

INTRODUCTION TO LAW AND JUSTICE

COURSE SUMMARY

The Distinctiveness of Australian Law

- The **rule of law**: all people are subject to the law and can rely on the law to set the bounds within which other people and governments can operate
- Adversarial system= common law; Inquisitorial system= civil law
 - o Derives from the history of trial by combat
- English Historical Legal system: *Western Liberalism*
 - o Divided into barristers and solicitor
 - Solicitors: advise clients and manage their affairs
 - Barristers: advocacy in the courts
- The Kable's Case:
 - o Although they were convicts, they could bring an action and they won, first civil actions in Australian law
- A **common-law system**
 - o Three meanings:
 - Law derived from the English legal system (as in Australia, like Canada, USA, India all nations who follow common law and have links to England)
 - To the way law is made in our system (judges making decisions which become legal authority)
 - Refers to particular-branches of law (common law vs. legislation)

Branches of Law

- **Public**: Constitutional, Administrative, Criminal, Taxation, Social Security (one party is the state)
- **Private**: Torts, Contracts, Commercial, Property, Family (between private individuals)

R v Wright (conflicts of private and public law overlap)

- **Facts**: 17-year-old Wright drank a bottle of Rum, stole a car with his friend and crashed the car killing his friend. Wright pleaded guilty to the theft but contested being culpable to death as it required 'gross' negligence.
- **Issue**: distinction between public and private law matters, specifically in civil and criminal negligence.
- **Ratio**: If it was civil negligence, the degree of negligence is irrelevant, in contrast to criminal negligence.

R v Wacker (conflicts of private and public law overlap)

- **Facts**: The defendant drove a lorry with 60 hidden Chinese illegal immigrants in a refrigerated container - the air vent was sealed to alleviate detection, led to all immigrants dying. Charged and convicted of 58 counts of manslaughter. He appealed the conviction under the basis that civil law rules regarding duty of care don't apply where there is a joint illegal activity.
- **Issue**: Did the facts make the case fall under a civil, or a criminal jurisdiction?
- **Ratio**: The duty to take care cannot, as a matter of public policy, be permitted to be affected by the countervailing demands of the criminal enterprise.' Hence, the court accepts that it was a criminal issue and it was manslaughter, as per the Jury's original decision.

Sources of Law

- **Legislation**: Created by Parliament
- **Common Law**: created by the decisions of judges
- **International Law**: Bi-lateral and Multilateral agreements between 2 or more countries
- **Indigenous Customary Law**: Native title reform ect...

Separation of Powers

- **Legislative**: power to make laws
- **Executive**: power to put laws into action
- **Judiciary**: power to interpret laws

Minister of State of Immigration and Ethnic Affairs v Ah Hin Teoh

- **Facts**: Teoh was going to be deported on a criminal charge, leaving his seven children at risk of entering children's services. He was charged with drug related offences relating to his wife dealing and being addicted to heroin.
- **Ratio**: All actions concerning children should have the best interest of the children (CRoC)

Jurisdiction

- Scope of a body power to hear a matter, determine what the facts are, and apply the law to make a judgement
- Where do the courts power come from?
 - o Constitution,
 - o legislation,
 - o Implied power
- What are the different types of jurisdiction?
 - o Supreme Court: general jurisdiction- no limit
 - o District Court: jurisdiction limited by their enabling act, monetary limits, motor accidents, indictable offences
 - o Local (Magistrates Courts): jurisdiction set out by statute; committal, monetary limits
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- State and Federal Courts
 - o State: Lower Courts (Local/magistrate) → Intermediate (county/district) → Supreme → High Court
 - o Federal: Federal Magistrate → Federal or Family Court → Commonwealth Courts → HC
 - **The doctrine of accused jurisdiction** permits a federal court to determine issues arising entirely under

state law, when such issues form part of the matter in respect to which jurisdiction is specifically conferred on the federal court

- Hierarchy:

- **Precedent:** principle of *stare decisis*: like cases should be decided alike
- When a superior court decides a case a certain way lower court cases with same or similar facts must be decided that way
 - Precedent is binding only on lower courts in the same hierarchy

Derrick v Cheung (Legal Hierarchy)

- **Facts:** Driver was driving under speed limit in busy area, hits child that ran onto road
- **Issue:** was the driver negligent, were the subsequent findings correct?
- **Judgement:** at HC- driver was acting reasonably therefore not negligent
- **Ratio:** judgements must not be value judgements but based on what a reasonable person ought to have done

