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LAWS1061: Torts

The role and function of tort law

The law of torts concerns the obligations of persons to respect the safety, property and personality of their neighbours, both as a priori matter (matter of cause and effect) and as a duty to compensate for wrongfully caused harm after the fact. Tort law therefore concerns the rules of proper behaviour that society imposes on each citizen for avoiding improper harm to others, and determining when compensation is due.

Tort law: common law and statute

The most commonly used torts (trespass, nuisance, negligence and defamation) derive from common law, however statute has made significant inroads into the common law status of tort law.

Examples of areas of law carved out of tort law include Motor Accident compensation schemes and Dust Disease schemes.

The most significant legislative impact on the common law was brought about by civil liability legislation introduced in 2002 - in NSW, the *Civil Liability Act 2002* (NSW). This meant tort law, particularly relating to personal injury, is partially structured by legislation.

There is a complex relationship between the CLAs and common law. The CLAs do not replace nor encode the common law, but do abolish or modify parts of the common law. Other parts of the statutes create new regimes not seen in the common law.

The CLAs focus generally on negligence as a mode of action rather than necessarily as a tort. However, the acts are also limited in their scope in certain ways. These limitations differ between jurisdictions. Areas which are excluded from legislation may mean that common law continues to apply.

The role of tort law

There can be recognised a number of roles of tort law. The most commonly accepted idea is the compensatory function of tort law.

- The function of tort is to compensate for people who are injured by a wrong.
- Damages are awarded on the basis that the person who suffered injury should be put back in the position they were in before the accident happened - insofar as money can achieve that.
- Using tort as a regulatory framework for compensation can be problematic:
 - Hard to predict the future - eg. change to income of carers and nurses. There are many cases where injured plaintiffs have run out of awarded money.¹

¹ See case of Gillian Thurston p8.

where “sensible personal discomfort” was at issue, the locality was vital and that in a manufacturing district a landowner must put up with some inconvenience arising from trade operations, but that where physical damage to the land was involved, this did not apply.

Protection of certain rights relating to the land

Nuisance also includes interference to certain rights such as:

- The right to cross or otherwise use someone else's land for a specified purpose (easement).
- Support of land (eg. excavating in such a way that the neighbour's land collapses).
 - An aspect of this that has been criticised is that this is only the right to the support of the natural land that is covered by this rule - if a building is on top it is only if the land would have subsided had the building not been there that there is nuisance.
- Right to enter and leave land is a right of enjoyment.
- Many rights which could be protected by nuisance, such as rights to water and drainage, are now covered by legislation. Nuisance has little scope here unless an injunction is sought or damages claimed.

Interests not protected

Certain invasions have been found not to qualify as private nuisance. For example, a landowner does not have a right to:⁹

- Natural light.
- A view from their property.
- Unhindered television reception.
- Not have an interference where others are able to see into their property.

The courts do not see these as private nuisance since interferences to view, air and light occur as a result of structures being built and the common law does not prevent someone from building on their own land.

It is otherwise if something emanates from a neighbour's land - eg. *Thompson-Schwab v Costaki* [1956] view of prostitutes bringing clientele into premises next to the plaintiff was a private nuisance.

Unreasonable interference

Just as in public nuisance, the law of private nuisance holds that society should make some allowance for the actions of neighbours - a balance between the defendant's and the plaintiff's right to enjoy property. Legal intervention is only warranted when interference goes beyond what others in the vicinity should be expected to bear - the interference must be substantial and unreasonable. If the plaintiff has a particularly sensitive use of land, the activities of the defendant which damage it may be less likely to be held to be nuisance.

⁹ [16.65].

The fact that an interference is temporary does not mean that it is not substantial (eg. loss of a night's sleep is substantial).

Munro v Southern Dairies [1955] - SC of VIC

The plaintiff complained of noise, smell and flies from a horse stable adjacent to their property, which the defendant kept for delivery of milk.

