

Torts & Contracts II LAWS1017

Lecture 1: Introduction

Comparing Contract and Tort:

Read pages 15-20 of the Course Guide. There are revision questions on pages 19 and 20.

Basis of liability in tort:

- In tort, there is liability because someone has committed a tort; the plaintiff has to fit case within elements of tort that will give remedy.
- The same set of facts may give rise to more than one tort.

Basis of liability in contract:

- Suing for a breach of contract
- Theoretically, liability in contract and tort is said to arise differently
 - o Contractual liability arises by free choice or voluntary agreement
 - o Tortious liability is imposed by operation of law
 - Made by *Voli v Inglewood Shire Council* by Windeyer J
 - Due to the undertaking of the activity that a person has engaged in
 - Contract determines the task upon which the person entered i.e. the contractual duty can mould and contain the tortious duty to some extent

Considering remedies:

- Specific performance is not a direct remedy, it is secondary.

Overall of Contract, Tort and equitable obligations

Contract and tort do not cover the field of private obligations and remedies.

Equity has played an important role: fiduciary obligations; obligations and liabilities arising from estoppel; obligations of confidence.

- Fiduciary is an obligation of loyalty i.e. put interests of client ahead of their own interests. Never put themselves in a position of conflict.

Statute may impose private obligations and remedies.

Restitution for Unjust enrichment

Common law and equity recognise obligations to reverse or give restitution for unjust enrichment.

Unjust enrichment not a freestanding basis for entitlements in Australia but may explain some existing causes of action or entitlements or remedies.

- No such thing as a cause of action for unjust enrichment

Restitution = giving something back/handing something back which the law thinks should belong to another person. Restitution of a benefit.

Example:

- Mistaken payments
 - o No contract, no tort (no deception, negligence) – can payer get money back?
 - o 1992 HCA stated that there should be no distinction, any money, whether it is mistake of fact, subject to change of position.
- Work done and accepted without a binding contract or agreement as to price
 - o Workum meruit
- Repayment of contract price where contract fails

Measures of damages in tort

Gates v City Mutual Life Assurance Society

- Damages awarded with object of placing P in position in which he would have been had to contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss).
- In tort, damages are awarded with object of placing P in position in which he would have been had the tort not been committed.

Limitation Period

Time that someone has to sue from when the cause of action is complete. In both contract and tort, most losses are six years.

Personal injury cases = three year limitation period.

In negligence, time starts to run when damage/loss is suffered, whereas in contract time starts to run at the date of breach.

- Thus, tort has a longer tail.

Choice of Law

COL arises where private/civil disputes have an international dimension

In tort, an action will be governed by the law of the place where the tort was committed

- If hit by car in France, apply French law not NSW law.

In contract, an action will be governed by proper law of the contract – this can be specified in the contract expressly, or it can be decided by the court.

- Typically, the rule is where the contract was formed.
- Went on holiday, booked with company --> injured overseas due to negligence of company, need to look at contract.

Contributory Negligence

Standard of performance in tort and contract

s5b of Civil Liabilities Act for breach of duty.

Contract:

- Analyse contract itself to determine standard
- Will assume that we know difference between contract that has standard of care, and contract that has strict liability

Comparing Damages in Tort and Contract

Nominal damages – when you have been wronged in some way, but you have not suffered any loss e.g. commit tort of battery by shoving you gently.

- Available for torts that are actionable per se
- Not the tort of negligence --> have to demonstrate damage or cause of action fails.

Substantial/compensatory damages – damages awarded that is intended to compensate for loss.

Exemplary/punitive damages – damages that designed to punish or to represent the court's displeasure with D's actions

- Contumelious disregard is the test
- Not available in contract per *Addis*

Next week: termination, go over contract notes.

Multiple causes of action

Facts which could give rise to multiple causes of action. Difficult to understand without civil procedure.

In civil litigation it is common for litigants to rely on a range of doctrines.

- Can't do this in criminal trials, confuses and annoys the jury.

The way in which the proceedings unfold at the hearing, as well as the judge's view, will determine the outcome.

Significant Coverage of Equitable Doctrine

Most of the 'vitiating factors' we study involve the application of equitable doctrine

2012, confirmed that rule against penalties also – controversially – survives in an equitable form

Have not yet heard equity law in detail.

Look at podcast by Dr Campbell on LMS.

What is equity?

- Chancellor – senior office of state – keeper of the great seal
- Latin side of Chancery – issued 'writs' that commenced (and defined) civil actions
- Litigants would petition the King to exercise residual judicial power where common law failed to meet needs
- Soon Lord Chancellor – and later the officers of the Chancery – heard petitions of this kind
- in Chancery, matters were decided by reference to 'conscience'
 - o Over time, Chancery developed its own precedents, rules and procedure

- Parallel system of courts – litigants had to choose where to institute proceedings
- Parallel system of rules – hence possible to speak of the different positions ‘at common law’ and ‘at equity’
- 1873/75 Courts of Chancery were abolished, however take rules of equity and give them to common law
 - Common law and equity not fused together
 - Have on court that applies both sets of rules
- In NSW, we have Supreme Court which is a court of law and equity