

TABLE OF CONTENTS

WHAT IS A TORT?	3
ELEMENTS OF A TORT	3
CIVIL LIABILITY ACT 2002	3
BACKGROUND	3
CLA OBJECTIVES	4
CLA vs. NEGLIGENCE	4
FUNCTIONS OF THE CLA	4
CORRECTIVE JUSTICE (UPHOLDING MORAL RIGHTS)	5
NUISANCE	6
PUBLIC NUISANCE	6
PRIVATE NUISANCE	7
REMEDIES	9
DUTY OF CARE	11
NEIGHBOUR PRINCIPLE TESTS	11
DEVELOPMENT OF DUTY OF CARE	11
CATEGORIES OF DUTY OF CARE	14
TYPES OF DEFENDANT	14
TYPES OF HARM	14
NOVEL CASES	14
PSYCHIATRIC HARM / MENTAL INJURY	15
NERVOUS SHOCK	15
CIVIL LIABILITY ACT 2002 (NSW)	17
PURE ECONOMIC LOSS	18
PURE ECONOMIC LOSS AS A RESULT OF NEGLIGENT WORDS	19
PURE ECONOMIC LOSS CAUSED BY NEGLIGENT ACT	21
DUTY OF CARE: PUBLIC AUTHORITIES	23
PUBLIC AUTHORITIES	23
CIVIL LIABILITY ACT 2002 (NSW)	25
OCCUPIERS LIABILITY	26
DUTY OF CARE: Foetus	28
UNBORN PLAINTIFF	28
WRONGFUL BIRTH	29
WRONGFUL LIFE	30
ABEL	32
BREACH OF DUTY: STANDARD OF CARE	33
A REASONABLE PERSON	33
CHILDREN	33
MENTAL ILLNESS AND DISABILITY	34
LEARNERS/KNOWLEDGE	34
PROFESSIONALS AND THOSE WITH SPECIAL SKILL	34
CIVIL LIABILITY ACT 2002	35
REASONABLE FORESEEABILITY OF RISK OF HARM	36
CAUSATION	38

FACTUAL CAUSATION: THE 'BUT FOR' AND COMMON SENSE TEST	38
CAUSATION: FAILURE TO WARN OF RISKS.....	40
NOVUS ACTUS INTERVIENS	40
INTERVENING ACTS	41
REMOTENESS	42
SCOPE OF LIABILITY.....	42
EGGSHELL SKULL RULE	44
SCOPE OF LIABILITY AND REMOTENESS OF DAMAGE.....	45
DEFENCES TO NEGLIGENCE.....	45
CONTRIBUTORY NEGLIGENCE	45
VOLUNTARY ASSUMPTION OF RISK	47
STATUTORY DEFENCE: DANGEROUS RECREATIONAL ACTIVITY (VOLENS)	49
EXAMPLES.....	50
BREACH OF STATUTORY DUTY	51
EXAMPLES OF STATUTORY DUTY	52
CIVIL LIABILITY LEGISLATION	52
EXAMPLES – PRIVATE RIGHT TO SUE.....	52
NATURE OF ACTION FOR BREACH OF STATUTORY DUTY	53
ESTABLISHING A BREACH	53
CONCURRENT LIABILITY.....	56
VICARIOUS LIABILITY.....	56
WHAT IS AN EMPLOYEE?	57
IN THE COURSE OF EMPLOYMENT TEST.....	58
NON-DELEGABLE DUTY.....	60
DAMAGES	62
TYPES OF DAMAGES	62
ASSESSMENT OF DAMAGES	63
HEADS OF DAMAGES	63
LOSS OF EARNINGS	64
PAST LOSS OF EARNINGS	64
FUTURE LOSS OF LIFE	65
DISCOUNTING FOR THE VICISSITUDES OF LIFE	66
MEDICAL EXPENSES	67
GRATUITOUS CARE.....	67
NON-ECONOMIC LOSS.....	70
DAMAGES FOR UNCONSCIOUS VICTIM	70
THEORETICAL ARTICLE	71
WALDRON – PHILOSOPHICAL FOUNDATIONS OF TORT LAW	71

WHAT IS A TORT?

