

LAW203- Torts

L1- Introduction

- Accidents can and do happen anywhere, any time. Tort law answers the question of who is going to pay to compensate
- Tort means wrong, tort law provides redress for harms sustained other than by way of breach of contract
- Tort law is common law, scope and content of law is a question of precedent. It is not fixed, constantly expanding and evolving
- Tort actions take the form of plaintiff vs. defendant- balance of probabilities
- For example; client vs. accountant, patient vs. doctor, employee vs. employer (vicarious liability- employer is liable for actions of other employee)
- There is no unifying principle of tort law
- Tort law terminology:
 - Harm or injury suffered
 - Compensation for harm or injury- damages
 - Responsibility for causing harm- liability
 - Allocation of responsibility for causing harm- vicarious, concurrent liability, contributory negligence, self-defence, provocation
- **Theories of tort law (descriptive and prescriptive):**
 - **Economic theories**- consider alternative legal outcomes in terms of opportunity costs. Theorists use the language of loss-spreading (insurance) vs. loss-shifting (fault-based schemes). Posner says the laws will ultimately provide the most efficient outcome but consider transaction costs, market failure and value of life
 - **Distributive justice**- consider how the risk of injury or loss is distributed in society. What if lump-sum compensation payments turn out to be inadequate due to assumptions made or changes in circumstances
 - **Feminist**- Where do our laws come from, are they biased?
 - **Human rights**- various human rights, such as the right to life, interest with the tort actions of trespass and its sub-categories and the tort of false imprisonment intersects with the right to be free from arbitrary detention. Consider the purpose of tort law (peacekeeping between individuals, remedial) vs. the purpose of human rights law
- **History:**
 - Historically torts had a peacekeeping function; trespass to land, forcible interference with the person
 - Initially writs (causes of action) were available only for direct physical interference
 - Then the 'action on the case' developed for damage or injuries consequent upon an intentional act. Now there are many different causes of action at common law
- **Common law**- the plaintiff commences an action by filing a statement of claim in court naming the defendant or defendants and pleading the material facts necessary to establish the causes of action relied upon
- **Legislation- Civil Liability Act 2002 (NSW)** applies to 'any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, contract, under statute or otherwise' The Act does not apply to an 'intentional act that is done with the intention to cause injury or death'

L2-

- 4 main torts studied in this course; intentional, tort of negligence, nuisance and breach of statutory duty
- **Intentional torts (concerning land)**
- **Trespass to land:**
 - General principle- Cause of action in trespass protects from interference the legal right to exclusive possession of land. Peacekeeping function, protects possession, privacy, security. No need to prove damage
 - Exceptions- Generally no liability for harm caused without fault (unavoidable accident) unless resulting from ultra-hazardous activity
 - P had exclusive possession of the land at the time of the alleged trespass, D intentionally engaged in conduct. D's conduct directly interfered with P's right to exclusive possession of the land. It makes no difference if D intended to interfere with P's rights

- Land includes soil and subsoil, fixtures (buildings), crops before harvesting, airspace above the land etc.
- Taking photographs from hundred feet about the ground is not a trespass *Bernstein v Skyviews* (1978)- have recommended a statutory cause of action for breach of privacy
- For the rules about who has exclusive possession of land; generally the owner or the tenant or the person with factual and legal possession; a mere licensee has no right to exclusive possession and therefore no standing to sue in trespass
- Complexity- corporate structures with leases and non-exclusive licenses, e.g. *Hinkley v Star City Casino*
- **Intention**- Not intentional if D was having an epileptic fit when she fell onto train tracks, *Public Transport Commission of NSW v Perry* (1977)
- **Interference with possessory rights**- contrast interference with possession against interference with amenity (e.g. noise, fumes- actionable in nuisance)
 - Walking or driving over land
 - Stay after permission to stay is withdrawn
 - Police entering under invalid warrant
 - Gatecrashing, dumping rubbish, spraying graffiti
 - Entering land to take photographs for television footage
 - Erecting overhanging signs, swinging cranes, building work
 - *Kuru v State of NSW* (2008)- police entered Kuru's premises in response to a report of domestic violence, Kuru gave them permission to 'look around', he then asked the police to leave, they didn't leave and had no statutory power to stay; a violent struggle ensued, Kuru was punched, sprayed with capsicum spray, handcuffed, injured while handcuffed (due to a fall), taken to police station, logged, released without charge
 - Causes of action against the police: trespass to land, trespass to person, false imprisonment; police conceded that if they were trespassing it followed the other causes of action were made out too; Kuru was awarded \$418,265 in damages
- **Remedies**- damages are generally compensatory, based on the 'probable and natural consequences' of the impugned conduct. Aggravated exemplary damages also available. Injunctions may be granted to prevent a threatened or continuing trespass, but rarely to prevent publication of TV footage during a trespass (*Seven v ABC* re Chaser stunt)
- **Interference with Chattels (concerning goods):**
 - **Trespass to goods:**
 - Protects from direct interference chattels in the possession of P, based on the criminal action of robbery. Actionable *per se* (no need for proof of damage)
 - Non-owning possessor, non-possessing owner can sue for trespass
 - P had possession of the chattel at the time of the trespass. D intentionally engaged in conduct. D's conduct directly interfered with P's right to possession of the chattel- It makes no difference if D intended to interfere with P's rights or was negligent or mistaken (but affects damages)
 - Historically, dead bodies are not chattels unless there has been an investment of time. But more recently sperm has been held to be subject to property rights *Jocelyn Edwards*
 - **Possession at the time of the Trespass**- possession is usually actual control coupled with intention to exercise control. Exceptions; P has a right to immediate possession of the chattel pursuant to a bailment at will or where the bailment has come to an end. P has a right to immediate possession where another on P's behalf holds goods. *National Crime v Flack*- police found briefcase full of cash in back of cupboard in P's home, she wanted it back 3 years after seizure. *Parker v British Airways*- P found a valuable fold bracelet in an airline lounge and wanted to keep it and got to keep it as the airline was not in possession at the time of finding
 - **Interference with right to possession**- handling of a chattel without authority is a trespass *Penfolds Wines v Elliot*
 - Mrs Flack did not sue for trespass as there was no wrongful interference with the briefcase in *NCA v Flack* (because it was seized under a valid warrant)
 - **Conversion**- protects from direct interference chattels in the possession of P; historically based on criminal action of robbery; does not meet the challenge of the electronic age. Actionable *per se*