Chamberlain Case (Legal Hierarchy)

- **Facts:** Child goes missing in Uluru, mother blames dingo, everyone else blames mother
- **Issue:** As per this course, the matter of navigating multiple tiers of the legal system and appeals ect.
- **Judgement:** Not guilty after further evidence is discovered
- **Ratio:** Sometimes dingoes eat babies

Intentional Torts

- Tort law 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
- History:
 - End of the 12th Century the writ of trespass used to deal with direct and forcible interference with the person, land or goods
 - 13th Century the writ of ‘trespass on the case’, ‘trespass on the similar case’, or ‘case’ developed to deal with consequential or indirect injuries.
- Trespass v. Action on the case
 - **Trespass:** must prove there was a direct act or interference, actionable without proof of damage
 - Fault: the plaintiff need only to prove the defendant intended the interference
 - **Action:** on the case the act or interference is consequential, plaintiff must prove injury (**negligence**)
 - Fault: the defendant's act was so plainly calculated to produce some effect of the kind that was produced that an intention to produce it ought to be imputed to the defendant
- ‘Intentional’ Torts v ‘Unintentional’ Torts
 - **Intentional**
 - Trespass to the Person (assault, battery, false imprisonment) – immediate damage
 - Trespass to Property (land) – immediate damage/injury
 - Trespass to goods (chattels) – immediate damage/injury
 - **Unintentional**
 - Action on the case – consequential damage/injury - Negligence.
- Trespass to the Person
 - Assault
 - **Conduct:** there must be a positive act, gesture or threat made by D
 - **Effect:** D’s act must directly cause P to apprehend imminent or ‘relatively imminent’ physical interference with their body
 - **Fault:** D must have intended to cause P’s apprehension, or been reckless or negligent (in the sense of being careless) about causing it.
 - **Circumstances:** *reasonableness*: P’s apprehension of imminent physical interference must be reasonable in the circumstances. There must be no lawful justification for the conduct.
- **Judgement:** Threats over the phone constitute assault
 - Battery
 - **Conduct:** there must be a positive act D
 - **Effect:** D’s conduct must directly cause imminent’ physical interference with the body of P
 - **Fault:** D must have intended the act of physical contact or interference with P’s body, or been reckless or negligent (in the sense of being careless) about causing it
 - **Circumstances:** There must be no lawful justification for the conduct. There is justification under ‘everyday contact exception’
 - False Imprisonment
 - **Conduct:** there must normally be a positive act or statement by D (or D’s agent)
 - **Effect:** D’s conduct must directly cause a total restraint of P’s liberty by confining P to delimited area
 - **Fault:** D must have intended to cause P’s confinement, or been reckless or possibly negligent (in the sense of being careless) about causing it
 - **Circumstances:** There must be no lawful justification for the conduct
 - There must be no reasonable means of escape
 - The confinement may be caused solely by P’s submission to D’s power, if P reasonably thought that, in the circumstances, there was no reasonable alternative but to comply
 - A person’s liberty may sometimes be lawfully restricted eg, by reasonable condition of entry or by voluntarily accepted condition imposed by contract

Tuberville v Savage (Assault-threat)

- **Facts:** Savage had made some insulting comments to Tuberville. In response, Tuberville grabbed the handle of his sword and stated, "If it were not assize-time, I would not take such language from you." Savage responded with force, causing Tuberville to lose his eye. Tuberville brought an action for assault, battery, and wounding, to which Savage pleaded provocation, to-wit Tuberville's statement.
- **Ratio:** A conditional threatening statement without imminent threat of harm does not constitute an assault

Scott v Shepherd (Assault-directness)

- **Facts:** Shepherd throws a squib into a crowded market place, it is then subsequently thrown by two other people, then hits Scott in the face
- **Issue:** Issue: was the defendant's act of throwing the squib, which was then thrown by the other two parties, a trespass
- **Ratio:** everyone who does an unlawful act is considered the doer or what follows
- **Judgement:** Majority held that he is responsible as the intermediary actors were merely a continuation of the defendant's initial act

Barton v Armstrong (Assault-proximity)

- **Facts:** Barton made multiple threats over the phone to Armstrong, threatening to harm Armstrong if he did not sign a document
- **Issue:** Are threats made over the phone a threat?
- **Ratio:** Threats made via distance constitute an assault if they affect the person psychologically

Rixon v Star City (Assault-threat, Battery-everyday contact, False Imprisonment-legal justification)

