

## Week 1: The nature & functions of Torts

---

**Tort** – an unconnected group of civil wrongs other than breach of contract for which a court of law will afford a remedy in the form of an action for damages

**Tort Law** – concerned with compensation of losses suffered by private individuals in their legally protected interests, through the conduct of others which is regarded as socially unreasonable

### **Types of individual torts recognized by common law:-**

- Rights of personal safety and integrity (eg. Torts of assault, battery, false imprisonment & negligence)
- Rights associated with the possession & ownership of land (eg. Torts of trespass to land, nuisance and negligence)
- Rights associated with economic & commercial interests (eg. Torts of passing off, conspiracy, deceit and negligence)
- Personal reputation (tort of defamation)

### **3 Functions (or aims) of Tort Law:-**

1. **To provide compensation for loss suffered**
  - a. In determining situations meriting compensation, the courts have traditionally considered
    - i. The interests of the plaintiff
    - ii. The nature of the conduct which caused the harm to the plaintiff
2. **Deterrence**
  - a. *Henry v Thompson* (1989) – Aboriginal prisoner v 3 police officers – exemplary damages was not covered in employer’s insurance - “tort does not pay”
  - b. Exemplary damages now confined to intentional torts (*NSW v Ibbett* (2005))
  - c. Exemplary damages are denied in claims based on negligent conduct – §21
3. **To spread the loss suffered by an individual to a wider group of society. This is mainly achieved through liability insurance (Loss distribution & insurance)**
  - a. ‘*Corrective Justice*’ Approach- whether or not the defendant should be made to compensate the plaintiff for the wrong suffered by the plaintiff
  - b. ‘*Distributive Justice*’ Approach – whether the loss suffered by the plaintiff should be shared by the wider community

### **All torts have the following in common:-**

- ✓ An act or omission
- ✓ The infringement of a legally recognized right
- ✓ An action for damages

### **Acts or Omissions**

**Misfeasance** (acts causing harm) – must have been *voluntary* in the sense that the **tortfeasor** (wrongdoer who committed the tort) knowingly committed the act, but not necessarily that they knew harm would result from the act

*Consolidated Co v Curtis & Son (1892) 1QB 495* – tort of conversion (auctioned goods)

**Motive** (tortfeasor's reason for acting) – not relevant to liability & will not convert a lawful act motivated by ill will into an unlawful one – it may be relevant to the type & assessment of damages

Exception - motive may be a justification for an act that is otherwise tortious (eg. Trespass in order to preserve life or property) – *Proudman v Allen (1954) SASR 336*

**Malice** (dishonest or improper motive) – generally irrelevant to liability

Exception – were malice is one of the elements of the cause of action - torts of malicious prosecution (*Cth Life Assurance Society Ltd v Brain(1935)*) and conspiracy (*Commissioner of Railways v Scott(1959)*) & malice in a defendant may also negate some defenses, such as defamation, & may be relevant to the type & assessment of damages

### **Infringement of Rights**

Unless the plaintiff can establish that there has been interference or infringement with a legally recognized right (such as an action that involves pure financial loss), the plaintiff will have no cause of action in torts law

*Rights* – 2 types:-

1. Absolute Rights – any interference with which gives rise to an action in tort (eg. Trespass to land protects the absolute rights associated with the possession of land & any direct interference with those rights will give rise to a trespass action – *Plenty v Dillon (1991)*)
2. Qualified Rights – interference which only gives rise to an action in tort when that interference has caused a recognizable form of harm to plaintiff (eg. Where there is an *indirect* interference with a person's possession of land, then the protection given by the nuisance and negligence actions (for eg) is qualified by the need for the plaintiff to suffer a legally recognized form of harm as a result of the direct interference – *Esso Petroleum Co Ltd v Southport Corp (1954)*)

### **Action for Damages**

- Nominal damages
- Contemptuous damages
- Compensatory damages
- Aggravated damages
- Exemplary or punitive damages

