

LAWS1061 – TORTS

Table of Contents

<i>Class 1 – Introduction – Role and Function of Tort Law</i>	<i>2</i>
<i>Class 2 – Nuisance</i>	<i>3</i>
<i>Class 3 – Negligence – the General Duty of Care</i>	<i>Error! Bookmark not defined.</i>
<i>Class 4 – Duty – Mental Injury</i>	<i>Error! Bookmark not defined.</i>
<i>Class 5 – Duty of care – Pure Economic Loss</i>	<i>5</i>
<i>Class 6 – Occupiers liability</i>	<i>Error! Bookmark not defined.</i>
<i>Class 7</i>	<i>Error! Bookmark not defined.</i>
<i>Class 8 – Duty – Public Authorities</i>	<i>Error! Bookmark not defined.</i>
<i>Class 9 – Breach of Duty – Standard of Care.....</i>	<i>Error! Bookmark not defined.</i>
<i>Class 10 – Breach of Duty – Reasonable Foreseeability and Calculus of Negligence</i>	<i>Error! Bookmark not defined.</i>
<i>Class 11 – Causation</i>	<i>Error! Bookmark not defined.</i>
<i>Class 12 – Causation – Novus Actus Interveniens</i>	<i>Error! Bookmark not defined.</i>
<i>Class 13 – Causation – Remoteness and Loss of Chance</i>	<i>Error! Bookmark not defined.</i>
<i>Class 14 – Defences</i>	<i>Error! Bookmark not defined.</i>
<i>Class 15 – Breach of Statutory Duty</i>	<i>7</i>
<i>Class 16 – Concurrent Liability and Vicarious Liability</i>	<i>Error! Bookmark not defined.</i>
<i>Class 17 – Concurrent Liability and Non-Delegable Duty</i>	<i>Error! Bookmark not defined.</i>
<i>Class 18 – Damages</i>	<i>Error! Bookmark not defined.</i>
<i>Class 19 – Torts (Law) Revision</i>	<i>Error! Bookmark not defined.</i>
<i>Class 20 – Theory for Essay</i>	<i>Error! Bookmark not defined.</i>
<i>EXAM! – TEMPLATE FOR ALL PROBLEM QUESTIONS</i>	<i>8</i>

Class 1 – Introduction – Role and Function of Tort Law

(Chapter 1 – p3-21)

Introduction to Tort Law

[1.05] Overview

- The law of torts concerns the obligations of persons living in a crowded society to respect the safety, property, and personality of their neighbours, both as an a priori matter [that is, a matter of cause and effect] and as a duty to compensate for wrongfully caused harm, ex post [after the fact]
- Tort law involves questions of how people should treat one another and the rules of proper behaviour that society imposes on each citizen for avoiding improper harm to others, and for determining when compensation for harm is due
- Tort is about wrongs, with tort law aimed to fix wrongs
- Tort is about injury

[1.15] Tort Law: Common law and Statute

- Although most commonly used torts were originally judge made, statute has made significant inroads into the common law status of torts
- Most significant impact of Civil Liability Legislation – the law of tort in Australia (particularly relating to personal injury) is not at least partially structured by legislation
- Aim of the tort reform process
 - o Reduce litigation, reduce compensation payable by insurers, to make insurance affordable
- CLA is based on and modifies the common law. Therefore, start with the common law and then see how it is different
 - o CLA legislation is focused generally on negligence as a mode of action rather than necessarily as a tort
 - o Some parts apply to some torts and not to others
 - o Definitions of trespass, nuisance, negligence and breach of statutory duty are important
- Depends what aspect we are talking about to whether there is an interaction between CLA and common law, it has changed the common law or whether it doesn't apply at all

[1.20] The Role of Tort Law

*Protection of a range of interests e.g. personal or bodily integrity, reputation, property, privacy

Compensatory Function

- Function of tort law is seen by many to be compensation for people who are injured by a wrong – either to person or property
- Damages must also be paid in a lump sum – **Lim Poh Choo v Camden and Islington health Area Authority** – “there is really only one certainty: the future will prove the award to be either too high or too low”
- Limitation of compensation
 - o Lump sums problematic due to poor management
 - o Large sums can run out because of the difficulty in predicting the future
 - o In the absence of fault, no compensation will be available – e.g. person injured at home will not receive whereas if person injured the exact same way at work they will be compensated
- For negligence, causation is needed in order for the wrongdoer to pay for the harm

