

Contents

Alfred McAlpine Constructions Ltd v Panatown Ltd [2000] 3 WLR 946.....	10
Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) 61 CLR 286	12
Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968) 120 CLR 516	12
Hadley v Baxendale (1854) 9 Ex 341:.....	13
Transfield Shipping Inc v Mercator Shipping Inc ('The Archilleas') [2009] 1 AC 61	14
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 428	15
Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94	16
Koufos v Czarndnikow Ltd [1969] 1 AC 350.....	17
H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791	17
Expectation damages	19
Clark v Macourt [2013] HCA 56	19
Damages for non-delivery: Sale of Goods Act 1923 (NSW), s 53(3)	22
Damages for non-acceptance: Sale of Goods Act 1923 (NSW), s52(3).....	22
Hoffman v Cali [1985] 1 Qdr 253.....	22
Loss of chance.....	23
Chaplin v Hicks.....	24
Commonwealth of Australia v Amann Aviation Pty Ltd.....	24
Howe v Teffy (1927) 27 SR (NSW) 301	24
Reliance Damages.....	25
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64	25
McRae v Commonwealth Disposals Commission (1950) 84 CLR 377.....	27
Restitution damages	28
Surrey County Council v Bredero Homes Ltd [1993] 1 WLR 1361	29
AG v Blake [1998] 1 All ER 833.....	29
Combined claims	29
Shevill v Builders Licensing Board (1982) 149 CLR 620.....	30
Breach of a contract to provide entertainment or enjoyment.....	31
Jarvis v Swan Tours Ltd [1973] 1 QB 233	31
Baltic Shipping Cop v Dillon (Mikhail Lermontov) (1993) 176 CLR 344	31
Loss of reputation or publicity.....	32
Insight Vacations Pty Ltd v Young (2010) 78 NSWLR 641	34
Flight Centre Ltd v Louw (2010) 78 NSWLR 656	35
Reinstatement costs.....	35
Bellgrove v Eldridge (1954) 90 CLR 613.....	35
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8	36
Ruxley Electronics and Constructions Ltd v Forsyth [1995] 3 WLR 118	36
British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673	37
Clark v Macourt [2013] HCA 56	38

Young v Queensland Trustees Ltd (1956) 99 CLR 560	39
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd	40
Andrews v Australia and New Zealand Banking Group Ltd	41
Paccioco v ANZ Banking Group Ltd [2016] HCA 28.....	41
Cavendish Square Holding BV [2015] UKSC 67.....	42
White & Carter Councils Ltd v McGregor [192] AC 413	42
Garcia v National Australia Bank Ltd.....	44
Allcard v Skinner (1887) 36 Ch D 145	45
Johnson v Buttress (1936) 56 CLR 113	46
Commercial Bank of Australia v Amadio (1983) 151 CLR 447	46
Kakavas v Crown Melbourne Ltd (2013) 298 ALR 35	47
Contracts Review Act 1980 (NSW).....	47
West v AGC Advances Ltd (1986) 5 NSWLR 610	50
St Clair v Petrivic & Anor (1988) ASC 55-688.....	51
Gough v Commonwealth Bank (1994) ASC 56-270	51
Carlin “The Contracts Review Act 1980 (NSW): 20 Years On” (2001) 23(1) Syd L Rev 125.....	52
ACCC v CG Berbatis Holdings Pty Ltd (2003) 197 ALR 153.....	60
Pritchard v Racecase Pty Ltd & Ors (1997) ATPR 41-554.....	60
Bell v Lever Bros	62
Solle v Butcher [1950] 1 KB 671	62
Svanosio v McNamara (1956) 96 CLR 186.....	63
Sale of Goods Act 1923 (NSW), s 11: Goods which have been perished	63
Goldsbrough Mort v Quinn (1910) 10 CLR 674	64
Raffles v Wichelhaus (1864) 2 H & C 906.....	64
Cundy v Lindsay (1878) 3 App Cas 459.....	65
King’s Norton Metal Co Ltd v Edridge Merret & Co.....	65
Lewis v Averay [1972] 1 QB 198.....	66
Smith v Hughes (1871) LR 6 QB 597.....	66
Taylor v Johnson (1983) 151 CLR 422	67
Pukallus v Cameron (1982) 43 ALR 243.....	70
Saunders v Anglia Building Society	70
Petelin v Cullin (1975) 132 CLR 355	71
With v O’Flanagan [1936] Ch 575	75
Holmes v Jones (1907) 4 CLR 1692.....	75
Redgrave v Hurd (1881) 20 Ch D 1	76
Alati v Kruger (1955) 94 CLR 216.....	77
Vadasz v Pioneer Concrete (1995) 130 ALR 570.....	78
Coastal Estates v Melevende [1965] VR 433	79
Leaf v International Galleries [1950] 2 KB 86	80

