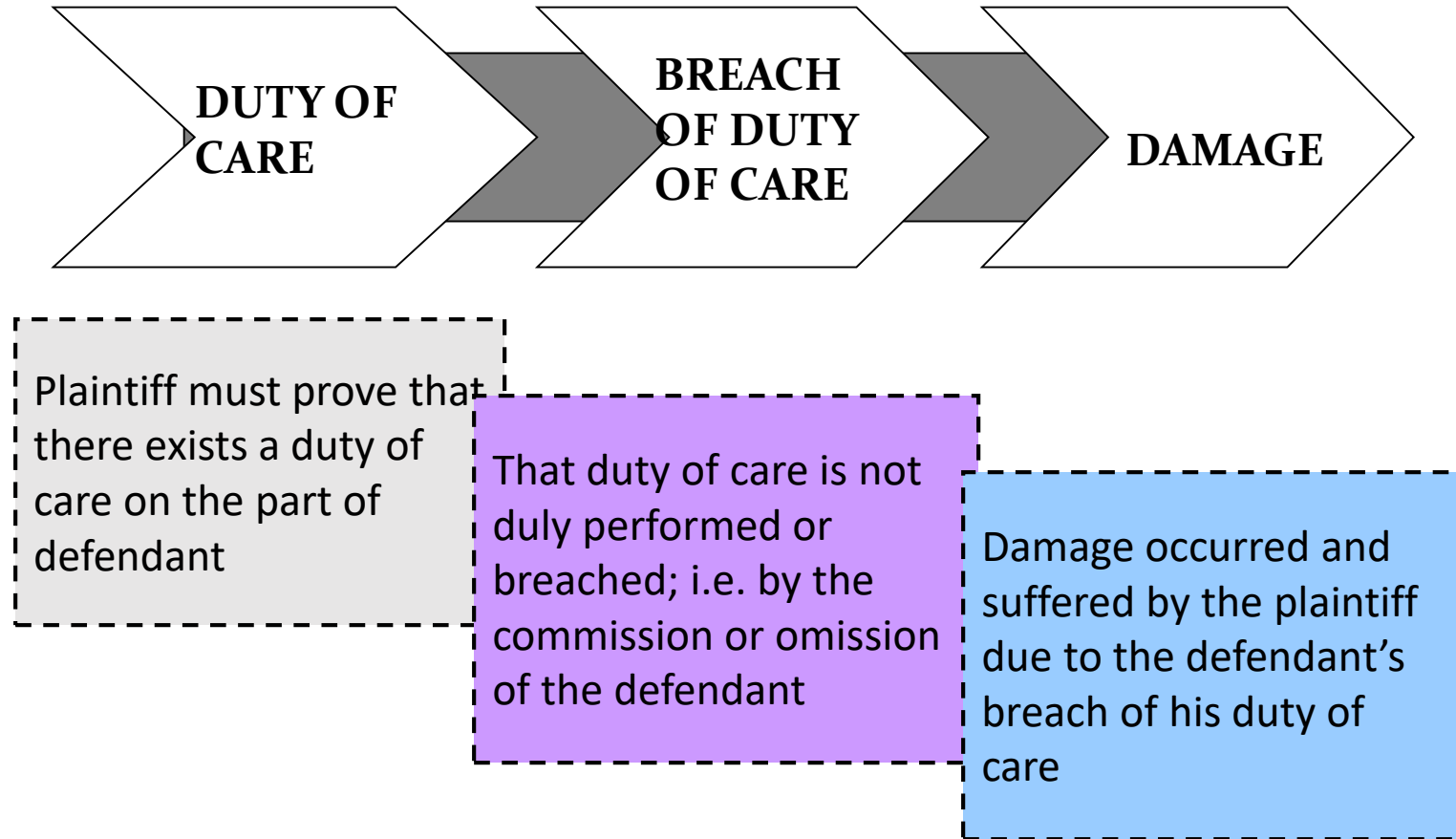
- P (one-eyed man) was employed by D to work in conditions involving some risk of eye injury without protection – goggles were not necessary for normal worker – P was injured and was totally blind – Crt held that P's condition increased the risk – D was negligent.