Class 2 – Nuisance

(Chapter 16 –p763-787;793-798)

Introduction

- The two nuisance torts are Public nuisance & Private nuisance
- Public nuisance: interference with those interests that are shared by the public, that is, public rights
 - o “an unlawful act or omission...which...endangers the lives, safety, health, property or comfort of the public or by which the public are obstructed in the exercise or enjoyment of any right common to all.” (Kent v Johnson (1973) 21 FLR 177 at 203-4.)
- Private nuisance: nuisance to the private rights of an individual, specifically those concerning her/his use and enjoyment of land
- Both public and private nuisance may be affected by the CLA
- Where a nuisance is negligently created, or if it involves the intentional infliction of personal injury according to the relevant legislation, the CLA may apply to the action.
- Otherwise, the common law will continue to apply

Public Nuisance

[16.10] Introduction

- To establish prima facie case of public nuisance, a private individual will have to prove
 1. Title to sue (standing)
 2. That the interference is with a public right
 3. The defendant’s interference is substantial and unreasonable

[16.15] Title to sue

- A private individual is able to initiate proceedings for a public nuisance if he or she can prove that they have suffered “special” or “particular” damage; damage over and above which is suffered by the rest of the public
- Most cases brought by Attorney-General as he or she represents the public
- Private individual can bring a claim when a public right has also be violated
- **Walsh v Ervin [1952] VLR 361**
 - o Facts: plaintiff suing for public nuisance as prevented from accessing property by motor vehicle for 3 years by defendant and suffered loss of time and added inconvenience by defendant’s actions
 - o Issue: has the plaintiff suffered “special” or “particular” damages
 - o Ratio:
 - “Particular damage” is not limited to “special damage” (in the sense of pecuniary loss)
 - May consist of proved general damage such as inconvenience or delay – provided it is substantial and direct (not consequential) and appreciably greater in degree than any suffered by the general public
 - as particular damage must be thus proved, thus mere nominal damages cannot be recovered

[16.30] Interference with a public right

- To sue in public nuisance the court must be satisfied that the interference with a “public right”
- Public nuisance has been described as a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take

proceedings on his own responsibility to stop it, but that it should be taken on the responsibility of the community at large – Lord Denning in **Attorney-General v PYA Quarries Ltd**

- The extent to which the public is affected is a central consideration in determining whether the defendants act interferes with a public right
- **R v Clifford [1980] 1 NSW 314**
 - o Facts: Prisoners climbed and stood on roof of jail for 14 hours
 - o Outcome: Not a public nuisance as no evidence of drawing a crowd or noise or interactions with neighbors
 - o Ratio: in order for an action to be a public nuisance, must actually disturb a public right

[16.40] Interference must be substantial and unreasonable

- In modern world, inconveniences are part of everyday life and must be expected
- **Maitland v Raisbeck**
 - o Defective tail light causing collision not considered as unreasonable as every driver of any vehicle would be “turned into an insurer in respect of latent defects of his machine” – everyday event as was not substantial
- **Harper v Hayden**
 - o Refusal to uphold public nuisance of covering plaintiffs shop with scaffolding as defendant only effected what was necessary in order to conduct the works – was seen as reasonable
- **R v Carlile**
 - o Defendant held liable when a crowd of people gathered to watch the burning of a libelous effigy and was not reasonable

Private Nuisance

[16.45] Introduction

- Tort concerned with property rights
- Protects a person’s right to the use and enjoyment of their land
 - o Enjoyment means ordinary use of the land
 - o Often a matter between neighbors
 - o Offers protection from tangible intangible interferences
- To establish
 1. Title to sue
 2. Defendant had requisite knowledge of the nuisance
 3. Nuisance was a substantial or unreasonable interference with the plaintiffs right to enjoyment on their land
- Can be a single incident or a continuing course of conduct

[16.50] Title to sue

- Only a person with rights in or over property has standing to sue – must be owner or tenant with exclusive possession
- Owner cannot sue if has leased premises to tenant
- Reversionary interest – where someone else is using the land and it reverts back when the trust is over
- **Oldham v Lawson**
 - o Determined a rule that only one that has rights over property is able to sue

Class 5 – Duty of care – Pure Economic Loss

[8.197 + Slides] Introduction

- Pure economic loss refers to situation where economic loss is not consequential on personal injury or property damage – sometimes referred to as “relational economic loss”
- Traditionally, pure economic loss was regarded as the domain of contract → but in 1960s, courts expanded negligence by expanding duty of care
- Negligence crept into areas that had been closed e.g. pure economic loss
- **“Consequential”** Economic Loss
 - o Economic loss which is consequential on physical injury or property damage
- **“Pure”** economic loss
 - o Economic loss which is not consequential on physical injury or property damage