Car and Universal Finance Co Ltd v Caldwell [1965] 1 QB 525	81
Svanosio v McNamara (1956) 96 CLR 186.....	81
Holmes v Jones (1907) 4 CLR 1692	83
Derry v Peek (1889) 14 App Cas 337	84
Hedley Byrne principle	85
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594	88
Bevanere v Lubineuse (1985) 7 FCR 325.....	88
E v Australian Red Cross Society (1991) 27 FCR 310.....	89
Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592.....	89
Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd.....	89
Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216.....	90
Parkdale Custom Build Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191	90
Campomar Sociedad Ltd v Nike International Ltd (2000) 202 CLR 45.....	91
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 79 ALR 83.....	91
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31	92
Campbell v BackOffice Investments Pty Ltd [2009] HCA 25	92
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65	92
Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82.....	93
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514	94
Henville v Walker (2001) 206 CLR 459.....	94
Travel Compensation Fund v Tambree (2005) 224 CLR 627	94
Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94 at [75].....	94
Mark v GIO Australia Holdings Ltd	95
Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq) [2011] NSWCA 367	100
Derry v Peek 14 App Cas 337.....	101
Palmer-Bruyn and Parker Pty Ltd v Parsons [2001] HCA 69	101
Hedley Byrne & Co v Heller & Partners [1964] A 465.....	102
MLC v Evatt (1968) 122 CLR 556	103
Shaddock & Associates v Parramatta City Council (1981) 150 CLR 225.....	103
Essanda Finance Corporation v Peat Marwick Hungerfords (1997) 188 CLR 241	104
San Sebastian Pty Ltd v The Minister (1986) 162 CLR 340	105
Tepko v Water Board (2001) 178 ALR 634	105
Caparo Industries plc v Dickman [1990] 2 AC 605.....	105
BT Australia Ltd v Raine & Horne Pty Ltd [1983] 3 NSWLR 221	105
Voli v Inglewood Shire Council (1963) 110 CLR 74.....	105
Hill v Van Erp (1997) 188 CLR 159.....	105
Badenach v Calvert [2016] HCA 18	106
Donoghue v Stevenson [1932] AC 562	107
Voli v Inglewood Shire Council (1963) 110 CLR 74.....	107

Cattle v Stockton Waterworks Co (1875) LR 10 QB 453	107
Caltex Oil v The Dredge “Willemstad” (1976) 136 CLR 529	107
Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd [1986] AC 1	107
Perre v Apand (1999) 198 CLR 180	107
Christopher v MV ‘Fiji Gas’ (1993) Aust Torts Reports 81-202.....	109
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27	109
Fortuna Seafoods Pty Ltd v The Ship ‘Eternal Wind’ [2008] 1 Qd R 429	110
Marsh v Baxter [2015] WASCA 169.....	110
Rail Corporation NSW v Fluor Australia Pty Ltd [2009] NSWCA 344 (esp [126-133] per Macfarlan JA)	110
Sutherland Shire Council v Heyman (1985) 157 CLR 424	111
Anns v Merton London Borough Council [1978] AC 728 (HL)	111
Junior Books Ltd v Veichi Co Ltd [1983] 1 AC 520 (HL).....	112
D & F Estates Ltd v Church Commissioners for England [1989] AC 177.....	112
Minchillo v Ford Motor Co of Australia [1995] 2 VR 594.....	112
Bryan v Maloney (1995) 182 CLR 609	113
Woolcock Street Investments v CDG (2004) 205 ALR 522.....	113
Brookfield Multiplex Ltd v Owners Corporation SP 61288 [2014] HCA 36.....	114
Chan v Acres (2015) NSWSC 1885	114
Rail Corporation NSW v Fluor Australia Pty Ltd [2009] NSWCA 344.....	114
Barclay v Penberthy (2012) HCA 40.....	115
Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) [1947] AC	116
Stevens v Brodribb Sawmilling Co. (1986) 160 CLR 16	116
Zuijs v Wirth Brothers (1955) 93 CLR 561	118
Hollis v Vabu (2001) 207 CLR 21	118
Sweeney v Boylan Nominees (2006) 227 ALR 46.....	119
Thompson v The London County Council [1899] 1 QB 840	120
XL Petroleum (NSW) v Caltex Oil (Australia) (1985) 155 CLR 448	121
Bitumen & Oil Refineries (Aust) v Commissioner for Government Transport (1955) 92 CLR 200	123
Brambles Constructions v Helmers (1966) 114 CLR 213	123
Bitumen & Oil Refineries (Aust) v Commissioner for Government Transport (1955) 92 CLR 200	123
James Hardie & Co v Selsam (1998) 196 CLR 53	123
Amaca v New South Wales (2003) 199 ALR 596.....	124
Reinhold v New South Wales Lotteries Corporation (No 2) [2008] NSWSC 187.....	125
Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10	125

