

## COURSE OVERVIEW AND CONTENTS

EXAM TIPS AND TRICKS	3
IRAC METHOD GUIDE	4
INTRODUCTION TO LAW	5
TRESPASS TO THE PERSON	10
• DEFENCES TO TRESPASS TO LAND	18
NUISANCE	21
DEFAMATION	27
DUTY OF CARE	38
• PURE ECONOMIC LOSS	46
• MENTAL HARM	55
• OVERVIEW	60
BREACH OF DUTY	61
CAUSATION AND REMOTENESS	74
DEFENCES TO NEGLIGENCE	85
VICARIOUS LIABILITY	93

## EXAM TIPS AND TRICKS

### **BASIC RULES –**

- In civil law, the plaintiff has the burden of proving his case on a balance of probabilities.

### **PROBLEM SOLVING –**

- Using concepts
  - Use “can fall within” instead of “can be seen as”

### **CASE TITLE –**

- Plaintiff v Defendant
  - Example: Commonwealth v Verwayen
    - Commonwealth is the plaintiff
      - Party suing
    - Verwayen is the defendant
      - Party being sued

### **EXAM LAYOUT –**

- One problem solving question on negligence
  - Use tutorial questions and week 12 questions as guidance on style of question
    - There will be multiple parties
  - When referencing, case title and year is sufficient
    - “... is the authority of this principle”
  - Don't mix up plaintiff and defendant!
- How to approach question
  - Use IRAC when planning
    - Rule and application is written in the same section
      - Don't have big slabs of principle
      - Justify principle with facts of the case
  - In reading time, organise your answer and help identify the issue
    - Identify the parties (the plaintiff and the defendant)
    - Identify the incidents
      - What did they do wrong?
    - Identify the types of damage they are seeking
    - Articulate an umbrella issue
      - Specify the parties
      - Cause of action (negligence)\
      - Damage specified
      - Incident
  - Layout of answer
    - Is there a duty of care?
    - Was the duty of care breached?
    - What damage occurred?
      - Need to occur due to the above breach and be in the scope of liability
    - Possible defence
  - Don't always need to answer all 4 of the above statements
    - If it is obvious, just state the authority and the fact and move on
    - Focus on the live issues
      - This is where the marks will come from
      - Look at ways both the defendant and plaintiff would argue the points and weave them into a point on both the facts and law
  - Consider
    - Drawing attention to gaps or ambiguities in the facts and draw conclusions based on alternative views
    - Compare relative cases and apply, distinguish or deal with them
  - Make a conclusion at the end of each point and then an overall conclusion

## IRAC METHOD GUIDE

### **IRAC METHOD –**

- Follow IRAC method when doing problem-solving tasks.
  - Issue
    - Identify legal issue presented in this issue.
      - Defamation, negligence etc.
  - Rule
    - Relevant legal rules and tests
  - Application
    - Apply law to the facts presented
  - Conclusion

## INTRODUCTION TO TORT LAW (CHAPTER 1)

### **SOURCES OF LAW –**

- Legislation
  - Passed by parliament
    - *Wrongs Act 1958* (Vic)
    - Compensation Schemes.
- Common Law
  - Case law
    - When a judge makes a decision during a case.

### **TORT LAW –**

- Torts are wrongs committed by people on other people.
- 'Tort' is French for 'wrong'.
- Using tort law, remedies can be sought for these wrongs.
  - Not just monetary.
- Described as civil wrongs.
  - Give rise to civil proceedings brought by private individuals.
  - Not all civil wrongs are torts.
- The law determines the parties' rights and obligations.
  - A tort is a wrong because it is a departure from what the law determines should happen.
- It is a crime against a particular individual.
- Two main elements
  - Focuses on the plaintiff or the claimant
  - Focuses on the defendants conduct.
- Many different types of torts
  - A tort is a civil wrong actionable at the suit of a private individual, which is actionable because the law says its wrong.
  - Some torts may also be crimes
    - Assault
    - Battery

### **EXAMPLES –**

- Negligence.
  - Protects people's rights to enjoy living in a safe society.
  - Shapes our world and the work we live in.
- False imprisonment.
  - Total restraint on someone liberty.
  - Protects human rights
    - Freedom of movement
  - Protects integrity.
  - Protect physical and psychological wellbeing.
- Assault.
  - Deals with apprehending offensive contact.
    - Threatening.
  - Protects personal safety.
  - Protects physical integrity.
- Battery.
  - Offensive physical touching.
    - Defence is consent.
- Defamation.
  - Protects a persons right to have a sound reputation.
- Nuisance.
  - Protects a persons right to enjoy their use of land.
- Trespass to land.
  - A person has a right to their land and privacy for that land.

