

MLL213 Notes – All Topics

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'Torts' are a non-criminal act that gives cause to action with civil remedies. It is an injury to another person without legal justification. Can also be a crime at the same time.

Purpose of torts as opposed to criminal law only is for compensation. It is there to make one whole (compensation) and as a deterrent.

Damages

Plaintiff bears burden of proof on damages.

Compensatory

Amount to compensate what was lost. Can be very complex when it comes to injury.

4 main principles

from (*Todorovic v Waller*)

1. A plaintiff that was injured by defendants negligence should be awarded in an amount of money to put them in a position as if the infringement never occurred
2. Damages of one course of action will be paid once and forever (lump sum). It cannot be reheard after it is settled, so plaintiff cannot ask for more money if actual costs higher (*Fetter v Beal (1701)*) and defendant can argue later that the amount was too much as the loss didn't get that high in reality (*Gilchrist v Estate of Taylor*).
 - a. However, *S 28n of Wrongs Act* outlines structured settlement agreements which allow staggered payments and no tax penalty to plaintiff, only applies to cases that settle out of court.
3. Court has no concern in how plaintiff uses that money. Court will award damages even if plaintiff can't use them (due to the nature of their injury).
4. Burden rests on plaintiff to show types of harm done

There are restrictions to the amount of damages awarded in the *Wrongs Act*, but this does not change the kind of damages that can be awarded. The caps ONLY apply to unintentional torts and statutory breaches.

If damages are lump sum and defendants actions rendered the plaintiff unable to manage the money, the plaintiff is entitled to recover the cost of managing it (*Gray v Richards*)

Terminology

Special damages: Compensation for expenditure actually occurred

General damages: damages that cannot be quantified such as future economic loss, non-economic loss, does not need to have loss shown. Generally awarded when tort is deliberate.

Nominal damages: awarded for an infringement of personal right, but where no damage has occurred. Often \$5-\$15k

Contemptuous damages: Same as nominal, however derisory amount (like \$1) to recognise that claim has no merit and plaintiff may be liable for costs.

Heads of compensatory damages

Economic loss (pecuniary damages)

Can be medical or rehab costs, gratuitous attendant care or loss of earning capacity. Can be special or general.

Caps were put in place in the *Wrongs Act pp VB and VBA*.

Actual medical expenses

As per *Sharman v Evans*

- 'Reasonable' expenses are recoverable – 'reasonable' being defined as being in terms of conferring significant physical or psychiatric health benefits.
- Medical expenses can be denied if they are high with little health benefits (*Altmann v Dunning*)
- Damages can include loss of amenity and cost of trips and outings to break monotony of hospital life if hospital care is of lifetime duration.
- Damages can include loss of earning capacity but take into account saved expenses resulting from hospital care.

Gratuitous care damages

Known as '*Griffiths v Kerkemeyer* damages'

- Legal principle and pragmatism favours the award
- Entitlement comes from plaintiffs *need* for the services
- It is irrelevant if the money is spent on the service(s)
- It is irrelevant if potential carer is a family member/friend who is not being paid
 - No guarantee they will care for plaintiff for the rest of plaintiff's life
- Can be awarded if tortfeasor is the care provider (*Kars v Kars*)
- Determined on market value of care services, not based on loss of income of carer losing income to care for plaintiff.
- G v K damages allowed under Wrongs Act, but there are threshold criteria and caps
 - *S 28B* defines 'attendant care services' as
 - Services of a domestic nature
 - Services relating to nursing
 - Services that aim to alleviate consequence of the injury
 - Refers to 'gratuitous attendant care services' defined as attendant care services provided by another person that the plaintiff has not paid or is not liable to pay
 - *S 28IA(1)*
 - Gratuitous attendant care services will not be awarded unless
 - A reasonable need for the service exists
 - The need arises *solely* because of the injury the damages related to (*Woolworths Ltd v Lawlor*)
 - Services would not have been provided but for the injury
 - *S 28IA(2)* (quoted)
 - 'No damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided
 - a) For less than 6 hours per week; and

