

LAWS1203/6103 TORTS

Lecture and Reading Notes

TRESPASS

History: trespass and case

- Directness: The interference with the plaintiff's person, land or goods must be direct. IT must be part of the defendant's act and not merely a consequence of it.
- Actionable per se (without proof of damage): trespass is actionable without proof of damage.
- Onus of proof: the plaintiff need only prove a direct interference with the person, land or goods. The defendant must prove any defence by way of justification, authorisation and excuse.

Direct interference

- *Hutchins v Maughan* [1947] ALR 201
 - o Quoted Herring CJ in *Scott v Shepherd* (1773) 2 Wm Bl 892
 - "took the settled distinction to be that where injury is immediate, an action of trespass will lie where it is only consequential, it must be an action on the case"
 - o "And so trespass does not lie in respect of defendant's act in laying the baits... It was necessary for the complaint himself to bring his dogs with him to the baits in order that the injurious consequences should result from the defendant's act"
- *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007) 243 ALR 356
 - o Gray ACJ: "There is an obvious distinction between direct interference of the kind required to constitute a trespass and leaving something that sheep might or might not choose to eat in a place where they might or might not choose to go for the purpose of eating"
- Trespass requires directness from the above examples.

Trespass, intention and negligence

- It was generally acknowledged that a contact due to inevitable accident, being excusable, did not attract liability in trespass.
- Intention to do the act that amounts to a direct interference with another's person, land or good.
 - o The motive that prompts the defendant to do the act will not prevent it from being a trespass.
 - o A defendant who enters on land or takes a chattel under the mistaken impression of an entitlement to possession of it commits trespass.
 - o *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714
 - Misinterpretation of NSWSC which was reversed by the HC caused imprisonment of the plaintiff beyond the completion of his sentence. Trespass admitted, as the defendant had the intention to imprison him; the lack of negligence or of awareness that the imprison was unlawful was irrelevant.
- *Morris v Marsden* [1952] 1 All ER 925
 - o D, a schizophrenic, battered P.
 - o "if a person in a state of complete automatism inflicted grievous injury, that would not be actionable... Knowledge of wrongdoing is immaterial, and where there is the capacity to know the nature and quality of the act, that is sufficient, although the mind directing the hand that did the wrongdoing is diseased"

- Liability requires D to know the nature of the act. Liability does not require D to know the act was wrong.
- D is liable in trespass

Battery and Assault

- Committed by directly and intentionally (or negligently) bringing about a harmful or offensive contact with the person of another.
- Assault is committed by intentionally (or negligently) creating in another person an apprehension of imminent harmful or offensive contact.
- Assault allows an action for damages, not for any material harm, but for a purely emotional reaction to the defendant's conduct.
- *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98
 - Quoted Holt CJ in *Cole v Turner* (1704) 6 Mod 149
 - *'the least touching of another in anger is battery', on the other hand, 'if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery'*.
 - The absence of anger or hostile attitude by the person touching another is not a satisfactory basis for concluding that the touching was not a battery.
 - *Collin v Wilcock* [1984] 1 WLR 1172
 - Lord Goff: every person's body is inviolate and that any touching of another person, however slight may amount to battery.
 - Widely drawn a principle must inevitably be subject to exceptions.
 - Consent is a defence to battery
- Acceptable conduct must be considered in the context of the incident in dispute.
- Assault: a traditional definition is an 'overt act indicating an immediate intention to commit a battery, coupled with the capacity of carrying that intention into effect.
- Assault consists in intentionally creating in another person an apprehension of imminent harmful or offensive contact... there may be an assault without battery if the threat to inflict unlawful force is not in fact carried out... the intent required for the tort of assault is the desire to arouse apprehension of physical contact, not necessarily to inflict actual harm.
- Proof of assault requires proof of an intention to create in another person an apprehension of imminent harmful or offensive contact.
- Conditional Assaults
 - *Zanker v Vartzokas* (1988) 34 A Crim R 11
 - The plaintiff jumped out of a moving van after being threatened by the defendant.
 - White J: It is an assault. The young woman was in imminent and continuing fear so long as she was imprisoned by the defendant.
 - *'The threat was, it is true, to be carried out in the future but there was no indication by the defendant whether the 'mate's house' was around the corner or several or more streets away in the suburban area. A present fear of relatively immediate imminent violence was instilled in her mind from the moment the words were uttered and that fear was kept alive in her mind, in the continuing present, [as they kept driving]'*.
 - Construction of fear in person's mind constitutes an assault.