### **POSSIBLE OUTCOMES –**

- Compensation.

- Economic loss
  - Receiving a monetary award.
    - Loss of income
    - Living costs
- Non economic loss (general)
  - Pain and suffering
  - Loss of enjoyment of life\
  - Loss of expectation of life.
- Corrective justice.
  - Court admitting its wrongdoing.
- Loss shifting.
  - Defendant moving the amount owed to its insurance.
- Loss spreading.
  - The loss that the defendant has incurred has shifted to the insurer and the insurer spreads it to all the members of the insurance company.
- Deterrence.
  - Preventing the same wrong happening again.
  - Fear of being sued may result in deterrence.
- Punishment.
  - Theoretically, civil law shouldn't punish.
  - Awards of damages and compensation can result in punishment.
- Defensive medical decision-making.
  - Health care workers may do things not under the interest of the patient but to reduce their liability.
- Medical costs.
  - Rising medical costs as doctors are concerned about getting sued and they take out insurance, which results in the customer having to pay more for the service.
- Injunction
  - Preventing someone to do something
  - Forcing someone to do something

### **TORT LAW VS CRIMINAL LAW –**

- Who brings the action?
  - Tort law
    - Plaintiff
  - Criminal law
    - State
    - Prosecution
- Standard of proof?
  - Tort law
    - Balance of probabilities
  - Criminal law
    - Beyond a reasonable doubt
- What can courts impose?
  - Tort law
    - Damages
    - Injunctions
  - Criminal law
    - Imprisonment
    - Fines
    - CCO's.
- What are the aims?
  - Tort law
    - Compensation
    - Punishment
  - Criminal law
    - Protecting society
    - Punishing offenders
    - Denunciate an offenders behaviour

- Deter offending and rehabilitation.
- Is there same overlap?
  - Tort law
    - Assault
    - Battery.
  - Criminal law
    - Unlawful assault.

### THE ROLE OF FAULT –

- Objectives
  - Securing damages or compensation for harm suffered
  - Deterrence
  - Punishment
  - Appeasement
  - Education
  - Standard setting
- No liability in the tort of negligence without fault on part of the defendant.
  - The plaintiff must provide that the defendant was at fault in order to recover compensation for his or her injuries.
- The fault-based system of compensation does not seem fair and just.

### THE ROLE AND EFFECT OF THIRD PARTY LIABILITY INSURANCE –

- Most potential defendants are insured against the risk of liability in tort.
- Insurance against liability for personal injuries is legally compulsory for drivers of motor vehicles.
  - Ensures that injured plaintiffs can sue a defendant that is able to make effective compensation.
- A fault-based system of compensation makes some sense if the defendant is personally responsible for compensating the plaintiff.
  - The person at fault is the person who is required to make compensation.
- The presence or absence of fault on the part of the defendant is crucial to the plaintiff, as it affects whether or not he or she can recover compensation from the defendant's insurer.
- The main practical function of the concept of fault is to determine which injured plaintiffs have access to insurance funds, and which do not.

### DEVELOPMENT –

- 1932: *Donoghue V Stevenson* [1932] AC 562 (PAGE 266 OF TEXTBOOK AND PAGE 46 OF CASEBOOK)
  - Decomposed snail in ginger beer.
  - Suffered shock and illness
  - Sued for duty of care through the neighbour principle.
  - Manufacturer found liability.
  - Established duty of care and the tort of negligence.
- 2002: *Review of the Law of Negligence* (the IPP Report)
  - Over 60 recommendations for reform made
- 2003: Legislative Reform to Tort Law
  - Reform to the *Wrongs Act 1958* (Vic) through the IPP Report.

### COMPENSATION SCHEMES –

- *Accident Compensation Act 1985* (Vic)
- *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)
- *Transport Accident Act 1986* (Vic)
- *Victims of Crime Assistance Act 1996* (Vic)

### NO FAULT COMPENSATION SCHEMES FOR PERSONAL INJURY –

- Australia does not have a comprehensive national no fault compensation scheme that eliminates the right to sue at common law.
  - It does have a number of discrete no fault schemes of limited application.

- It is a solution to the anomalies presented by the way in which common law tort actions operate.
- The most prevalent schemes define causally.
  - No fault compensation for injuries sustained as a result of motor vehicle accidents, workplace accidents and criminal acts of violence.

#### **NEW ZEALAND COMPREHENSIVE SCHEME –**

- In 1972, NZ passed the Accident Compensation Act 1972 (NZ)
  - Introduced a comprehensive statutory no fault compensation scheme.
  - Any person injured by accident in NZ may recover compensation on his or her injuries, whatever they type of accident, and whether or not that accident was caused by someone else's fault.
- **Sir Owen recommender the introduction of this scheme in Australia covering both injury and sickness.**
  - The Bill was never passed.

