



HD APPROVED

TORTS

MLL213

COMPREHENSIVE NOTES

-UPDATED FOR 2022-

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1 | INTRODUCTION, DAMAGES & COMPENSATION SCHEMES

OVERVIEW OF THE NATURE OF TORTS LAW

- A miscellany of **civil wrongs**
- Non-criminal conduct that gives rise to causes of action with civil remedies

Objectives

- primary objective: compensation for loss
- also: normative (standard-setting) and punitive (punishment) objectives
- also: loss spreading (spreading loss from victim to others)
 - e.g. statutory compensation schemes, TAC and WorkCover
 - property (house and car)
 - public liability insurance (house, car, government authorities, businesses, sporting/recreational associations)
 - professional indemnity insurance

Tort reform post-2002

- community outcry re cost of public liability and/or professional indemnity insurance — amateur sporting associations, medical professionals, councils.
- sustained lobbying by insurance industry
- led to 'Ipp Report' in Sept 2002, which recommended reform
- each jurisdiction has introduced reforms — only Vic reforms examinable (*Wrongs Act 1958*)
- reforms commonly provided for:
 - codification of the elements of negligence and provisions dealing with controversial areas such as:
 - obvious risks
 - recovery for psychiatric injury
 - damages reforms: sets thresholds to prevent minor claims and imposes damages caps (See below)
 - Good Samaritan, volunteer and food donor protection
 - waiver agreements with providers of recreational services

DAMAGES FOR PERSONAL INJURY

Categories of damages

1) Compensatory

- aggravated

2) Exemplary/punitive

The above are awarded to:

- living plaintiffs
- dependants or executors of dead plaintiffs

1) COMPENSATORY DAMAGES

Damages (for living plaintiffs) — Fundamental principles of compensatory damages awards

Objectives of compensatory damages

***Todorovic v Waller (HCA, 1980)* —**

- 1) The objective of a damages award is to place the plaintiff in the position she would have occupied if the tort had not occurred
- 2) The court awards damages 'once and forever' in a lump sum
- 3) The court doesn't care how the plaintiff spends the money, or even if the plaintiff spends the money
- 4) The onus lies on the plaintiff to prove the loss or injury

1) Compensatory objective

- P to be put in the [monetary] position as if the injury had not been sustained.

2) 'Once and for all' rule

- Damages awarded 'once and for all'
- 2 consequences:
 - (a) lump sum awards: can not be varied
- Cannot claim compensation for the same civil wrong twice – i.e. cannot claim extra compensation when it is believed initial compensation awarded is not sufficient (***Fetter v Beal (1701)***)
- Cannot claim compensation back, even when the plaintiff dies (***Gilchrist v The Estate of the Late Sara Alexander Taylor (NSWCA, 2004)***)
 - (b) Courts must make predictions about the plaintiff's future health, employment etc
- Vicissitudes of life: ***Wynn v NSW Insurance Ministerial Corporation (HCA, 1995)***, ***Malec v JC Hutton (HCA, 1990)***

Structured settlements: s 28N Wrongs Act

- not taxed
- advantages — financial management + future reassessment

- limitations — no **power to order** parties to enter into a structured settlement, i.e. only applies if parties have agreed to **structured settlement**

3) The court doesn't care how, or if, the plaintiff spends the money

- the permanently unconscious plaintiff: *Skelton v Collins* (HCA, 1966)
- damages for 'gratuitous attendant care services': aka: *Griffiths v Kerkemeyer* (HCA, 1997) damages
- however, if damages are awarded as a lump sum, and the defendant's negligence has rendered the plaintiff unable to manage the money, the plaintiff is entitled to recover for the costs of managing the fund into which the lump sum is paid: *Gray v Richards* (HCA, 2014)

4) The plaintiff bears the burden of proof on damages

Terminology

'Special' vs 'General' damages:

- special damages — can be quantified with a degree of precision (future economic loss, non-economic loss)

Nominal and contemptuous damages:

- nominal damages — awarded for an infringement of a personal right, but where no damage has occurred
 - available for torts actionable *per se* such as trespass to land and battery
 - often in range of \$5k to \$15;
- contemptuous damages — same as above, however, a derisory amount (e.g. \$1) in recognition that the claim is unmeritorious + P might be liable for costs

TYPES/HEADS OF COMPENSATORY DAMAGES

A) Economic loss (pecuniary damages)

- medical, hospital, for gratuitous attendant care services
 - loss of ability to care for others (in *Wrongs Act* only but not common law)
- loss of earning capacity

B) Non-economic loss (non-pecuniary damages)

- pain and suffering;
- loss of amenities of life;
- loss of enjoyment of life; **s 28LB**
- loss of expectation of life.

