

Torts 1012

What is a tort?

A civil wrong for which the law provides a remedy, usually in the form of an action for damages by way of compensation for loss suffered.

The fault-based nature of tort liability requiring *intent* or *negligence* on the part of the defendant, subject to limited exceptions involving strict liability (private nuisance, aircraft operators for damage to persons or property on the surface).

Multiple Tortfeasors

In Torts, we will come across many situations where more than one person may be liable to the injured party. This may be because:

- They each committed a separate tort (in which case they will be separately liable to the plaintiff)
- They committed a tort together (e.g. jointly committing a tort against someone, or breaching a duty which was owed jointly to the plaintiff)

Where more than one person is liable to the plaintiff for the same damage, the liability is “joint and several” in cases of personal injury: this means that the plaintiff may recover 100% of his/her loss (*but not more*) from *any* of the parties. The defendants may seek a contribution from each other, under s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (see *Statutory Extracts*). In this way the damage can be spread according to what both P and D want.

If the loss is property damage or economic loss caused by *negligence*, and not related to personal injury, then liability is now “proportionate”, under Part 4 of the *Civil Liability Act 2002* (NSW), meaning that generally each potential defendant is only primarily liable to the plaintiff for his or her proportion of the plaintiff’s loss. Liability for intentionally caused property damage or economic loss is still joint and several.

Vicarious Liability

The person who committed the tort was employed as an employee at the time *and* the tort was committed in the course of that employment. An employer’s *vicarious liability* is strict liability in the sense that it is not dependent on any personal fault on the part of the employer.

The vicarious liability of an employer does not affect the personal responsibility of the employee who committed the tort *as between the employee and the tort victim*, although, in such case, the employee may be entitled to be indemnified by the employer in NSW under the *Employees Liability Act 1991*, as long as employee’s actions did not involve serious and wilful misconduct.

1. An employer is generally not liable for the torts of an independent contractor.
2. An employer is liable for the torts of an employee committed in the course of employment.

3. Determining whether a person is employed as an independent contractor or as an employee is not always straightforward. A number of factors are relevant.
4. Determining whether an act was committed in the course of employment is not always easy. Even prohibited acts may still be judged to be in the course of employment so as to render the employer liable (although the seriousness of the misconduct may disentitle the employee to be indemnified by the employer for any liability to the injured party).

Historical Background

Modern tort law in essence is derived from the medieval forms of action trespass *vi et armis* (with force and arms). As a result, trespass is actionable per se (without proof of material loss or damage). Trespass on the case (“action on the case” or “case” or, confusingly, “an action of trespass on the case”) which date from the 13th and 14th centuries, respectively. Case is not actionable per se; proof of material loss or damage is an essential element of an action on the case such as the modern tort of negligence; onus of proof of fault; commencement of the limitation period.

Direct/ Indirect Injury

The Test for directness:

* **Reynold v Clarke**: if a man throws a log onto the highway and it hits someone and injures them it is an “immediate wrong” and so trespass can be filed. If as it lies on the floor someone comes and trips over it and injures themselves then it can be brought as an action on the case because it is only a “consequential” injury of the original act.

- Trespass = Direct Injury.
- Action on the Case = Indirect/ Consequential Injury.

Trespass cannot be committed by an involuntary act: fault in some form is required and we find that unless it is completely without fault it will be trespass. It is based on either intentional or negligent conduct.

* **Fowler v Lanning**: trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant’s part.

* **Williams v Milotin**: “In the absence of intention of some kind or want of due care, a violation occurring in the course of traffic in a thoroughfare, is not actionable as trespass.” The need in highway cases to prove that the damage was caused either by an intentional act or by negligence is well established.

Trespass and Negligence

Fault in the intention to do the tortious act or want of due care in doing so is a key element of the tort of trespass in all of its forms. But is trespass limited to intentionally caused hard or

in cases of consequential personal injury caused by negligent conduct. If so, could the P bring a suit in trespass or case?

Suits in Trespass and Negligence

A suit in trespass could succeed only if interference was direct. Action on the case was developed for consequentially inflicted injuries.

- **Trespass: right of action will lay only if the injury is direct whether it was intentional or negligent**
- **Case: right of action will lay even if the injury was consequential and intentional or if it was direct and unintentional.**

The rulings on negligence in England and Australia diverge.

* **Letang v Cooper** (English): attempt to confine actions based on carelessness to the tort of negligence and separate it from trespass.

* **Williams v Milotin** (Australia): the facts of the case were that trespass had been committed against the P but the statute of limitations on the tortious act had run out. This case opened the possibility of the P being able to strategically choose a cause of action in trespass *or* case. The effect of this **choice of election** is that if P decided on negligence the statute of limitations would be longer and they could still try the case. Whether an accident occurs on or off the highway, it is possible on the same set of facts to establish two distinct causes of action.

The P is free to make an election. This case shows that negligently inflicted injury to the person can, in at least some circumstances be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.

Onus of Proof of Fault

Trespass

First the P must prove a trespassory act attributable to the D, *Platt v Nutt*.

Trespass off Highway

In England it appears to be settled that in all cases of trespass to the person whether occurring on or off the highway the burden of proving negligence rests with the plaintiff. They must state the intention by the defendant or the facts alleging negligence.

* **McHale v Watson**: the HC declined to follow Diplock's statement of onus of proof in *Fowler v Lanning* that said the burden rests on the P in trespass and negligence off highway. Instead they ruled, trespass the onus is on the D to prove on the balance of probabilities that the trespassory act occurred without the D's fault.

- o In Australia it is for the D to prove an absence of intent and negligence off highway, see *Williams v Milotin*.

Trespass on Highway

Where trespass occurs on the highway English and Australian courts agree on the need for the P to prove the defendant was at fault. Diplock J in *Fowler v Lanning* said there is no difference between highway cases and other cases on the question of burden of proof. In Australia, the burden of proof is on the P to show intentional injury (trespass) or negligent injury (case) on the highway, see *Venning v Chin*.

The reason for this is that when one enters the public highway they assume some risk of injury from inevitable dangers – this extends to those in nearby properties too. Thus, the plaintiff will have to take the injury out of the ‘inevitable’ danger’ class to claim in trespass or case. Today, all registered vehicles require comprehensive insurance to help spread the losses of negligent trespass across the community.

Action on the Case

In negligence the onus is on the P to prove D’s fault.

Negligent trespass or negligence?

Negligent trespass

- Actionable per se – if trespass is established the person whose rights were trespassed is entitled to a remedy without any need to establish damage
- Accidental/ unwitting trespass is sometimes called negligent trespass the motive for trespass is irrelevant in establishing a trespass has happened and what remedy should be provided
- Trespass off highway: once P proves direct injury the burden of proof of disproving negligence moved to the D.
- The tort of trespass is actionable per se – so without proof of damage. The P still has to prove direct injury.
- The trespass may also be used when a duty of care cannot be established between parties to file for a tort in negligence.
- In negligence there needs to be some material harm. When remote and still directly inflicted a case can be made in tort of trespass.

Tort of Negligence

Negligence: “action on the case” and there is only entitlement to a remedy if damage can be established.

- Not affected by any doubts concerning the direct nature of the injury
- P would be obliged to prove not only that D had acted in the manner complained of but that the defendant had done so negligently
- The gist of the action is damage. In trespass you must prove direct injury but not necessarily damage.