Sexual Assault

- Sexual assault = sexual battery
- *Sex-Discrimination Act 1984* (Cth)

- Self-defence and defence of others
 - o Whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did.
 - o *Zecevic v DPP (Vic)* (1987) 162 CLR 645
 - What is reasonable and necessary will depend on the circumstances. Allowance must be made for a defendant who responds to an attack in the heat of the moment.
 - Material considerations could include whether the defendant could have escaped the threat without using force, and whether excessive force was used.
 - o *Pearce v Hallett* [1969] SASR 423
 - The test whether it was reasonably necessary for the defendant to act as he or she did is applied, not only in cases where self-defence is an issue, but also in cases involving acts done in defence of another person: *Saler v Klingbiel* [1945] SASR 171
 - Or defence of one's property: *Hackshaw v Shaw* (1984) 155 CLR 614
 - o Disproportionate force is not necessarily unreasonable. Proportionality is a factor to be taken into account in determining whether the defendant's action were reasonable: *Zecevic v DPP (Vic)*

NEGLIGENCE – Duty of Care

Duty of care

- **Approaching the scenario:**
 - o **Established categories:** move swiftly to 'breach' issue.
 - o **New case (no clear authority):** if clear positive act by a private individual which directly causes physical harm to the plaintiff, reasonable foreseeability of damage of that general nature to that class of the plaintiff is enough. (incrementally + by analogy: Brennan J, *Sutherland Shire*)
 - o **Complex cases / omissions:** (i) reasonable foreseeability that kind of harm to that class of P's plus (ii) 'relationship factors / salient features'
 - Knowledge of the risk of harm does not give rise to duty of care.
 - Duty of care arises if the conduct was done, or omission was done.
- Duty of care can only exist when harm of that nature is reasonably foreseeable.
- The concept of a duty of care also serves to distinguish between liability and non-liability for non-physical damage, such as in cases of 'pure economic loss'.
- The law often denies liability even for physical damage when it results from an omission by the defendant.
- However, when liability is imposed for a failure to act, it is because there is a duty of care which requires action by the defendant.
- Nature and themes, history and foundations
 - o *Jaensch v Coffey* (1984) 155 CLR 549
 - (i) relevant duty owed by the defendant to the plaintiff to take reasonable care resulting from the combination of:
 - Reasonable foreseeability of real risk that injury of the kind sustained by the plaintiff would be sustained either by the plaintiff, as an identified individual, or by a member of a class which included the plaintiff,
 - Existence of the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission and the injury sustained,