- b) For less than 6 months'
 - There has been some ambiguity in this depending on the jurisdiction
 - a) Victoria state that you are only precluded if BOTH criteria are met (*Herison v Melhem*)
 - b) NSW state that you are only precluded if EITHER criteria is met
- *S 28ID(1)*
 - You can claim the loss of ability to care or provide gratuitous care for others such as your children, however with following requirements (from s28 ID(2))
 - a) Plaintiff must have been caring for dependant before injury (ie. Cannot claim for inability to care for unborn children for example)
 - b) Dependants can't care for themselves
 - c) Care would have been provided for 6 hours a week for at least 6 months
 - d) Care will be needed for the foreseeable future
 - Previously not awarded in common law
 - Court must be satisfied that claimant was caring for dependants prior to the injury
 - Established in *Sullivan v Gordon*

Loss of earning capacity

- Can claim income that would have been earned but for injury and trial
- Harder to calculate future earnings
- Need to consider likely-hood, age, and other factors.
- Very speculative
- To calculate:
 - plaintiffs pre-accident earnings x weeks left in pre-accident working life
 - Include benefits such as super and pensions
 - Some states limit this, but Victoria does not
 - Then deduct any earnings possible post injury
 - If negligence shortens life expectancy, plaintiff is awarded LOEC for 'lost years' based off pre-accident life expectancy (*Sharman v Evans*)
 - But cap is placed on it in *Wrongs Act s 28F(2)*
 - Maximum damages awarded for each week of lost earnings is 3 times the average weekly earnings at the date of the award
 - Average weekly earning is defined as 'average weekly total earnings of all employees in Victoria' as estimated by ABS in s 28F(3)(a)
 - Prior to amendments in 2015, if 'with injury' earnings exceeded the cap, plaintiff received nothing (*Tuohey v Freemasons Hospital*)
 - Since 2015, damages themselves are capped, irrespective of post injury ability to earn income
 - Deductions can be taken out too
 - Tax must be deducted (*s 28A*)
 - Life expectancy
 - Contributory negligence
 - Expenditure saved such as work expenses no longer needed to be paid

- Child care services are not deducted (*Wynn v NSW IMC*)
- Unexpected fortune changes (known as “vicissitudes of life”) discount between 5-20% (*Wynn v NSW IMC*)
 - Also considers if a pre-existing medical condition or similar will lower the expected working life of the victim (*Malec v JC Hutton*)
- A deduction must be made to account for a discount to the present value of the award – interest earned on lump sum paid now but spent later on expenses
 - 5% off in s 28I
 - 3% at common law
- There is no deduction for insurance, medicare or govt benefits

Non-economic loss (non-pecuniary damages)

- Defined in ss 28B and 28LB
- Compensation for pain and suffering, loss of amenities of life, loss of enjoyment of life (s 28LB) even loss of expectation of life. Only general damages apply here.
- Must be serious injury as defined in s 28LF and s 28LB
- s 28G defines caps (\$577,050), subject to indexation (s 28H).
- Reforms do not apply if fault is intentional and intended to cause death or injury or that is sexual assault or other sexual misconduct (ss 28C and 28LC).

Pain and suffering

- Compensation for physical pain and psychological consequences
- Completely subjective
- One who is unaware that they are in pain or suffering (unconscious for example) will not be awarded this (*Skelton v Collins*)
- Threshold test applies, NEL only recoverable if plaintiff has sustained a ‘significant injury’ (s 28LE) which is defined as a permanent impairment (s 28LB).
- Must be assessed as a ‘degree of impairment’ of the whole person.
 - Must be assessed by an approved medical practitioner or medical panel (s 28LF) and;
 - Must be determined in line with the AMA Guides 4th Edition (ss 28LH, 28LI)
 - Must be permanent (s 28LB)
 - Psychiatric consequences of physical impairment not to be taken into account (s 28LJ)
- Thresholds as per s 28LB are:
 - >5% for all injuries except psychiatric and spinal
 - >=5% for spinal
 - >=10% for psychiatric
- s 28LF also lists loss of a foetus, psychiatric injury arising from loss of a child and loss of a breast as satisfying ‘significant injury’.
 - Again, not applicable to INTENTIONAL acts done with INTENT TO HARM, KILL or SEXUAL MISCONDUCT

Loss of amenities/enjoyment of life

- Compensation for disability/impairment of ones ability to enjoy life
- Includes loss of any of 5 senses, loss of ability to engage in hobbies
- Largely subjective, modest sum if plaintiff is permanently subconscious