- The law of civil wrongs
- Concerns the obligations of persons living in a crowded society to respect the safety, property, and personality of their neighbours as an a priori matter (matter of cause and effect) and as a duty to compensate for wrongfully caused harm, ex post (after the fact).
- Involves questions of how people should treat one another and the rules of proper behaviour that society imposes on each citizen for avoiding improper harm to others, and for determining when compensation for harm is due.
- Approx. 60-70 torts (focus on negligence)

DIFFERENCE FROM A CRIME?

Criminal law

- In criminal law, the parties are different:
 - Crime: State vs. Defendant
 - Tort: Individual vs. Individual
 - Criminal law – harm against the community as a whole, breach of the peace, breach of statute
- Remedies – penalties, fines
- Legal threshold – proven beyond reasonable doubt (approx. 90%)

Tort

- Tort – harm against the individual
- Remedy – compensation for victim, injunction
- Legal threshold – balance of probabilities (> 50%)
- Civil law – wrongs between individuals within society

ELEMENTS OF A TORT

Controls / Legal tests: must be proven for the tort to be made out: Directness; Damage; Fault

BATTERY (PHYSICAL INTERFERENCE)

- A direct and intentional **act** by the defendant
- Positive act
- Intention / negligence
- Physical or offensive contact causing interference

ASSAULT (MENTAL APPREHENSION OF IMMINENT PHYSICAL INTERFERENCE)

- A **direct threat by the defendant**
- **Positive act**
- **Intention / negligence**

- Reasonable apprehension of imminent contact

FALSE IMPRISONMENT (TOTAL RESTRAINT OF LIBERTY BY CONFINEMENT)

- Direct
- Positive act
- Intention / negligence
- Confinement without reasonable means of escape

NEGLIGENCE

- Duty of care
- Breach of duty
- Causation

Damages – objective to restore the individual harmed to the position before the event occurred.

Tort law – primary function is to compensate. It has reduced impact on deterrence. There are problems within the system.

There are problems with compensation – ability to pay, need money to sue, need to be able to find a defendant to sue, legal fees are costly.

CIVIL LIABILITY ACT 2002

BACKGROUND

- CLA was introduced to deal with the insurance crisis after the review into the tort of negligence in July 2002. The crisis was caused by an increasing level of litigation producing increasing damages awards, in disproportionate amounts.
- Concern that Australia was becoming a blaming society where people, rather than taking personal responsibility for themselves, prefer to blame others and rush to litigation.

CLA OBJECTIVES

- To create *legislative structure*, the law of tort, particularly relating to *personal injury*.
- Focuses only on NEGLIGENCE
- To address unprecedented concern about the price and availability of increasingly expensive and unavailable insurance (eg. public liability insurance, legal liability for personal injury).
- Reducing litigation and limiting damages in order to reduce insurance premiums and make insurance more readily available.

CLA VS. NEGLIGENCE

- CLA is focused generally on negligence as a mode of action rather than necessarily as a tort.
- Eg. NSW Act, s 5A applies “to any claim for damage for harm *resulting from negligence*, regardless of whether the claim is brought in tort, contract or under statute.
- Common law applies to areas excluded by statute.

FUNCTIONS OF THE CLA

COMMON LAW

- CLA is not an exclusive legislation on the tort of negligence. In that case, courts will defer to the common law.
- Common law is used to supplement explanations and definitions in the CLA to understand some provisions.
- Some provisions of the CLA, they never existed in the common law – refer to cases heard on those provisions since 2002.

COMPENSATORY FUNCTION

- Torts provide a compensatory function for people who are injured by a wrong.
- Eg. damages awarded to put the person back to the position he/she would have been in had the wrong not occurred.
- Financial compensation – cannot restore the individual to the position they were in prior to the event.