- Absence of any statutory provision or other common law rule which operates to preclude the implication of such a duty of care to the plaintiff in the circumstances of the case
- A breach of that duty of care in that doing of the relevant act or the doing of it in the manner in which it was done was, in the light of all relevant factors, inconsistent with what a reasonable man would do by way of response to the foreseeable risk
- Injury which was caused by the defendant's carelessness and which was within the limits of reasonable foreseeability.
- *Donoghue v Stevenson*
 - D must take reasonable care to avoid acts or omissions which D can reasonably foresee likely to injure... person so closely and directly affected by D's act that D ought reasonably to have had them in contemplation as being so affected.
 - *Rule of law arise which limit range of complaints and extent of remedy.*
 - Limiting the liability to the consequences to the action. Moral and legal duty is separate.
 - Manufacturer had duty of care to the consumers who were not able to see inside the bottle. Consumers be the class of people who the manufacturer are liable to.
- **Reasonable foreseeability / foreseeable plaintiff**
 - *Bolton v Stone*
 - A man hit by a cricket ball far outside of the cricket ground.
 - It was foreseeable, but not reasonably foreseeable.
 - *Chapman v Hearse*
 - Chapman driving his car collided and he was deposited on the road. Dr Perry went to help him out and was hit by Hearse.
 - The plaintiff must show that the defendant could or should have foreseen exact events, or '*consequence of same general character*'
 - The plaintiff must show that the defendant could or should have foreseen harming the plaintiff herself, or just class to which the plaintiff belongs.
 - *Caterson v Commissioner for Railways (NSW) (1973) 128 CLR 99*
 - The plaintiff had boarded a train for the purpose of assisting a departing passenger with his luggage, the train disembarked and he jumped out of the train, sustaining injury.
 - Adopted "*It is not sufficient that the risk be foreseeable s a possible cause of injury. It must be a likely cause of injury.*"
 - It should be "*not unlikely to occur*" – *it denies the proposition that the event or damage should be apprehended as more likely than not to occur or to be suffered and on the other hand, by its negative form, it excludes possibilities which are theoretical and unreal in all the circumstances: it accommodates the idea of a **real risk** or danger though in relation to some situations it may possibly be more embracing than either of those terms.*
 - *Thompson v Bankstown Corp (1953) 87 CLR 619*
 - The true question... is whether the plaintiff acting as he did falls within the scope of the defendant's duty of care.
 - In the application of these formulas it is important to avoid the error of confusing the precise chain of circumstances by which the plaintiff incurs the injuries or damage of which he complains with the question whether he falls within the general description of persons likely to be affected.
 - It is another thing to treat it as reasonable to foresee in a general way the kind of harm that may ensue from acts and omissions and, under wide and indefinite categories, the sorts of situation men must occupy for the harm to be likely to reach them.

▪ *CLWA* Pt 3.2 Mental Harm

Part 3.2 Mental harm

32 Definitions—pt 3.2

In this part:

child, of a person, means the son, daughter, grandson, granddaughter, stepson or stepdaughter of the person, or someone to whom the person is acting in place of a parent.

consequential mental harm, to a person, means mental harm to the person that is a consequence of bodily injury to the person.

family member, of a person, means—

- (a) a domestic partner;
- (b) a parent or child of the person; or
- (c) a brother, sister, half-brother or half-sister of the person.

mental harm, to a person, means impairment of the person's mental condition.

negligence means failure to exercise reasonable care and skill.

parent, of a person, means the father, mother, grandfather, grandmother, stepfather or stepmother of the person, or someone acting in place of a parent to the person.

pure mental harm, to a person, means mental harm to the person other than consequential mental harm.

33 Personal injury arising from mental or nervous shock

In an action for personal injury, the plaintiff is not prevented from recovering damages only because the injury arose completely or partly from mental or nervous shock.

35 Mental harm—damages

- (1) Damages must not be awarded for pure mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.
- (2) Damages must not be awarded for economic loss for consequential mental harm to a person resulting from negligence unless the harm consists of a recognised psychiatric illness.

36 Extensions of liability under pt 3.2 in certain cases

- (1) A person's liability in relation to an injury caused by a wrongful act or omission by which someone else (*A*) is killed, injured or put in danger includes liability for injury arising completely or partly from mental or nervous shock received by—
 - (a) a parent of *A*; or
 - (b) a domestic partner of *A*; or
 - (c) another family member of *A*, if *A* was killed, injured or put in danger within the sight or hearing of the other family member.
- (2) If 2 or more family members bring, or may bring, actions in relation to liability arising under subsection (1) out of the same act or omission, the court may proceed in the way the court considers appropriate and may make the orders the court considers appropriate about—
 - (a) which family members are parties to the action; and
 - (b) who is to have the conduct of the action.
- (3) The action is for the benefit of all family members who are parties to the action.
- (4) The court may award the damages that it considers to be proportional to the damage to the plaintiffs resulting from the wrongful act or omission.