Cattanach v Melchior (2003) 215 CLR 1

- Facts
 - o Mrs Melchior consulted Dr Cattanach about having a tubal ligation to prevent conception → She told the Dr that when she was 15 her right ovary and right fallopian tube had been removed → When the Dr performed the operation what he saw was consistent with that history
 - o Therefore, he only attached a clip to the left fallopian tube
 - o Mrs Melchior became pregnant. Her right fallopian tube had not been removed.
- **Important legal issue** → Whether the patient had suffered a personal injury or pure economic loss
- Appellant (the doctor) argued that as a matter of policy, “the birth of a healthy child is not a legal harm for which damages may be recoverable...This policy of the law reflects an underlying value of society in relation to the value of human life.”
- Court’s reasoning:
 - o “The benefits to be enjoyed as a result of having the child are not related to that head of damage. The coal miner, forced to retire because of injury, does not get less damages for loss of earning capacity because he is now free to sit in the sun each day reading his favourite newspaper. Likewise, the award of damages to the parents for their future financial expenditure is not to be reduced by the enjoyment that they will or may obtain from the birth of the child.”
 - o The birth of the child did not constitute the harm. The harm was economic harm, which was inflicted upon the parents by the injury suffered as a consequence of the doctor’s negligence.
 - o **This economic expense was causally connected to the doctor’s negligence and it was reasonably foreseeable.**
- Contrary to the assumptions that appear to have been accepted by the courts below, the present was **not a case of pure economic loss**
- “It was, rather, an instance of direct injury to the parents, certainly to the mother who suffered profound and unwanted physical events (pregnancy and child birth) involving her person, after receiving negligent advice about the risks of conception following sterilisation. **Any economic loss was not pure, but consequential**
- “To deny recovery is to provide a zone of legal immunity to medical practitioners engaged in sterilisation procedures that is unprincipled and inconsistent with established legal doctrine.”
- The parents were entitled to recover damages for the economic consequences of the established physical events caused by the negligence without having to satisfy the **special tests adopted by the common law for so-called ‘pure’ economic loss**

Further Introduction

- Pure economic loss can be caused by:
 - o Words → Negligent words e.g. **Hedley Byrne v Heller Acts**
 - o Omissions (negligent failure to act) → E.g. **Perre**
- “No magical formula to apply in any given case. The answer depends on broad principles and an understanding of policy factors. Even when the tests are met, liability may be denied on policy grounds.” (Prof Todd NZ)

Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad” 1976 136 CLR 529

- Perre frequently refers to Caltex
- Facts
 - o In botany bay, the defendants dredge severed a pipeline in which ran Caltex’s Oil → Pipeline is owned by a third party → The dredge knew of the pipeline and that Caltex oil ran through it → Caltex did not claim for the property damage to the pipeline → Caltex argued that it **incurred pure economic loss** because it could no longer use the pipeline and had to run oil by truck around the bay
- Stephen J – “The need is for some control mechanism based upon notions of proximity...guidance in the determination of the requisite degree of proximity will be derived from the broad principle which underlies liability in negligence.”
- Salient Factors/Features
 - o 1) D’s knowledge that the property damaged (pipelines) was likely to be productive of economic loss
 - o 2) D’s knowledge of pipelines, their position and use, from charts → “These two factors lead to the conclusion that Caltex was within the reasonable contemplation of the Ds as a person likely to suffer economic loss if the pipelines were cut.”
 - o 3) Infliction of damage by the D to the property of a third party, AOR, as a result of conduct in breach of a duty of care owed to that third party.
 - o 4) The nature of the detriment suffered by the P – loss of use of pipeline
 - o 5) The nature of the damages claimed, which reflect the loss of use
- “These factors demonstrate a close degree of **proximity between the D’s conduct in severing the pipelines and the economic loss which Caltex suffered** when its chosen means of supplying its terminal with products was interrupted by the injury to the pipelines. ...all these characteristics combine to constitute a **relationship of sufficient proximity to give rise to a duty of care owed to Caltex** for breach of which it may recover its purely economic loss.”
- **Outcome: “I would, for the foregoing reasons, conclude that the economic loss suffered by Caltex is such as to be recoverable...”**
- Held:
 - o D’s liable for extra costs incurred, Close proximity of parties was important to reasoning, Also, important that Ds knew of risk to Caltex as specific Individual – thus, no fear of liability of indeterminate class. Loss was foreseeable.