LIMITATIONS OF TORT LAW IN PROVIDING COMPENSATION

- Damages run out - in cases of catastrophic loss, damages have run out due to difficulty to predict the future. Eg. cost of caring for a quadriplegic
- Legal fees are included in damages payments.
- Lump sums – people are poor at managing large sums of money
- Torts require the injured person to prove that someone else caused the harm – and the elements of legal test.
 - Requires a lot of work to get to the final result.
 - 5% of people injured get compensated through the system.
 - Costly – requires resources to bring an action. If lose, plaintiff might be liable for costs of the defending party.

DETERRENCE EFFECT

- Deterrence theory argues that if the wrongdoer is punished he/she will try to avoid such accidents in the future.
- Weak deterrence effect for individuals: Deterrence effect is greater for companies than:
 - Individuals, for which criminal prosecution is greater deterrence.
 - Medical accidents
 - If tort law is effective, there would be more accidents where tort law does not apply. Not proved in NZ where the Accident Compensation Scheme removes fault-based liability.
- **Calabresi** argues the goal of accident law should be to reduce the cost of accidents, while taking into account that our systems do not require the protection of life at all costs and that the system must be fair (difficult to achieve). To reduce cost of accidents a range of deterrents must be used, inc. loss-spreading (insurance), loss-shifting (person at fault pays). Preventing accidents costs money.
- **Posner** argues law of negligence create the most efficient outcome for society and the parties. Kaldor-Hicks efficiency accepts that a transaction is efficient if it leads to an overall gain so that the winners *could* compensate the losers out of their winnings.

INSURANCE FACTOR

- Loss-spreading and risk-spreading. Insurance prevents deterrence because person at fault does not pay for their wrong, only pays their premium. System of variable premiums
- Liability insurance (indemnity insurance) – allows insurer to take control of legal proceedings:

- First-party insurance – insurer contract to pay the insured on the occurrence of a particular event or to cover a specified loss (eg. life insurance)
 - Third party insurance – person insures themselves against having to pay money to someone else (eg. CTP, medical indemnity)
 - Public insurance – covers the public by reason of government action (eg. social security, disability pension, unemployment benefits)
- Deterrent effect:
 - Premiums occur annually – remind insured of desired behaviour
 - Blame and bad publicity
 - Remediate negligence – equalises the level of proportionality between the unintentional wrongful act (unblameworthy) and the harm done.

CORRECTIVE JUSTICE (UPHOLDING MORAL RIGHTS)

- **Weinrib**'s theory asks when is a person who causes harm responsible to compensate? He argues that individuals have specific obligations directly connected to rights. Criticised because does not consider multiple other facts (eg. systematic harm).
- **Perry** argues that individualised sense of fault should be put together with “outcome responsibility” – those who cause harm are responsible even if not at fault. When causally responsible, morally should shift loss proportionally to the defendant.

INDIVIDUAL RESPONSIBILITY

- Agent is only responsible for actions that are intentional or could have been avoided.
- Eg. foreseeability in negligence – requires individuals to avoid harm that it foresees.
- There should be an element of proportionality with regard to a person's contribution to the harm caused

COLLECTIVE RESPONSIBILITY

- A community as a whole decides the level of risk to be borne together and recognises that when a person suffers the outcome of that risk they should be compensated by the community.
- *Distributive justice and risk allocation*

NUISANCE

PUBLIC NUISANCE

- An unlawful act or omission which endangers the lives, safety, health, property or comfort of the public or by which the public are obstructed in the exercise of enjoyment of any right to common to all.
- Interference with the interests that are shared with the public, ie. public rights
- Criminal offence at common law and by statute.

To establish a prima facie case of public nuisance, a private individual will have to prove:

1. Title to sue
<ul style="list-style-type: none"> • Attorney General • Individual if "special and particular" damage: <i>Walsh</i>
2. Is the interference is with a public right?
3. Is the defendant's interference is "substantial and unreasonable"?
See <i>Carlile, Harper, Maitland</i>

AG CLAIM IN PUBLIC NUISANCE

- Public nuisance involves an interference w/ public rights; and the AG represents the public.
- This prevents the multiple actions based on trivial complaints by members of the public.