#### **THE NATIONAL DISABILITY INSURANCE SCHEME AND NATIONAL INJURY INSURANCE SCHEME –**

- In April 2010, the federal government referred an inquiry into the implementation of a national disability long-term care and support scheme in Australia.
  - Recommended the establishment of the federal run national disability insurance scheme and the state/territory national injury insurance scheme.
  - Became operational on 1 July 2013.
- National disability insurance scheme
  - Provides no fault funding for various types of disability support for people with a significant and permanent disability.
  - Designed to complement existing compensation arrangements for personal injury.
  - Does not extinguish the right to sue at common law.
- National injury insurance scheme.
  - A federated model of separate state and territory no fault accident insurance schemes for catastrophic injuries.
    - Injuries incurred in transport, workplace, medical and general circumstances, with motor vehicles accidents the first area of coverage.
    - Include brain injuries, spinal cord injuries, severe burns, multiple amputations and permanent traumatic blindness.

#### **TRANSPORT ACCIDENTS –**

- No fault compensation schemes for injuries sustained in transport accidents.
  - Northern Territory
    - A person injured in a motor vehicle accident receives benefits on a no fault basis, but cannot bring a common law action.
  - Tasmania
    - One can receive no fault benefits and sue at common law
      - No fault benefits are relatively limited.
  - Victoria
    - Those injured in transport accidents are entitles to receive no fault benefits with limitations but can only sue if the injury is determined to be serious
  - New South Wales
    - Motor Accidents Compensation Amendments Act 2006 (NSW)
    - Benefits primarily relate to lifelong medical care and related treatment and rehabilitation, which are provided to a specific class of claimant.
      - A person who suffers a catastrophic injury such as spinal injury, brain damage or blindness.
    - Common law actions are not precluded with respect to economic loss that relates to income loss and future loss of earnings or non-economic loss.
    - Special entitlements such as medical care and related treatment benefits and provided to a child under 16 years who is injured.
    - Also allows for recovery for blameless accidents.
- South Australia
  - Motor Vehicles Accidents (Lifetime Support Scheme) Act 2013.

- Individuals who suffer catastrophic injury are entitled to benefits, which include the cost of medical treatment, rehabilitation, attendant care and support services, education and vocational training and modifications.
- Economic losses related to loss of earnings and loss of earning capacity and non economic losses are recoverable at common law if one can provide fault.
- Injured individuals may also bring common law actions with respect to non-catastrophic injuries.
- Children under 16 years are eligible for compensation on a no fault basis with respect to their continuing medical costs.
- Australian Capital Territory
  - Lifetime Care and Support (Catastrophic Injuries) Act 2014.
  - Provide lifelong care including medical treatment, rehabilitation, attendant care and educational and vocational training to individuals who have been catastrophically injured in motor vehicle accidents.
  - Economic losses related to loss of earnings and loss of earning capacity and non economic loss are recoverable in common law actions on the basis of proving fault.

### **WORKER'S COMPENSATION –**

- Each state and territory has compensation legislation, which provides for no fault compensation for injuries suffered in the workplace.
  - In some states, if the employees injuries were caused by negligence on the part of the employer or on the part of a fellow employee.
  - The employee may sue the employer for compensation in the tort of negligence.
- Common law claims for workplace accidents do not exist in NT and SA.
  - When the right to sue is still available, statutes curtail its scope and the amount or kinds of damages that can be awarded.

### **CRIMINAL INJURIES COMPENSATION –**

- Been established by legislation in all jurisdictions to provide compensation from government funds to crime victims who are unable or unwilling to sue offenders.
  - Demonstrate community support to those entitled.
- Provide victims of crime with limited, circumscribed benefits, such as those that are medical in nature, counselling and amount related to lose income for a limited period of time.
  - Victims of crime who receive compensation are still entitled to sue the offender in tort.
- Discretionary in nature, in the claims to compensations under these Acts are not absolute entitlements.

### **THE STOLEN GENERATION –**

- In 2006 Tasmania become the first jurisdiction to enact legislation whereby Aboriginal persons who are members of the Stolen Generations can claim compensations for having been forcibly removed from their facilities by welfare agencies.
  - Stolen Generations of Aboriginal Children Act 2006 (Tas).

### **SUING SUCCESSFULLY IN TORT –**

- To sue successfully there needs to be
  - A defendant to sue
  - To be able to afford to litigate
  - The stamina to endure the difficulties and strain of the litigation process
  - To be able to fit your acts within the elements of the cause of action on which you are basing your claim.