Torts reform post-2002 re damages

- significant legislative reform — **Part VB** and **Part VBA** of the *Wrongs Act*

- 'caps' and thresholds on damages
- **Important note:** reforms N/A where 'the fault concerned is an intentional act done with intent to cause death or injury or that is sexual assault or other sexual misconduct': **ss 28C, 28LC**
- **Note:** source of damages award is the common law NOT the *Wrongs Act* — the *Act* merely modifies common law principles

The **Wrongs Act 1958 (Vic)** contains important damages reforms in **Parts VB** and **VBA**:

Part VB limits the award of economic losses and provides a cap on non-economic loss. It applies to an 'award of personal injury damages' (**s 28C**), with 'personal injury damages' defined in **s 28B** of the *Wrongs Act* as 'damages that relate to the death of or injury to a person caused by the fault of another person'. However, **Part VB** will not apply where 'the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct': **s 28C**. The term 'injury' in this context has been defined as a 'harmful consequence': *Dean v Phung* [2012] NSWCA 223, at [30].

Part VBA provides a threshold for the recovery of non-economic losses, as defined in **s 28LB** of the *Wrongs Act*. The same exclusion for intentional and sexual acts exists: **s 28LC**.

Parts VB and **VBA** enact a number of different reforms, such as providing thresholds for claims, as well as providing for maximum amounts that can be awarded for specific heads of damage. These reforms are discussed below in the context of each head of damage, where applicable.

Further changes 2015

- following *Adjusting the Balance: Inquiry into Aspects of the Wrongs Act 1958* (VCEC Report), which was made public on 1 September 2014
- *Wrongs Amendment Act 2015* (Vic) amended *Wrongs Act 1958* (Vic)
- Applies from 19 Nov 2015 to all proceedings, including proceedings already on foot
- most significant changes (see below) to:
 - **s 28F**: 'cap' on loss of earnings capacity clarified
 - **s 28G**: 'cap' on non-eco loss increased
 - **s 28ID, 28IE** ability to care for others head confirmed
 - **s 28LB**: 'threshold' on non-eco loss lowered and clarified

A) ECONOMIC LOSS

MEDICAL AND HOSPITAL EXPENSES

2 main categories:

- 1) Actual medical expenses; and
- 2) Gratuitous care damages

1) Actual medical, hospital, rehabilitation expenses

Sharman v Evans (HCA, 1977)

- Gibbs and Stephens JJ at [14]: 'such expenses as the plaintiff may reasonably incur' — 'touchstone of reasonableness is... **cost matched against health benefits to the plaintiff**
- medical expenses denied where the cost is 'very great' but the 'benefits to health slight or speculative' or relates only to amenity
 - of modern community attitudes to the disabled:
 - *Amman v Dunning* (1992)
 - *Diamond v Simpson (No. 1)* (2003)

2) Damages for gratuitous attendant care services

- Known also as '**Griffiths v Kerkemeyer** damages', or 'gratuitous care damages' ('GCD'): **Griffiths v Kerkemeyer** (HCA, 1977)
 - legal principles and pragmatism favours the award
 - entitlement arises from P's **need** for the services, not the financial loss to P (*irrelevant whether P will reimburse the carer*)
 - no guarantee carer will provide services for rest of P's life
- Awarded even if tortfeasor is care provider

Kars v Kars (HCA, 1996)

Section 28B (gratuitous) attendant care services

- does *Wrongs Act* allow for *G v K* damages?
- yes, but provides threshold criteria and caps
- it refers to 'attendant care services', defined in s 28B as any of the following:
 - a) services of a domestic nature
 - b) services relating to nursing
 - c) services that aim to alleviate the consequences of an injury
- it also refers to 'gratuitous attendant care services', defined as attendant care services provided by another person for which P has not paid or is not liable to pay (s 28B)

Section 28IA (1) threshold criteria

Sections 28IA(1): Damages for gratuitous attendant care services not to be awarded unless:

- a) A reasonable need for the services exists
- b) the need arises *solely* because of the injury to which the damages relate, and
 - see **Woolworths Ltd v Lawlor (2004)**: difference between pre-accident and post-accident care awarded.
- c) the services would not have been provided 'but for' the injury

Section 28IA (2) preclusion

Section 28IA(2) preclusion:

[N]o damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided —

- (a) for less than 6 hours per week; and
- (b) for less than 6 months

Meaning of s 28IA(2)?

