

PART A – TORTS (PROPERTY TORT)

Section 1A: Items of damages and remedies sought in relation to property damage

Items of Damages (in relation to the property claim):

- *O'Grady v Westminster Scaffolding Ltd* [1962]: Home, sentimental value = restore/rebuild
- *Harbutt's Plasticine Ltd v Wayne's Tank and Pump Co Ltd* [1970]: factory destroyed in fire. Modernised whilst it was rebuilt. Damages refused.
- *Hoad v Scone Motors P/L* [1970]: tractor – damages reduced, replacement of tractor inevitable and merely accelerated
- *Evans v Balog* [1976]: Home, sentimental value = restore/rebuild
- *Pantalone v Alaouie* (1989): Investment property, nothing special = diminution value (no rebuild)

1. Diminution OR Restoration?

- General principle in awarding damages in tort is to seek to restore the plaintiff to the position in which he would have been had the wrongful act not been committed
- In *Evans v Balog* (1976), Samuels JA held that the starting point for compensation for property damage is the diminution in value, but that a higher award reflecting the cost of reinstatement and restoration may be made where the plaintiff's desire to rebuild is reasonable.
- **Diminution:** damages assessed on a diminution in value basis typically look at the cost of acquiring substitute property, less the proceeds of sale of the damaged property.
 - o Repairing damaged property may be more expensive, and perhaps a lot more expensive, than purchasing something similar, hence start with diminution
- **Restoration:** where property (real or personal) is damaged, it can usually be repaired or restored, hence the cost of repairs or restoration (first item), along with any damages relating to the loss of use of the property in the meantime (second item), will usually put the plaintiff into the position he/she would have been in if the property had not been damaged.
 - o The market value of damaged property which has been repaired may sometimes be less than that of similar property which has never been damaged, so full compensation may sometimes also include any residual reduction in value.
- Assessment of damages for property damage may be complicated by two factors:
 - o **Reasonableness** (whether it is *reasonable* to rebuild/restore property)
 - o **Betterment** (improvements to the property)
- Damages may also be recoverable for the loss of use of the premises from the time of destruction or damage to the time it should have been rebuilt (measured by fair market rental value)
- Damage to motor vehicles is an exceptional category. It is often hard to precisely evaluate what the market value of a vehicle was before an accident.

Mitigation

- Mitigation – duty (plaintiff) to act reasonably to minimise loss
- Onus on defendant to prove plaintiff's action/inaction was unreasonable
- May act reasonably by doing nothing, eg *Knott Investments P/L v Fulcher* (2014) QCA (statutory defective products)
 - o Tomato growing business (husband ran farming, wife ran packing/marketing) destroyed by fire. Decision to cease trading reasonable. Re-establishing business required big loan, much time. May not have recaptured lost market due to competition. Wife's mental harm may have prevented her from returning. Awarded profits, company would have made to trial.
- Where P acts **unreasonably**, D **not liable** for any loss reasonable action would have avoided, or any loss caused by unreasonable action (cf scope of liability causation):
 - o *Henjo Investments v Collins Marrickville* (1987, 1989): They had to mitigate their loss by offering their lease to someone else, the cost incurred in doing that was the rent subsidy
- Where P acts **reasonably**, D **not liable** for avoided loss (even if reasonable for P to have done nothing)
 - o eg *Hoad v Scone Motors Pty Ltd* (1977) NSWCA: New tractor put end to continuing farming losses
 - o *Unity Insurance Brokers v Rocco Pezzano* (1998) HCA
- Where P acts **reasonably**, D **liable** for costs of mitigation and for any further losses caused by reasonable action (even if would have been avoided by doing nothing)

Reasonableness

- Law: In *Evans v Balog* (1976) the Court suggested that 'the question is whether it was reasonable for the plaintiff to desire to reinstate their property'.
- **TEST:** The Court stated that reasonableness is determined with reference to the advantages of reinstatement, measured against the extra cost to the defendant in having to pay damages for reinstatement rather than diminution in value.
- **Where property (not real) is unusual or unique:** The Courts will often consider it reasonable where the property is somehow unusual or unique:
 - o *O'Grady v Westminster Scaffolding Ltd* (1962), where the damaged vehicle was unique and could only be rebuilt using original or hand-made parts.
 - o The courts have tended to accept a quote for the repair of a motor vehicle as reasonable unless the defendant adduces evidence to the contrary: *Murphy v Brown* (1985).
- **Where real property is family property:** Where the damage has been done to a family property, the Court tends to award damages to rebuild/restore, rather than diminution in value due to the plaintiff's sentimental connection with the property:
 - o *Evans v Balog* (1976): Neighbours had been excavating and caused ground to subside along the plaintiffs boundary. Plaintiffs house started to fall in.
 - **HELD:** Samuels J stated that as the plaintiff had lost their family home, 'fair compensation requires that they be given

PART A – TORTS (PERSONAL INJURY)