- **Facts:** Rixon was not permitted on the premises of Star City, he was tapped on the shoulder by a security guard and brought into a room to be held until the authorities arrived
- **Issue:** Was this an assault or battery in regard to the contact, was there a false imprisonment when he was held in the room
- **Judgement:** No case of any, fails threat for assault, fails battery as constitutes everyday contact, fails imprisonment as legally justified
- **Ratio:** For battery → everyday contact or contact to obtain attention does not constitute battery, For assault → threat must be apprehended, for false imprisonment → must not be legally justified

Zanker v Vartzokas (Assault-threat)

- **Facts:** Women takes ride with man, he speeds up and requests sexual favours, she denies, he says "my friend will sort you out when we get there", she jumps from the vehicle and sustains injuries
- **Issue:** Was the threat imminent enough to constitute a threat to harm
- **Ratio:** threats are imminent entire time falsely imprisoned
- **Judgement:** the fear in the woman's mind was 'immediate and continuing...so long as she was imprisoned by the defendant'

Robertson v Balmain Ferry Co (False Imprisonment)

- **Facts:** Man enters wharf to ride ferry, ferry is too long, wants to leave without paying
- **Issue:** Was defendant liable to the plaintiff for false imprisonment, in the circumstances was the payment of a penny a reasonable means of escape
- **Ratio:** false imprisonment must be total deprivation of liberty
- **Judgement:** in the circumstances, payment of a penny was a reasonable means of escape. Escape by water was also reasonable

Defences to Intentional Torts

- **Consent**
 - o If a person consents to tortious interference no action is available
 - Consent is a defence for assault, battery, false imprisonment, trespass to land and interference with chattels
 - o If **consent is an element** of the trespass action, the *plaintiff must prove* that the interference was without the plaintiff's consent
 - o If **consent is a defence** then the *defendant must prove* the plaintiff consented
 - *Marion's Case*
 - o Consent can either be **expressed or implied**
 - **Expressed:** signing a consent form, getting a medical procedure
 - **Implied:** circumstances i.e., boxing ring, sports match, also day to day activities
 - o Must be real and freely given
 - Especially important in medical cases, cannot be obtained through coercion or force
 - o However, if there is no harm, unless a case of trespass can be brought, there is no tort claim available
 - i.e., A dentist performs an unnecessary procedure on eight patients after informing them the procedure was medically necessary → if not harm *then no tort*
 - o The individual must be **capable of consenting**
 - "every person of adult years and sound mind has the right to determine what should be done with their body" → HC *Marion's Case*
 - o Consent must not be **exceeded**
 - Consent will not be effective if the conduct exceeds the consent given
 - *McNamara v Duncan*

- **Self Defence**
 - o Defence for the claim of trespass to person
 - The defendant must prove that there is a reasonable apprehension of physical force to the defendant or others and that the force the defendant used did not exceed what was *reasonably necessary for*
- **Necessity**
 - o Similar to consent: a defendant unable to gain the consent of the plaintiff might nevertheless act on the basis that it is necessary for them to do so
 - For the defence to be successful the defendant must prove:
 - There actions were necessary to prevent serious harm to person or property
 - There actions were reasonable in the situations and proportionate to the threat posed

Marions Case (Capacity to Consent)

- Facts Marion was a mentally disabled child, and her parents wanted to have medical treatments in the form of operations to ensure that she would not be able to have a child.
- Issue: Does the medical treatment of the operations amount to assault? Can the hysterectomy and ovariectomy be considered 'medical treatment'?
- Ratio: Prima facie, any physical contact or threat of it is unlawful, it is the right of the individual to choose what occurs with respect to his or her own person

Macnamara v Duncan (Exceeding Consent)

- Facts: The defendant deliberately struck the plaintiff during a game of AFL. The plaintiff had just kicked the ball, but the defendant continued to run at him and hit him on the head, fracturing his skull. This is an infringement of the rules to a serious extent. It was argued that there was implied consent to a little bit of foul play in the game
- Issue: Can contact in a scenario of implied consent still be seen as trespass?
- Ratio: the fact that it was both **direct** and **reckless** beyond normal foul play would constitute trespass vi et armis.

The Doctrine of Precedent and The Rise of Negligence

- The paradox of the doctrine of precedent: precedent means like cases are judged alike however the law can also change
- Cause of Action v Forms of Action
 - o **Forms of Action**: abolished by the Judicature Acts of 1873 yet still influences Causes of Action
 - o **Causes of Action**: the sum of the legal elements which a court will recognise as constituting a basis for liability