INDIVIDUAL CLAIM IN PUBLIC NUISANCE

- A private individual who can prove that they have suffered "special" or "particular" damage;
- Damage over and above that which is suffered by the rest of the public.

TITLE TO SUE

<u><i>Walsh v Ervin [1952]</i></u>	
Facts	<ul style="list-style-type: none"> • The plaintiff's land was cut-off by the defendant who ploughed and fenced off sections of the highway that divided their land. Plaintiff suffered detriment; he was prevented from entering his land by MV along the fenced off area and a substantial loss of time moving his sheep b/w two paddocks.
Held	<ul style="list-style-type: none"> • Delay and inconvenience of a substantial character, direct and not merely consequential, not similar to that suffered by the general public may amount to damages, particular to the individual. • An individual person or corporation cannot sue in its own name in respect of a nuisance to a public highway, except for "particular damage" occasioned to it. • "particular damage" is not limited to "special damage" (ie. pecuniary loss) • It may consist of proved general damage, eg. inconvenience or delay provided that it is substantial, direct and not consequential, appreciably greater in degree than any suffered by the general public. • Premises were prejudicially affected by a direct near approach being permanently stopped, and replaced by a circuitous and longer way, or where business will be impeded, or additional expense may be probably necessary in consequence of the change: <i>Winterbottom v Derby</i>. • Delay and inconvenience was substantial; the highway was rendered unavailable for important purposes of the plaintiff (even when cannot infer actual pecuniary loss) • It was direct and non-consequential and was at a greater degree than that suffered by the general public.

INTERFERENCE WITH A PUBLIC RIGHT

- Interference is with a "public right"

- Nuisance so **widespread or so indiscriminate** in its effect that it would not be reasonable to expect one person to take proceeding on his own responsibility, it should be the responsibility of the community at large: *AG v PYA Quarries* (Lord Denning)
- Extent of public interference:
 - The number of persons required to be affected for an interference to constitute a public nuisance **depends upon the circumstances of each case**: *R v Clifford* [1980]
 - Nuisance cannot be brought against public authorities in respect of construction, maintenance and repair of public infrastructure: *Brodie v Singleton Shire Council* (2001)

INTERFERENCE MUST BE SUBSTANTIAL AND UNREASONABLE

- A tail light that was defective leading to a collision (*Maitland v Raisbeck*)
 - Reasonable – if classed a nuisance, then every driver would be responsible for the defects of their MVs.
 - Minor defects are common – if courts found it unreasonable, then the standard would be raised and public nuisance litigation would be
- Scaffolding and boarding erected in front of the plaintiffs shop (*Harper v Haden*)
 - Reasonable – scaffolding and boarding were effected for the purpose of conducting building operations, D only erected what as necessary and reasonable for the construction work.
- Defendant burnt a libellous effigy on the street attracted a crowd of onlookers (*R v Carlile*).
 - Unreasonable – crowd's obstruction of the use of the highway is attracted by something done by D which is *not* necessary for the bona fide carrying on of D's trade.

PRIVATE NUISANCE

- Nuisance to the private rights of an individual concerning their use and enjoyment of land

1.	Does plaintiff have title to sue ?
	<ul style="list-style-type: none"> • Right to possession (eg. owner or tenant) • Exclusive factual possession (eg. squatter) • Normally "living" at property • If exclusive possession, P has title to sue.
2.	Is the interference w/ use and enjoyment of property tangible ?
	<ul style="list-style-type: none"> • Damage: <i>St Helen's case</i> • Not trivial: <i>St Helen's case</i>
3.	Is interference w/ use and enjoyment of land intangible ?
	<ul style="list-style-type: none"> • Give + take rule – to work out whether "substantial + unreasonable" • Consider: <ul style="list-style-type: none"> • Location • Frequency + extent • Time • Malicious intent: <i>Hollywood Silver Fox</i> • Sensitive (not abnormally sensitive) – objective test of the average person
4.	Can the defendant be sued?
	<ul style="list-style-type: none"> • Create nuisance? Or • Authorising the nuisance? Or • Adopt the nuisance? (Knowledge)
5.	Remedies
	<ul style="list-style-type: none"> • Damages – tests of remoteness – reasonable foreseeability • Injunction – "substantial" interference • Abatement – "reasonable" in circumstances

ELEMENTS OF PRIVATE NUISANCE

1. Plaintiff must establish he/she has title to sue;
2. Defendant had requisite knowledge of the nuisance;
3. That nuisance was a substantial or unreasonable interference w/ P's right to enjoyment of their land.

