



Semester 1 | **2015**

The Law of Torts: MLL213

0406969544

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The Law of Torts Notes:

MLL213:

A tort is a miscellany of civil wrongs giving rise to a remedy. It signifies an actionable wrongful act, other than a breach of contract, done intentionally, negligently, or in circumstances involving strict liability. It is open to a civil remedy the main type being damages (however not necessarily monetary compensation). Each tort relates to a particular interest or interest that the law regards as worthy of protection – recovery is dependent on fault and whom it lies with. A defendant’s conduct will be deemed wrongful where a failure to act in accordance with normative standards of behavior occasions an injury to the plaintiff’s interests.

Categories:

Intentional Torts: intended wrongdoing – battery, assault, false imprisonment, trespass to land, and trespass to goods.

Unintentional Torts: negligence causing another person harm or loss – includes nuisance.

Miscellaneous: includes breach of statutory duty

What does it protect?

Torts have a normative function in society ultimately aiming to create a set of standards regarding acceptable behavior for people in society and hence setting responsibilities. It aims to compensate those whom suffer a wrong for their loss as well as deterring those whom commit wrongs from that same behavior occurring again.

Note: the conduct of behavior, which constitutes a tort, may also constitute a crime. However there are small nuances between the two. The elements required are different despite being subject to two areas of law. Keep in mind that the elements required for criminal law are far stricter than in torts. The standard of proof is also different, and rather than being beyond reasonable doubt it is established on the balance of probabilities.

TORTS REFORMS 2002-2003:

Prior to the law reforms, community groups, businesses, public authorities, medical practitioners and other professionals experienced difficulty in obtaining public liability and professional indemnity coverage at reasonable premiums. There was a community perception that personal injury litigation increased dramatically in the last two decades of the twentieth century, making it too easy for plaintiffs in personal injury cases to establish liability for negligence. Majority of medical practitioners found themselves without indemnity insurance and threatened to cease seeing private patient.

- Government commissioned two reports. VLRC recommended *inter alia* capping damages; improving court’s usage of expert witnesses; changes to limitation of

action periods; thresholds for compensable injuries and the institution of structured settlements.

- IPP report recommended partial codification of, and far-ranging changes to the law of negligence and the law of damages to be contained in a single statute to be enacted in each jurisdiction.

→ Consequently each jurisdiction has enacted its own statutory code of tortious liability as the Commonwealth lacks the legislative power to validly enact a torts reform statute that would bind the states.

→ High Court decisions concerning common law doctrines will bind all jurisdictions, except where a specific state or territory legislation provides otherwise.

Damages for Personal Injury:

The Nature of Compensation:

It has been suggested that private wrongs involve 'an infringement or privation of the private or civil rights belonging to individuals, considered as an individual' whereas public wrongs are based on 'a breach and violation of public rights and duties, which affect the whole community'. The primary goals of damages for tortious harms are as follows:

- a) To deter tortious conduct and/or
- b) To compensate claimants for harm sustained as a result of the private wrong.

The tortfeasor must pay fair compensation for past and future economic loss suffered by the plaintiff and as a result of the injury and any needs created by the wrongful conduct that would not otherwise exist, and pain and suffering.

Rights and Duties:

When the right is recognized, others are under a corresponding obligation/duty not to infringe that right (primary rights and obligations).

Obtaining personal injury compensation at common law:

It is part and parcel of the accepted process of settlement of industrial and legal disputes, including personal injury claims, for both sides to make ambit claims in anticipation of the final, more moderate settlement.

- In 95% of cases, the bargaining process leads to an out-of-court settlement.
- If settlement is not forthcoming, the parties serve each other with pleadings – 'written identification and communication of the extent of the plaintiff's claim'. These issues will arise for determination at the trial unless the defendant admits liability in relation to them beforehand.
- Pleadings also determine the range of evidence the parties may need to adduce at the trial and the extent of discoverable documents and available interrogatories.

The nature of proof in civil cases:

'Standard of proof' refers to the required degree of persuasion for the fact-finder to find.