### **Tort of Negligence**

- The defendant owed a *duty of care* to the plaintiff
- The defendant acted or omitted to act in a way which failed to meet an objective standard of care (*breach of duty*); and
- As a result of the defendant's fault in failing to meet (breaching) that standard of care, the plaintiff suffered harm (or *damage*)

### **Contracts and Torts**

## Important differences

- ❖ In contract, the *agreement between the parties* imposes rights and duties on the *identifiable* parties
- ❖ In tort, the *law* imposes the rights and duties, and the duties are owed to people in general. Accordingly, they may arise between *strangers*
- ❖ Contractual obligations are productive in nature, as they produce advantageous results
- ❖ Tortious obligations are protective in nature, as they avoid disadvantageous outcomes
- ❖ In contract, the justification for imposing obligations is that the defendant has performed some voluntary conduct (eg. Made a promise to the plaintiff)
- ❖ In tort, the justification for imposing obligations is that the defendant has acted in a socially unreasonable way and damaged some protected interest of the people in general, of whom the plaintiff was one
- ❖ Damages for breach of contract would be for the LOSS OF THE BARGAIN (the cost of the contract and what you would have gained if the contract were properly performed)
- ❖ In torts, the damages (or money) awarded would COMPENSATE FOR LOSS so far as money is able to place in the position you were in before the damage (the plaintiff would be placed in the same financial state they were in before they suffered the loss)
- ❖ Concurrent liability – you can be sued in tort and for breach of contract

## Crimes and Torts

### Important differences

- ❖ Tort = harm and compensation (function & object = compensate for injury/damage suffered)
- ❖ Criminal law = fault and its punishment (purpose = protect | object = punish)
- ❖ Torts are uninitiated by and against parties in their individual capacities and are designed to vindicate private rights
- ❖ Criminal proceedings are largely initiated and controlled by the state with the aim of punishing those who harm society by transgressing society's rules and deterring others from doing same
- ❖ The onus of proof in a criminal trial is on the prosecution to prove its case beyond reasonable doubt
- ❖ In a civil torts action the plaintiff need only prove their case on the balance of probabilities
- ❖ As a general rule in criminal law, the accused must be shown to have intended the act and its consequences
- ❖ In most torts, provided the defendant's act was voluntary, the tortfeasor may be liable for the consequences of the wrongdoing whether it was intended or not
- ❖ The primary remedy in torts is compensatory damages, which have the object of returning the injured party to the position they would have been in had the wrong not have been committed against them
- ❖ The primary object of criminal law penalties (eg. Fine or community service) is to punish the wrongdoer & deter others from engaging in criminal activity
- ❖ In criminal law, the degree of punishment is measured against degree of culpability rather than the harm caused

- ❖ In torts, the remedy which usually involves the calculation of the quantum of damages, is determined by reference to the degree of harm suffered by the plaintiff rather than by reference to the manner in which it was caused
- ❖ Concurrent liability – you can be sued in tort and prosecuted (charged with crime) (**R v Clark**)

**“The neighbour principle”** – 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, **Donoghue v Stevenson**)

### The Concept of FAULT

The plaintiff must prove that the defendant was in some way at *fault*, with the onus on the plaintiff to prove the fault and the standard of proof is on the balance of probabilities

**Fault** – may consist of intentionally or negligently doing the act that caused the harm

#### **Shifting liability:-**

- **No liability** – no shift
- **Strict liability** – an almost invariable shift
  - liability without proof of fault
  - These are areas in tort law where the law imposes liability on a defendant even though the defendant was *not* at fault (eg. Vicarious liability of an employer for the torts of an employee, non-delegable duty of a principal for the harm caused by indpt contractor)
- **Fault liability** – a conditional shift

**‘Me invito’** = unwillingly

**Balmain New Ferry Company Ltd v Robertson** – one penny entry/exit on wharf – defendant won appeal