- The interference must be “substantial” to constitute nuisance. This is measured by the standard of the ordinary person and “not merely according to elegant or dainty modes and habits of living” per Bruce V-C in *Walter v Selfe* (1851).
- The factors considered by Scholl J s relevant to the ‘give and take’ equation are:
 - The duration of the interference.
 - The frequency of the interference.
 - The time of the interference.
 - The extent of the interference.
 - The locality of the interference.
- Held there should be an injunction to restrain the defendant.

Assessment of the defendant’s activity

The utility of the defendant’s actions and the defendant’s intent can be considerations in assessing give and take.

Hollywood Silver Fox Farm v Emmett [1936] - King’s Bench Division

The plaintiff bred foxes on land neighbouring the defendant. The plaintiff erected a prominent advertising sign which the defendant wanted removed because he thought it would be detrimental to the development of his building estate. The plaintiff refused to remove the ad, and in response, the defendant carried out a threat to shoot guns near to the breeding pen, reducing the number of fox cubs reared. The plaintiff seeks damages for nuisance by noise.

MacNaghten J:

- It is not a legitimate use of the defendant’s land to use it for the purpose of vexing or annoying neighbours.
- Even if conduct on one’s land is legal, if it is done with a malicious intent towards the neighbour, there is greater consideration for a case in nuisance.

This case is contrasted with *Rattray v Daniels* (1959) where the defendant used a bulldozer to clear land, knowing the neighbour’s minks were sensitive to noise. His actions were held not to be nuisance since the only time of year the bulldozer was available coincided with mink breeding season.

Mild responses in retaliation to a nuisance would not normally be considered unreasonable unless there is malice.

Who can be sued?

Liability for private nuisance was traditionally determined by reference to either misfeasance or nonfeasance. Nuisance by an act of misfeasance was strictly liable and in

Held:

- From *National Insurance v Espagne*: benefits a plaintiff is to receive from a source other than the defendant are not to be regarded as mitigating loss if (a) they are received as a result of a contract made before the loss; or (b) they are given by way of bounty with the intent that the plaintiff enjoy them in addition to claim for damages.
- Court of appeal though the real intent was enabling the applicant to perform volunteer work more effectively, taking them outside the second category in *Espagne* and more analogous to payments for services.
- The intent is either an intention to benefit the victim or to benefit the wrongdoer.
 - Eg. either reduce damages the tortfeasor must pay or confer additional bounty on top of damages.
- Court of appeal thought payments were not only to benefit the plaintiff but also themselves.
- The critical question is whether the payments were intended to diminish the damages.
- Appeal allowed - damages not reduced.

Damages for non-economic loss: general damages

The CLAs do not uniformly define non-economic loss, but there is consistency on key aspects such as pain and suffering, loss of amenities and life, loss of expectation of life, and disfigurement.

Skelton v Collins (1966) - HCA

The 19 yo plaintiff suffered severe brain damage as a result of the defendant's negligence and was likely to remain unconscious until his death, expected 6 months from the date of trial. The trial judge awarded lost wages, hospital costs, loss of earning capacity for the six month period, and \$1500 in general damages. The total sum was reduced by 25% for contributory negligence.

Taylor J:

- Rejects appellant's first contention - that general damages should be assessed without regard to the fact that the plaintiff remained unconscious.
 - 'Loss of the amenities of life' in personal injury cases is intended to denote a loss of capacity of the injured person consciously to enjoy life to the full as, apart from his injury, he might have done.
 - A person who is forced to live with their incapacity, fully conscious of the limitations which it imposes upon their enjoyment of life, is entitled to greater compensation than one who is spared by insensibility from the realisation of their loss.
- In regards to second contention - that in assessing damages for lost earning capacity, regard should have been had to the probable period of the plaintiff's working life and not merely the period of life which remained to him:
 - The recognition which has been afforded to the right of an injured plaintiff