TOPIC 1: INTRODUCTION: TORT & CONTRACT

Issues of consideration:

- Theoretical foundations and rationale for liability
- Rationales for and objections to concurrent liability in tort and contract
- Extent to which contractual terms and obligations regulate or limit obligations in tort
- Role of legislation in overriding or supplementing common law principles
- Role of fault and strict liability
- Differing limitation periods
- Choice of law rules
- Remedies
- Effect of contributory negligence by a claimant and the operation of apportionment legislation such as the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW).

Introduction

In considering the relationship of tort and contract, 2 questions arise.

1. What is the conceptual distinction between liability in tort v liability in contract?
2. Assuming there is a conceptual distinction between these two forms of civil liability, what are the practical implications of this distinction particularly in cases of concurrent liability in tort and contract i.e. cases where there is co-extensive liability in both tort and contract for the same wrongful act or omission?

Conceptual distinction

“The law of torts governs infringements of interests protected by the law independently of private agreement, whereas the law of contract governs expectations arising out of particular transactions between individual persons” (J H Baker 2002, p 317)

Following general observations may be made:

- i. Tort is concerned primarily with compensation for injury or damage.
Contract is concerned primarily with the enforcement of agreements.
- ii. Liability in tort is imposed by law without the agreement of the parties but may be relevant.
Liability in contract is derived from the agreement of the parties.
- iii. Liability in tort is based on fault comprising intentional wrongdoing or negligence (subject to limited exceptions such as strict liability for some breaches of statutory duty).
Daniels v. R White and Sons and Tarbard [1938] 4 All ER 258

Practical Implications

- Limitation period under *Limitation Act* 1969 (NSW) for commencing an action in tort for negligence or in contract is the same (6 years as general rule, 3 years for personal injury), the limitation period in tort for negligence commences when damage is suffered by plaintiff but limitation period in contract commences when the breach occurs irrespective of whether the plaintiff has suffered damage at that time.
- **Measure of damages**
 - Mason, Wilson and Dawson JJ in *Gates v. City Mutual Life Assurance Society Ltd* (1986) 63 ALR 600 at [607]

“In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss).”
 - Usually difference in basis for assessment
 - Test of remoteness of damage in contract is narrower than that applied in tort: *Koufos v. C Czarnikow Ltd* [1969] 1 AC 350; *Astley v Austrust Ltd* (1999) CLR 1 at [23]
- **Contributory negligence (historical interest only)**
 - Common law – contributory negligence is a complete defence to a claim in tort for negligence (leading in modern law to reduction of damages under apportionment legislation) but it is no defence in a claim founded on breach of contract (*Astley v. Austrust Ltd* (1999) 161 ALR 155).
 - Unless contract provides to the contrary, it is not a defence to a claim for breach of contract for a D to show that the P’s carelessness contributed to the loss or damage which forms the subject of P’s claim: *Astley v Austrust* – this case continues to govern matter in situations to which amended legislation does not apply.
 - P must prove that its loss or damage was caused by D’s breach of contract. If the P’s own carelessness breaks the chain of causation between the breach and loss or damage, P will fail.
 - *Harper v Ashtons Circus Pty Ltd* [1972] 2 NSWLR 395: Plaintiff fell backwards from top tier of seats during performance of D’s circus. P sued D for breach of contract, being the D’s failure to provide a safety rail at the back of the top tier of seats. Though NSWCCA found no contributory negligence on part of P, court held, as a matter of principle, contributory negligence is no defence to an action founded on breach of contract and hence no ground for reduction of P’s damages under apportionment legislation.
 - Today, the apportionment principle (reduction of damages on account of contributory negligence) applies in cases of “breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort”) s 9(1) *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW)
 - S 9 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW):