Part 1B: The assessment of damages for a personal injury claim (either damages for loss of earnings/earning capacity, or damages for gratuitous assistance/loss of domestic capacity)

Damages for Loss of Earnings/Earning Capacity:

- Firstly the lost earning capacity will be determined. Then, any deductions or adjustments will be considered. Finally, considerations of shortened life expectancy, contingencies and collateral benefits will be considered.
- A personally injured plaintiff is compensated for the lost “capacity” to earn, rather than for lost earnings: *Arthur Robinson (Grafton) P/L v Carter* (1968) 122 CLR 649.
 - o Thus a plaintiff who has not yet entered the workforce may be compensated for lost potential.
- Hence, necessary to consider how the plaintiff would have exercised their earning capacity if not injured (this is their pre-injury earning capacity)

1. Determining the Lost Earning Capacity

- In *Medlin v State Government Insurance Commission* (1995), the Court stipulated that the Plaintiff must establish that:
 - o i) Their earning capacity had been diminished due to the injury;
 - o ii) This loss of capacity has or will result in financial loss (*therefore retirees cannot recover damages*).
- *Civil Liability Act 2002* (NSW) applies: any pre-injury earnings in excess of 3 times average weekly earnings is disregarded: s 12 (under the *Competition and Consumer Act 2010* (Cth), the maximum is 2 times average weekly earnings: ss 87U, 87V).
 - o Where plaintiff continues to work after injury: The Court in *Tuohey v Freemasons Hospital* (2012) held that if the plaintiff, after injury, continued to earn an income that exceeded the statutory minimum, then the plaintiff is **not** entitled to recover damages.
- **Superannuation**: damages may be awarded for loss of employer superannuation contributions in the relevant percentage of damages payable for the deprivation or impairment of the earning capacity: s 15C(1) CLA.
- If the plaintiff’s **earning potential is unknown**, or his/her pre-injury work history does not enable the court to determine pre-injury earning capacity, a “broad-brush” or “buffer” approach adopted, eg *State of NSW v Zerafa* [2005] NSWCA 187.
- “Where precise evidence is obtainable [eg tax returns], the court naturally expects to have it.
 - o Where it is not, the court must do the best it can”: *Callaghan v Wm C Lynch Pty Ltd* [1962] NSW 871.
- **Sharman v Evans (1976)**: Where 20-year-old plaintiff was rendered a quadriplegic as a result of the accident. But for the accident, the court reasoned that she would have married. The court equated the financial security of marriage with earning capacity, and assumed that she would have worked to retirement age without marrying.

2. Deductions/Adjustments

- The court will deduct any work expenditure, personal expenditure, or residual earning capacity/ employment (*Wynn v NSW Insurance Ministerial Corporation* (1995))
- **1. Work expenditure:** Court may deduct expenditure that would have been incurred in realising an earning capacity (eg. travel expenses, clothes), as the plaintiff has ‘saved’ these expenses because of the injury that has destroyed their earning capacity; *Sharman v Evans*
- **2. Personal expenditure:** Food, clothing and accommodation will not be deducted unless it would lead to double compensation; *Sharman v Evans*
- **3. Residual earning capacity/employment:** Any income that could be generated by residual capacity will be deducted. Where the plaintiff has obtained alternative employment, these earnings will be deducted.
 - o If where loss of capacity is partial, residual capacity (work plaintiff can still do) is deducted from pre-injury capacity.
 - o Any existence of a residual earning capacity will be asserted by the defendant who will then be required to adduce evidence to prove it: *Woodhead v Barrow* [1993]
- NOTE however that if the plaintiff has incurred expenditure for re-training for his alternative employment, these costs will be recoverable.
- In *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, the 60-year-old plaintiff retained the physical capacity to continue his pre-injury employment, albeit with discomfort, but took voluntary early retirement and claimed damages for post-retirement loss of earnings.
 - o The High Court saw this as an issue of causation; the injuries contributed materially to the decision to retire.

3. Considerations

Income Splitting Arrangements

- Pre-injury income generated by the plaintiff may have been earned by a partnership, trust or company and distributed amongst beneficiaries/shareholders
 - o Thus aggregate tax paid by the recipients was less than that which would have been paid on the whole amount by the plaintiff as an individual.
- Plaintiff is compensated for lost capacity rather than lost earnings, the courts regard the plaintiff’s pre-injury earning capacity as the whole of the income he/she generates (not the income on which he/she was taxed): *Husher v Husher* (1999).
- Damages are based on net (after-tax) earnings, the notional tax deducted is that which would have been paid by an individual rather than the reduced tax payable through the income-splitting arrangement: *Spargo v Haden Engineering Pty Ltd* (1993).
- Therefore you lose your ability to reduce your tax through trusts etc

The “Lost Years”

- Aka = shortened life expectancy
- If the plaintiff has a shortened life expectancy because of the sustained injury, then damages for lost earning capacity are still awarded for the lost years.