[8.200] Negligent Words - Hedley Byrne v Heller

- **Pure Economic Loss caused by a negligent misstatement**
- Facts
 - o Plaintiff was an advertisement agency, working for a company called Easipower
 - o The Plaintiff was concerned about the financial position of Easipower, and sought help through their bankers, who obtained information through the Defendant [Heller], the banker of Easipower

Class 15 – Breach of Statutory Duty

Introduction

- The tort of breach of statutory duty is not part of negligence
- Breach of statutory duty is a separate, independent tort
- Note that it is frequently argued alongside a negligence claim.
- A torts action for damages may be available for breach of a duty imposed by statute.
- Actions for breach of statutory duty have been common for duties involving workers' safety, but exceptional in other areas.
- E.g. the first successful modern action for breach of statutory duty was by an employee for breach of a statutory duty to fence dangerous machinery: **Groves v Wimborne [1898] 2 QB 402.**

Elements

- There are 6 elements that must be satisfied before the action is complete.
- The elements are primarily based on statutory interpretation.
- Note that my organisation of the elements is different from the textbook (p731). That is deliberate. My aim is to ensure that students do not miss any steps.
 - o 1. The statute must confer on the plaintiff a right to sue (rather than merely impose a public law duty).
 - o 2. The plaintiff must be a member of class of persons protected by the statute.
 - o 3. The statute must be directed at preventing the kind of harm suffered by the plaintiff.
 - o 4. The statutory duty must have been imposed on the defendant.
 - o 5. The statute must be breached – Strict liability imposed.
 - o 6. The breach must cause the P's injury.

Step 1: THE STATUTE MUST CONFER ON THE PLAINTIFF A RIGHT TO SUE (RATHER THAN MERELY IMPOSE A PUBLIC LAW DUTY).

- The requirement is satisfied if the statute expressly states that there is a private right to sue.
- However, in most instances the statute is silent. That makes our job as lawyers particularly fun!
- What are the various presumptions that have developed by which the court may determine that there is, or is not, a legislative intention to create a private action?
 - o 1. The statute contains no penalty for breach
 - o 2. Must be a penalty imposed by the statute
 - o 3. Must be some kind of adequate alternative remedy
 - o 4. A duty for the benefit of a limited class
- EXAMPLE – **Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544**
 - o H An operator of a licensed dog racing track (D) failed to provide a bookmaker (P) space at the track to carry on business. The P argued that the D had breached the Betting and Lotteries Act 1934 (UK). "The occupier of a track shall take such steps as necessary to secure that... there is available space for bookmakers on the track..." Substantial penalties were imposed by the Act.
 - o **Was the intent of the legislature to provide a private right to sue?**
 - **Statute is talking about the bookmakers**

EXAM! – TEMPLATE FOR ALL PROBLEM QUESTIONS

BREACH

1. Introduce Case

[Plaintiff] v [Defendant]

2. ISSUE: Identify the wrong and what risk did the wrong create – be very specific

- The issue is whether the wrong in this instance, which is has breached the duty of care in which [defendant] owed [plaintiff]
- The risk created by this wrong is (higher potential of an accident occurring?), which can cause (physical and/or mental) injury

3. Standard of Care

- Per **Imbree v McNeilly**, the standard of care of the [plaintiff] is one of a reasonable person.
- However, the standard or care may be modified due to the attributes of the plaintiff.

IF NOT MODIFIED

Mental Illness and disability

- Interpreting the facts, it is clear that the plaintiff suffers from a form of mental injury/disability as
- However, as per **Carrier v Bonham**, mental injury and disabilities are seen to not diminish or reduce one's liability in negligence.
- Thus, the standard of care used to assess the plaintiff's liability will still be one of a reasonable person and will not be modified

Learners

- Interpreting the facts, it is clear that the plaintiff is a learner, as
- However, as per **Imbree v McNeilly**, Learners are still held to the same reasonable person test and the standard of care will not be modified

IF MODIFIED

Children

- Interpreting the facts, it is clear that the plaintiff is a child as
- However, as per **McHale v Watson**, the standard of care for children is modified into a lower standard of care, as children are not seen to have understood and awareness as an adult
- Thus, the plaintiff will be not be held to a reasonable person's standard of care when the court is determining whether a breach of duty has occurred.

