

TORTS 1 – NEGLIGENCE

A person commits the tort of **negligence** if they carelessly cause harm to another person.

3 important areas to include in a Tort of negligence claim:

1. Law of negligence
2. Defences
3. **Remedies**

- With regards to the ‘law of negligence’, **3 requirements must be considered**. Specifically, a person commits a tort of negligence if:
 1. They (Defendant) owe the other person (Plaintiff) a duty of care
 2. They (Defendant) breach the duty of care – the standard expected is that of the ‘reasonable person’
 3. The breach of duty causes the other person (Plaintiff) to suffer loss, damage or injury, and the injury was caused by the breach.

Requirement 1: Duty of Care

Examples of established categories for understanding: Motorists owe a duty of care to other road users; Doctors owe a duty of care to their patients; Accountants owe a duty of care to clients; Bankers owe a duty of care to their clients

Established categories:

- **Manufacturer:** A **manufacturer** of goods or products owes a duty of care to people who use their goods or products – such as customers;
CASE: Donoghue v Stevenson (1932) - snail case
- **Link to next step:** If a manufacturer’s duty of care exists, one still has to establish requirements 2 and 3 – breach of duty and if the harm was caused by the breach of duty – and then consider whether there are any relevant defences;
- **Occupier:** An **occupier** of premises owes a duty of care to all persons entering the premises to ensure that the premises are safe.
CASE: Australian Safeway Stores Pty Ltd v Zaluzna (1987) – plaintiff slips in wet store and successfully sues for negligence (landmark case)
- **Link to next step:** If an occupier’s duty of care exists, one still has to establish requirements 2 and 3 – breach of duty and if the harm was caused by the breach of duty – and then consider whether there are any relevant defences.

Within an Occupier’s liability are public authorities:

- Can include Government and Council bodies and organisations;
- Public Authorities can often be “occupiers” – they have control over public spaces – such as parks, streets, roads, waterways;
- Public authority’s duty of care is prevalent depending on whether they are required to warn of **hidden risks**.
 - QN: Is there a hidden risk that requires warning or prevention? Or is the risk so foreseeable or obvious to a reasonable person that no duty of care would exist?

Hidden risk examples:

- 1) Submerged rock in swimming area

INTELLECTUAL PROPERTY

- Only assessable areas for IP are copyright and trademarks
- Breach of confidence is a tort, so potentially assessable

What is Intellectual Property?

- Intellectual property (IP) is a form of intangible creation such as the expression of an idea or a trade mark
- It is a product of intellectual effort, rather than a physical manufacturing process
- IP law grants a business the right to prevent others from copying, using or exploiting its IP without its permissions

IP - Rights of Owner:

- The owner of IP has the exclusive right to exploit the IP for a profit
- The owner can either sell the IP or retain ownership
- This includes the right to licence the IP: in return for a fee the owner of the IP permits others to exercise their exclusive rights in relation to the IP (e.g. merchandise)

Types of IP Protection:

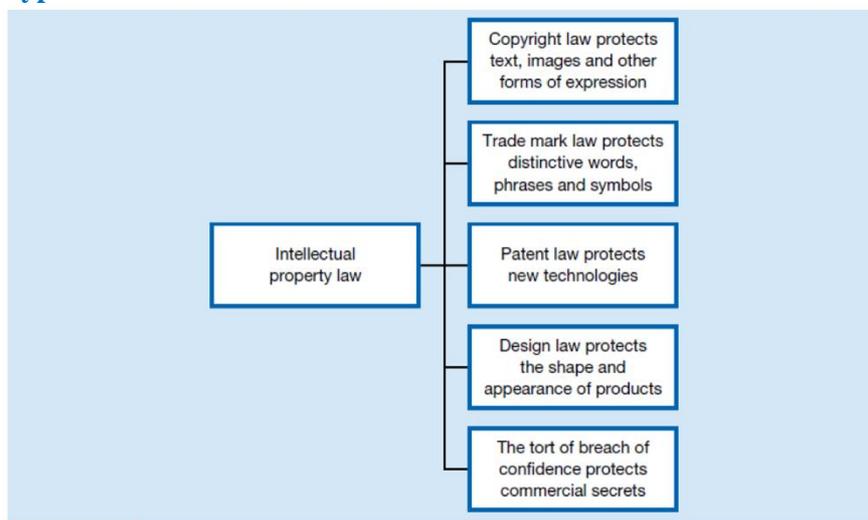


FIGURE 13.1 Types of IP protection

Multiple Categories of IP Rights:

1. Name/logo - protected by trade mark law
 2. Information - protected as a commercial secret (i.e. not wanting competition knowing certain information)
 3. Writing/graphics/music - protected by copyright law
- Expiration date: when intellectual property rights have expired - the IP is said to have entered the public domain - the IP in question can be copied or exploited by others without penalty