- Special case B: 'no duty' cases

34 Mental harm—duty of care

- (1) A person (the **defendant**) does not owe a duty to another person (the **plaintiff**) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the application of this section in relation to pure mental harm to a person, the circumstances of the case to which the court must have regard include—
 - (a) whether or not the mental harm was suffered as the result of sudden shock; and
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger; and
 - (c) the nature of the relationship between the plaintiff and anyone killed, injured or put in danger; and
 - (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the application of this section in relation to consequential mental harm to a person, the circumstances of the case to which the court must have regard include the nature of the bodily injury out of which the mental harm arose.
- (4) This section does not affect the duty of care a person (the **defendant**) has to another person (the **plaintiff**) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

- (5) Subsection (4) has effect subject to part 7.1 (Damages for personal injuries—exclusions and limitations).
- (6) The amount of damages awarded must, after deducting the costs not recovered from the defendant, be divided between the plaintiffs in the shares the court decides.

- Joint illegality
 - *Civil Wrongs Act 2002* (ACT) s 94*
 - *Miller v Miller* (2011) 242 CLR 446
 - The plaintiff was 16 years old who stole a car and driven to some distance away with her companions, was seen by a cousin who took over the driving. He was reckless and hit a pole. The plaintiff suffered injuries.
 - This was argued on different grounds to *Gala v Preston* (1991) 172 CLR 243 which the HC held that there as no duty of care when the plaintiff passenger and defendant driver were jointly contravening similar Queensland legislation.
 - The refusal to find a duty of care between those complicit in the offence follows from the more precise identification of the way in which the statutory proscription of illegal use of a vehicle seeks to promote road safety... The statutory purpose of a law proscribing dangerous or reckless driving ins not consistent with one offender owing a co-offender a duty to take reasonable care. And in a case where two or more are complicit in the offence of illegally using a vehicle, the statutory purpose of the law proscribing illegal use is not consistent with one offender owing a co-offender a duty to take reasonable care. The inconsistency or incongruity arises regardless of whether reckless or dangerous driving eventuates. It arises from the recognition that the purpose of the statute is to deter and punish using a vehicle in circumstances that often lead to reckless and dangerous driving.
 - The plaintiff, by asking to be let out of the car and with no reasonable means thereafter of preventing the offence, had done enough to withdraw from complicity in the continuation of the offence and was not jointly engaged with the driver in the illegal activity at the time when the accident happened.
 - It requires the civil and criminal law to be coherent. This means that the court must ascertain the purpose of the legislation and must determine by reference to that purpose whether ‘incongruity, contrariety or lack of coherence’ requires the denial of a duty of care.
 - It requires that a participant take all reasonable steps to prevent the commission of the offence, however, there was no reasonable steps the plaintiff could take.
- Intoxication
 - *Civil Wrongs Act 2002* (ACT) s 95, 96
- Legal work: ‘advocates immunity’
 - *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1
 - The plaintiff pleaded guilty as a result of misleading advice of the defendant, and on his retrial the plaintiff was acquitted from rape.
 - Decision in *Giannarelli*
 - Chief attention must be given to the nature of the judicial process and the role that the advocate plays in it.
 - Judicial process as an aspect of government
 - *Giannarelli*, Mason CJ said that ‘the barrister’s immunity, if it is to be sustained, must rest on considerations of public policy.
 - Immunity was used in a sense which assumed that rights and duties might otherwise exist at common law, but the immunity is sustained on considerations of public policy and