Professionals

- Interpreting the facts, it is clear that the plaintiff is a professional as
- However, as per **Rogers v Whittaker**, the standard of care is modified for professionals through the modified Bolam principle, stating that **"the standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill"**.
- Thus, the plaintiff will be held to a higher standard of care than the reasonable person.

4. Utilisation of the CLA – s5O and s5P

- S5o and s5P of the CLA will only be utilised if the standard of care applied is one of a professional.
- **IF NOT A PROFESSIONAL** – Hence, as the plaintiff is not a professional, these sections will not apply.

In regard to s5o:

- A professional will not be held liable in breaching a duty through a professional service if the professional acted in a manner which is widely accepted in Australia as a competent professional practice
- However, as per the modified bolam principle, the court will determine whether this widely accepted practice is irrational or not
- Interpreting the facts, the professional service of:
 - o Will be seen as widely accepted as, thus the plaintiff may be able to utilise this section.
 - o Will not be seen as widely accepted as, thus the plaintiff may not be able to utilise this section.

In regard to s5P:

- USE IF A WARNING IS RELEVANT IN THE FACT
- The disclosure of information is treated differently to treatment, as there is a duty to warn of a material risk regardless of any 'widely accepted practice', whereby a risk is material if the patient would attach significance to it or express concern.
- Thus, **Rogers and Whittaker** must be applied
- Applying this to the facts
- Therefore, it is evident that [plaintiff] will be (will not be) protected under this section

5. Reasonable Foreseeability of Risk of Injury

The court must now considers CLA s5B(1) in determining whether [Plaintiff] has breached his/her duty.

Reasonable Foreseeability

- In order to determine if the risk of injury is reasonably foreseeable as per **s5B(1)(a)**, we apply **Wyong Shire Council v Shirt**, assessing whether or not **“the risk is not one that is far-fetched or fanciful”**
- Applying this test to the facts,
 - o The risk is reasonably foreseeable as
 - o The risk is not reasonably foreseeable as

Not Insignificant

- In order to determine if the risk is not insignificant as per **s5B(1)(b)**, we must assess whether the negligent wrong carries a high probability of the harm occurring
- Applying this test to the facts,
 - o The risk is not insignificant as
 - o The risk is insignificant as

Calculus of Negligence

- In determining whether a reasonable person would have taken precautions against a risk of harm as per s5B(1)(c), the court is to consider the factors listed in s5B(2):
- This is not a value neutral exercise and there is no set weighting for these factors

Probability of the Harm

- The probability of the harm occurring indicates whether precautions should have been taken, as by applying **RTA v Deterer**, if the probability of harm is low a reasonable person would not have taken precautions, and vice versa
- **(Must go back before the incident happened to see if its foreseeable that the risk of harm could eventuate)**
- Interpreting the facts, there is clearly a
 - o High (low) probability of harm, as Hence, a reasonable person is likely (unlikely) to take precautions in this situation as per s5(2)(a)

Likely Seriousness of the Harm

- As per **Paris v Stepney Borough Council**, the likely seriousness will depend on the plaintiff at hand, particularly if the plaintiff is vulnerable to harm
- Interpreting the facts, it is evident that there is a
 - o Very likely (unlikely) potential for the harm to be serious, as Hence, a reasonable person is likely (unlikely) to take precautions in this situation as per s5(2)(b)

Burden of Taking Precautions

- As per **Woods v Multi-Sport Holdings**, the court must assess whether there is a burden in the defendant in taking precautions in avoiding the harm
- Interpreting the facts, it is evident that,
 - o There is (is not) a burden in taking precautions, as
- Hence, a reasonable person would have (would not have) taken precautions in such circumstances as per s5(2)(c)

Social Utility

- As per **E v Australian Red Cross Society**, one will not be found in breach of a duty of care if the court decides that the risk of harm does not outweigh the social utility.
- Interpreting the facts, it is evident that
 - o The risk of harm does (not) outweigh the social utility, as
- Hence, a reasonable person would not be found (would be found) to breach there duty of care on the basis of s5B(2)(d)

Weighing up calculus conclusion

- As it has been examined that, hence the court is likely to conclude that as per s5B(1)(c), a reasonable person would (would not) have taken precautions in such a situation

6. Overall Conclusion

Thus, it is likely (unlikely) for the court to conclude that [plaintiff] has breached his/her duty of care on the basis of.....