If a person (the claimant) suffers damage as the result partly of the claimant’s failure to take reasonable care (contributory negligence) and partly of the wrong of any other person:

 - (a) a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant, and

- (b) the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
 - s 8 defines 'wrong' as an act or omission that:
 - (a) gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law, or
 - (b) amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort.
 - The apportionment legislation will be relevant to a claim for damages for breach of contract if the breach by D amounts to the 'breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort.' This has 3 elements:
 1. D has undertaken a contractual DoC;
 2. Under common law principles of negligence, D is also subject to a tortious DoC; and
 3. Contractual duty is concurrent and co-extensive with the tortious duty.
- Most likely context in which contributory negligence of P will be relevant is where a professional person breaches an express or implied duty to exercise care in performance of services, and the carelessness of client contributes to the loss. But it will depend on circumstances whether duty in contract is co-extensive with common law duty of care. In cases where duties differ, apportionment legislation will not apply to a claim for breach of contract.
- Cases of strict liability – D who has exercised reasonable care may nevertheless be found to be in breach of contract. E.g. seller who supplies goods not fit for buyer's purpose is in breach of contract even if reasonable care has been exercised – apportionment legislation not relevant.

Concurrent liability in tort and contract

“The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract.” Donoghue v Stevenson [1932] AC 562 per Lord Macmillan

Concurrent liability in tort and contract arises where liability imposed by law (tort) is co-extensive with liability derived from the agreement, express or implied, of the parties (contract).

Examples:

- Employer is under common law duty of reasonable care in respect of workplace safety of employees (tort). Implied term in every contract of employment that employer will take reasonable care for workplace safety of their employees (contract)
- Carrier and fare paying passenger re safety of passenger: *Kelly v. Metropolitan Railway Co.* [1985] 1 QB 944. P was fare paying passenger on D's steam train. P suffered personal injury when engine driver negligently failed to turn off steam on time to prevent train running into wall at dead-end of station. D admitted liability and issue was whether P's claim was properly

founded in tort (as P contended) or contract (as D contended). Practical significance: higher scale of legal costs was recoverable by P in tort. ECA held that P's claim had properly been tried as an action in tort even though claim could also been tried as an action in contract. Lord Esher MR stated:

- Contract argument: a contract by railway company to carry P with reasonable care and skill and breach of that contract
- Tort argument: P was being carried by railway company to knowledge of their servants, who were bound not to injure him by any negligence on their part and negligent.
- Rationale of concurrent liability in a case such as *Kelly* is that the liability of the carrier for the safety of the passenger is an incident of the relationship of carrier and passenger and the carrier would be liable to the passenger even if he or she was being carried gratuitously i.e. there would be liability in tort even in absence of a contractual relationship between the parties.
- Whether the P frames action in contract or tort, damages will be assessed on the more favourable test: *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791.
- Between professional persons
 - *Prosser and Keeton on the Law of Torts* 5th edn, 1984, p. 661, the principle which seems to have emerged from the decided cases in the US (and it would also seem, the Anglo-Australian decided cases) is that there will be concurrent liability in tort and contract "whenever there would be liability for gratuitous performance without the contract"

Liability of minors

In cases of concurrent liability in tort and contract, the liability of D in tort is not affected by D's lack of contractual capacity on account of his or her minority: *Minors (Property and Contracts) Act* (NSW) s 48.

Choice of law considerations

- It is in context of choice of law that concurrent liability in tort and contract has its most practical implications in modern law.
- In essence, in Aust. law, liability in tort is governed by the law of the place where the tort was committed (lex loci delicti): *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503
- Liability in contract is governed by the legal system which is identified as the proper law of the contract or, in absence on an express or inferred choice, the legal system with which the contract has its closest and most real connection: *Bonython v Commonwealth of Aust.* [1951] AC 201.
- Thus, in case involving concurrent liability, the existence or extent of the liability of the employer may be significantly different depending on whether the employee's claim is framed in tort or in contract. See *Garstang v. Cedenco JV Australia* [2002] NSWSC 144; *Busst v. Lotsirb Nominees* [2003] 1 Qd R 477.
- If a contract between a tour operator and a client is expressed to be governed by the law of NSW and client is injured in an accident in Slovakia caused by the tour operator's negligence,