TITLE TO SUE

- Individual must have rights in/over the property. Eg. owner, tenant in actual possession who has the right to exclusive possession.

INTERFERENCE WITH THE ENJOYMENT OF LAND

- Tangible – indirect physical injury to the land (eg. flooding, fire, vibrations, leaves, tree roots, flood and dust)
- Intangible – sensible personal discomfort (eg. noise, smell and offensive sights)

Tests

- Physical damage to the land is not acceptable, but sensible personal discomfort depends on the circumstance (eg. locality of housing near largely manufacturing district): *St Helen's Smelting Co v Tipping* [1865]
- Protected rights:
 - Right to support of the land in its natural state.
 - Interfering w/ a person's right to leave and enter their land: *Dollar Sweets v Federated Confectioners Association of Australia* [1986]
 - Rights to water and drainage
- Unprotected rights:
 - Right to natural light or to a view.
 - Reasons for the distinction –
 - Acceptable practices are influenced by what the judges are representatives of social norms and attitudes hold. Eg. view of prostitutes bringing clientele to premises is a private nuisance.

SUBSTANTIAL AND UNREASONABLE

- Courts seek to balance the competing interest of the plaintiff and the defendants.

<u><i>Munro v Southern Dairies</i></u>	
Facts	<ul style="list-style-type: none"> P is the owner / occupier of a house claiming an action in nuisance of noise, smell and flies from the keeping of horses on a part of D's premises which abuts on P's street. Held: Substantial degree of interference w/ the comfort and convenience of the occupier who complains of a private nuisance, or the use or enjoyment of his land. The interference must be "material" or so "substantial" as to cause damage. Standard of comfort – test of reasonable use of premises: <i>Broder v Saillard</i> (1876) Plaintiff or activities must not be abnormally sensitive, unless interference would constitute a nuisance to an ordinary person <ul style="list-style-type: none"> Locality – chosen by the plaintiff affects the level of discomfort expected and acceptable to him. Social and local setting in which the nuisance is complained of
Held	<ul style="list-style-type: none"> Outcome: In favour of the plaintiff.

FACTORS TO BE CONSIDERED

- Location
- Frequency
- Extent
- Locality
- Malicious
- Sensitivity

<u><i>Hollywood Silver Fox Farm v Emmett</i></u>	
Facts	<ul style="list-style-type: none"> Plaintiff's bred silver foxes on land adjoining the defendant's. P erected a prominent advertising sign which D requested be removed because of fear it would be detrimental to the development of his building estate. D threatened and persisted to shoot guns on his own land near to the breeding pens, so P would not raise any cubs as it alarmed the vixens. Nuisance – noise and disturbing the vixens
Held	<ul style="list-style-type: none"> Motive of the defendant is immaterial where D was acting maliciously to do harm to P: <i>Bradford Corp v Pickles</i> [1895]. Acts done by D upon his own land were not actionable when they were within his legal rights, even though motive to prejudice his neighbour. State of mind of a person doing the act cannot affect the right. Nuisance by noise is a question of degree: <i>Gaunt v Fynney</i> (1872). Noises were excessive and unreasonable, made deliberately and maliciously for the purpose of annoying the plaintiff. Therefore, not a legitimate use of the defendant's house to use it for purpose of vexing and annoying neighbours. Outcome: in favour of the plaintiff – d's gunshots were made to alarm or disturb the foxes.

CAN THE DEFENDANT BE SUED

- Did the defendant create the nuisance?**
 - Strict liability and no requirement to occupy