Miller v Jackson [1977]



- P's property was damaged due to the ball hit from cricket ground – the cricket club had earlier increased the height of the fence to nearly 15ft high – Court held the risk of injury was so great that it had occurred frequently (in 8 or 9 occasions) – D was guilty of negligent.

Elements of Negligence



- Rinaldo v McGovern in the United States
- In this case, the plaintiff, who was playing golf, hit a golf ball which struck the vehicle of the defendant.
- The plaintiff was not found to be liable, and the court ruled that a player could be held liable for such an act only if they had “aimed so inaccurately as to unreasonably increase the risk of harm” (Anonymous, n.d.).
- This judgement may show the difficulties Plaintiff will have in taking his case to court, **unless he can prove that the football was kicked in a way that increased any risks to the spectators.**

- Woods v. Rogers in 1997 in the United Kingdom involved a golfer, the plaintiff, who was injured when he was hit by a ball shot by another golfer, the defendant.
- The defendant claimed that he was unable to see the plaintiff due to the layout of the course. The plaintiff's partner who was golfing with the plaintiff had waved him through,
- The court agreed could be taken as a sign that both golfers would be able to protect themselves from being hit

Requirement of Causation



- It is not sufficient to show/establish the existence of breach of duty of care AND the existence of damage.
- Instead, plaintiff is required to also show/establish the **CAUSAL LINK** between the breach of duty of care AND the damage itself.
- That causal link must be **present, unbroken** and **not too remote**.
- In other words, it must be proven that the defendant's negligent act or omission was the **effective cause** of the injury or damage suffered by the plaintiff!



- VNFI = Consent = Voluntary assumption of risk!
- “One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.”

Lord Herschell in *Smith v. Baker*
[1891] A.C. 325, 360.

- VNFI = **Consent**. But occasionally courts give different meaning:
 - “Consent applies when the plaintiff does give consent; whereas VNFI applies when he does not consent but so conducts himself as to lead the D to believe that he does.”

(Sir John Donaldson M.R. in *Freeman v. Home Office (No. 2)* [1984])

- Consent can be **implied** from conduct or expressed in words
 - *E.g.* participating in a boxing match
 - Presenting one’s arm for injection
 - Smoking cigarettes!



Requirements to Prove VNFI

- Generally the D will have to prove two things:
 1. That P knows about the Risk; AND
 2. That P consents to such Risk
- “if the defendants desire to succeed on the ground that the maxim VNFI is applicable, they must obtain a finding of fact that the claimant **freely and voluntarily**, with full **knowledge** of the nature and extent of the risk he ran, impliedly agreed to incur it.” From Case of: *Letang v. Ottawa Electric Rly Co* [1926]

Consent in Sport?



- Can VNFI apply against those who are injured in a sport event?



Consent in Sport?



- Consent to an injury applies when the injury is the kind which is **inherent** and it happens under **normal circumstances** of the sport **under its rules**. This applies to anyone who is involved: the sportsman, officials, reporters, spectators, etc.
- However, based on the circumstances, the injury may not be “consented” even if the players observe the rules.
- A sport spectator does not consent to the negligence of the participants of a game or sport that he is watching

Wooldridge v Sumner [1963] 2 QB 43



- P was a photographer at a horse show. A galloping horse, whose rider had taken the corner too fast, struck him. English Court of Appeal held that there was no negligence. The duty that D owes to P is a duty of care, not a duty of skill. All D had done was to commit an error of judgment in the course of doing his best to win.
- A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition.
- That is notwithstanding that such an act may involve an **error of judgment or lapse of skill**
 - unless the participant's conduct is such as to evince a reckless disregard for the spectator's safety."per Diplock L.J.