- (3) For subsection (1)(a), the presumption can be rebutted if the injured person establishes, on the balance of probabilities, that –
 - (a) the injury suffered by the injured person was less serious than it would have been if the injured person had been wearing a seatbelt at the time of the accident; or
 - (b) the injured person was not capable of fastening a seatbelt without assistance from someone else.
 - (4) For subsection (1)(b)(ii), the presumption can be rebutted if the injured person establishes, on the balance of probabilities, that the injured person could not reasonably be expected to have avoided the risk.
 - (5) If the presumption is not rebutted, the damages the injured person would be settled to, apart from the contributory negligence, must be reduced to the extent that the court considers just and equitable having regard to the injured person’s share in the responsibility for the injury.
- **CLWA s 101** Definitions
 - In this part:
 - “court includes arbitrator.
 - “damage” means loss of any kind (including loss of life, personal injury, damage to property and economic loss).
 - “wrong” means an act or omission (whether or not an offence) –
 - (a) that gives rise to a liability in tort in relation to which a defence of contributory negligence is available at common law; or
 - (b) the amount to a breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort.
 - **CLWA s 102** Appointment of liability – contributory negligence (**First point of test**)
 - (1) If a person (the claimant) suffers damage partly because of the claimant’s failure to take reasonable care (contributory negligence) and partly because someone else’s wrong –
 - (a) a claim for the damage is not defeated because of the claimant’s contributory negligence; and
 - (b) the damages recoverable for the wrong are to be reduced to the extent the court deciding the claim considers just and equitable having regard to the claimant’s share in the responsibility for the damage.
 - (2) However, if the claimant suffered personal injury and the wrong was a breach of statutory duty, the damages recoverable by the claimant for the personal injury must not be reduced because of the claimant’s contributory negligence.
 - (3) If an Act or contract providing for the limitation of liability applies to the claim, the amount of damages awarded to the claimant because of subsection (1) must not exceed the maximum limit applying to the claim.
 - (4) This section does not defeat any defence arising under a contract.
 - (5) This section has effect subject to part 7.1 (Damages for personal injuries – exclusions and limitations).
 - **CLWA s 103** Joint wrongdoers

- Part 2.5 (Proceedings against and contributions between wrongdoers) applies if 2 or more people are liable (or, if they had all been sued, would have been liable) under section 102 for the damage suffered by a person.
- **CLWA s 104** Claim by third parties – contributory negligence
 - (1) This section applies if –
 - (a) a person (the first person) suffers damage partly because of the first person’s failure to take reasonable care (contributory negligence) and partly because of someone else’s wrong; and
 - (b) because of the damage to the first person a third person suffers damage.
 - (2) In an action by the third person, the contributory negligence of the first person must be taken into account under section 102 (Apportionment of liability – contributory negligence) in reducing the damages recoverable by the third person for the damage as if the contributory negligence were a failure by the third person to take reasonable care.
- **CLWA s 5** Good Samaritans
- **CLWA s 27** Contributory negligence not defence in relation to death
 - (1) If a person has died partly because of the person’s failure to take reasonable care (contributory negligence) and partly because of someone else’s wrong, the damages recoverable in an action under this part for the wrong must not be reduced because of the contributory negligence.
 - (2) Subsection (1) has effect subject to part 7.1 (Damages for personal injuries – exclusions and limitations).
 - (3) In this section:
“Wrong” means an act or omission (whether or not an offence)
 - (a) that gives rise to a liability in tort; or
 - (b) that amounts to a breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort.
- Appointment of responsibility (comparison of culpability)
 - *Pennington v Norris* (1956) 96 CLR 10
 - The plaintiff was struck by the defendant’s car as he was crossing the road. The trial judge reduced the plaintiff’s damages by 50 percent. The plaintiff appealed.
 - In this case the very fact that his conduct did not endanger the defendant or anybody else is a material consideration.
 - Crossing was commonly done, where as the defendant speeded. The damage was allocated to defendant 80%, and the plaintiff 20%.
- Where the plaintiff was unreasonable to anticipate the defendant’s negligence
 - *Sibley v Kais* (1967) 118 CLR 424
 - The plaintiff and the defendant collided at an unprotected intersection. The defendant was on the left and should have given way to the plaintiff. The plaintiff’s damage was reduced by one-quarter because the plaintiff was late in looking to his left.
 - The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by