- In civil cases it is on the balance of probabilities – *The Evidence Act 1995* (Cth) s140.
- The plaintiff has 'the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so'.
- Where the party bearing the onus of proof can only show that the probability of the event having occurred was 50%, it will be treated as not having occurred, and the onus will not be discharged.

Damages and insurance:

'Loss shifting and loss spreading' – meaning loss suffered by the individual (as well as the award of punitive damages) tends to be shifted to, and spread among, the insured's. The

successful claimants are not paid usually but the individual tortfeasors, but rather, by their insurers. This means premiums are passed onto the public in the form of higher fees for services; higher rates by public authorities such as local councils, road authorities, and higher taxes by governments – society ultimately funds awards of damages determined by courts.

Statutory Principles applied to claims:

Unless specifically excluded, the reform statutory principles are applicable to any claim for damages for personal injury or death, as well as property damages or economic loss resulting from negligence, regardless of whether the claim is brought in tort, contract, equity, under a statute or any other course of action.

Damages for living plaintiffs:

1. Compensatory Objective:

Damages have the ultimate goal to restore the plaintiff as close to the financial position they were in before the tortfeasor's action occurred.

2. 'Once and for all' Rule:

Under common law, compensation in the form of damages is awarded unconditionally, as a lump. Once the plaintiff has recovered damages, he or she will not be allowed to bring another action to the court backed on the same facts, even if the injury develops into a much more serious condition than it appeared at the time of trial. NOTE this principle however can result in injustice for both the defendant and claimant.

Fetter v Beal (1701) 91 ER 1122:

Once fixed, damages are not decreased on the basis that subsequently the claimant miraculously recovered- or died – soon after the verdict.

Facts:

- Plaintiff sued for battery claiming the defendant had broken his skull. The defendant was found liable and ordered to pay 11 pounds.
- Eight years later the plaintiff brought a second action because a portion of his skull had been removed.

Issue:

- If the issue worsens, can the plaintiff bring a second action?

Held:

- Holt CJ – that the rule was settled and that if 'this matter' had been raised in earlier evidence, as a probable consequence of the battery, the plaintiff would have recovered damages.

Todorovic v Waller (1980) 150 CLR 402

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The 'once and for all' rule results in two consequences:

a) Lump sum awards cannot be varied:

When the court has made it award for damages, the plaintiff is free to spend the money as they wish, and the court consider their role to be finished. Once the money has been awarded, it cannot be altered.

Gilchrist v The Estate of the Late Sara Alexander Taylor (2004) NSWCA 476:

Facts:

- Sara sustained an injury when she was hit on the head by a gold ball struck by her brother in 1987. She was then taken to the hospital and was left with a significant neurological defect and suffered from frequent severe epileptic seizures and spontaneous uncontrolled grand mal epileptic seizures.
- Claim was settled after she sued the hospital for negligence and she received \$2.5million in damages awarded on 20 December 2002.
- Sara then died on January 21, 2003.

Issue:

- As Sara had died, could the hospital re-claim the damages as she could no longer use them

Held:

- 'Once and for all' rule – a reduction in damages that would otherwise be payable was refused, on the basis that counsel for the hospital negotiating the settlement failed to include a clause providing for the possibility of early death.

b) Courts must make predictions as to the plaintiff's future health, employment etc.

The court must award damages for all future losses necessary – involving the court making assessments or predictions about what the personal circumstances of the plaintiff would have been in the future had not the tort not been committed.

- Balance of probabilities analysis not appropriate to future events which involve prediction/conjecture and are not susceptible of exact proof - based on chance as a hypothetical event
- Damages must be discounted for the probability that the future event would occur and the plaintiff would suffer the same loss independently of the tortious accident due to a pre-existing medical condition
- Future event only to be ignored where it is speculative (less than one per cent)
- Applied to this case: no certainty that M's back condition could have lead to the same psychiatric condition; is could be said only that there was a chance this would occur. Damages for pain and suffering and for gratuitous care to be reduced by the chance that a similar psychiatric condition would have developed from factors unconnected with defendant's negligence (the back injury).
- Damages should only be awarded as a loss of the damage/harm/wrong suffered to you as a result of the defendant. If there is a pre-existing illness this must be taken into account when the court is awarding damages.