Copyright:

- The legal right to prevent unauthorised copying of the expression of an idea (e.g. a book, song, movie, photo)
- Regulated in Australia by the Copyright Act 1968 (Cth)

3 Requirements for Protection:

1. The creation is a 'work' or 'subject matter other than works'

2. The creation is original
3. The creation is expressed in a material form

Protection - Requirement 1:

- **Requirement 1:** The creation is a 'work' or 'subject matter other than works' - S32 CA - extends protection to 'works'

Copyright Act 1968 - Section 32

- **Literary works** - the expression of an idea in the form of text (e.g. a book, an article, an email, written information, an advertisement, a manual, song lyrics)
See: Mirror v Queensland (1982)
- **Note:** Single words, titles, headlines, banners and business slogans are often too short/unoriginal to be protected as literary works by themselves
See: Fairfax v Reed (2010) (Held: newspaper headlines are not literary works)
- **Musical works** - the musical arrangement of note and sound combinations
See: A&M v Napster (2001)
- **Dramatic works** - such as a show, dance routine, film script
- **Artistic works** - such as paintings, photographs, pictures, graphic designs, building or plans for a building, works of artistic craftsmanship
- **A creation may not just fall into one category of works or subject matter other than works** - each different component or element of a creation might have different copyright protection, for example:
 1. **A song** is a combination of literary works (music), musical works (musical arrangement) and sound recordings
 2. **A website** is a combination of literary works (text written on the website including logos and business slogans), artistic works (pictures and graphic design of the website), films (any videos or animated graphics on the website) and sound recordings (any background music on the website or accompanying any film)

Protection - Requirement 2:

- **Requirement 2:** The creation is original (S32 CA)
- **Must be the result of the person's own skill and effort** rather than the result of copying from another source
- **Compilations are protected provided they are original - a minimal degree of creativity is required**
See: Desktop Marketing v Telstra (2002)
- However, it is essential that the work originates from one or more human authors, not automated computerised processes
See: Telstra Corp v Phone Directories (2010)

Protection - Requirement 3:

- **Requirement 3:** Creation is expressed in material form
- Facts, information, methods and systems: not protected by copyright unless they are expressed in material form
See: John Fairfax v Consolidated (1960)
- **It is not the originator of an idea who owns the copyright but the person who first expresses the idea in material form** - someone may have a brilliant idea which is original, but if they tell the idea to a second person who produces a work based on that idea, copyright belongs to the second person. The originator of the idea has no rights in the finished work
See: Donoghue v Allied (1938)

Once protection has been established:

Extent of Protection:

- S31 CA: The copyright owner has exclusive rights to:
 1. Reproduce the work in a material form

COMPETITION AND CONSUMER LAW

Competition law deals with business2business

Consumer law

1. Competition and Consumer Act - Australian Consumer Law (Schedule to Act)
2. Misleading and Deceptive Conduct
3. Unconscionable Conduct
4. Unfair Terms
5. False Representations
6. Implied Consumer Guarantees

Why Protect Consumers?

- Consumer Law addresses the fundamental imbalance in bargaining power between business and consumers
- The traditional rules of contract law offer little assistance to a consumer who is disadvantaged because of the inequality of bargaining power: the general rule being caveat emptor (let the buyer beware)
- Consumer protection legislation seeks to overcome many of the difficulties with the common law of misrepresentation and provides better remedies for 'consumers' whose contracts are induced by false statements or by misleading or deceptive conduct

Why Consumer Law?

- Often an aggrieved party cannot hit all the tests that are required under contract law
- Proving a breach of consumer law is often easier than proving a breach of contract
- Typically, there is also a broader range of remedies available under consumer law, than is available under contract law

Consumer Protection Regulation:

- The Australian Consumer Law (ACL) is a Schedule (like an appendix) to the Competition and Consumer Act 2010 (Cth)
- The ACL protects consumers by prohibiting, misleading or deceptive conduct generally, unconscionable conduct, unfair terms and various specific forms of prohibited conduct

S18 - Misleading or Deceptive Conduct:

- Section 18 (1) of the ACL states 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'
- Under s18, intention or fault is irrelevant (plaintiff need not show intention) and liability cannot be avoided by use of a disclaimer

See: **ACCC v Telstra (2007)**

The range of remedies provided by the ACL for breach of s18

- including injunctions (s232), damages (s236) and compensatory orders under ACL Ch5

S18 - Who can Bring a Claim?

- First section on an exam - can the person bring a claim?
- Section 18 is not limited to consumer transactions or the supply or possible supply of goods or services
- S18 can also be relied upon by members of the public, lobby and public interest groups, other businesses and competitors

See: **Gillette v Energiser (2002)**