Ambiguous provision —

- better view: prohibition on recovery only where **both** conditions satisfied — i.e. if P requires services for less than 6 hours per week **and** for less than 6 months
- on this view, s 28IA(2) provides for *alternative tests* — i.e. P can recover by showing *either* needs the services for > 6 hours per week **or** for > 6 months
 - see **Harrison v Melhem (NSWCA, 2008)** (supplement, ch 11) — courts must interpret the words used by Parliament, not seek to divine the subjective 'intention' of Parliament
- provision precludes P from an award, it does not provide for conditions for P to qualify for an award
- 'and' is a conjunctive term; nothing in the provision which displaces this ordinary and natural meaning of the word

- underlying policy is unfairness to P and P's family and friends should the voluntary support should go unrewarded when provided over and above what could reasonably be expected on the basis of ordinary human bonds and affection
- Here, policy choice that unfairness threshold reached where either condition is met
 - Victorian Court of Appeal reached same conclusion in *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority (VSCA, 2007)* at [39]
 - Conflicting authority in QLD — *Kriz v King (QCA 2006)*
 - NSW legislation subsequently amended to resolve ambiguity — **s 281A(2)** has not been amended in 2015 amendments (presumption — this interpretation is correct)
- no requirement in s 281A(2) of 6 *consecutive* months (contrasts s 281D)

Quantum of GACS/GCD

HCA held in *Van Gervan v Fenton (HCA, 1992)* that reasonable value of services (ordinarily market value) to be awarded, not income foregone.

Van Gervan v Fenton (HCA, 1992)

- see now 'cap' in **s281B Wrongs Act**:
 - links the amount recoverable to average weekly Vic earnings
 - where services for >40 hours pw, GCD can not exceed the 'average weekly earnings' of Vic full time workers
 - where services for <40 hours pw, GCD are pro-rated (one-fortieth of 'average weekly earnings', to get hourly rate)

Loss of ability to care for others

- if the P, post-injury, is no longer able to care for others, is this recoverable as a head of damages?

At common law,

- this head of damages (known as *Sullivan v Gordon [NSWCA, 1999]* damages) not available as a separate head of damages

CSR Ltd v Eddy (HCA, 2005)

Through Vic *Wrongs Act*,

- differs from common law position and permits damages for loss of ability to provide services to family members, but imposes limitations: **s 281B**
- **s 281D** — no damages *unless* the court is satisfied that the care:
 - a) was provided to the claimant's dependants, **and**
 - defined in **s 281B** as 'any persons who are wholly, mainly or in part dependent on the claimant at the time of the injury'
 - not limited to persons whom P had a *legal obligation* to maintain (*Amaca Pty Ltd v Novek [2009]* NSWCA 50, e.g. children, grand children)
 - b) was being provided for at least 6 hours per week, **and**
 - c) had been provided for at least 6 consecutive months before the injury (or there was a reasonable expectation that they would have been)
- seems clear from the wording of the provision that these are *cumulative* provisions: cf **s 281A(2)**
- **s 281E** — same caps as for GCD: **s 281B**

LOSS OF EARNING CAPACITY

Note: Difference between **past loss of earnings** (between injury and date of trial) and **loss of capacity to earn income in the future** (from date of trial to retirement)

Calculating LOEC

Multiply P's pre-accident or 'without injury' earnings x weeks left in P's pre-accident working life

- if negligence shortened life expectancy, P awarded LOEC for the 'lost' years: **Sharman v Evans (HCA, 1977)**, i.e. damages calculated on basis of *pre-accident* life expectancy)
- from these 'without injury' or pre-injury earnings deduct 'with injury' or post-injury earnings
- but 'cap' on award of loss of earning capacity: **s 28F(2)**

Section 28F(2) Wrongs Act (as amended in 2015)

- The maximum amount of damages that may be awarded for each week of the period of loss of earnings is an amount that is 3 times the amount of average weekly earnings as the date of the award.
- 'amount of average weekly earnings at the date of the award' = 'average weekly total earnings of all employees in Victoria' (**s 28F(3)(a)**)

***Former s 28F(2): Tuohey v Freemasons Hospital [2012] VSCA 80**

- Former wording of s 28F(2) ambiguous:

'In the case of any award to which this section applies, the court is to ... disregard the amount (if any by which the claimant's gross weekly earnings would (but for the death or injury) have exceeded an amount that... is 3 times the amount of average weekly earnings as the date of the award.'

- Considered in **Tuohey v Freemasons Hospital [2012] VSCA 80**

- COA held wording of s28F clear — reference to 'gross weekly earnings' a reference to 'without injury' earnings
- therefore, if P's 'with injury' earnings were above the capped amount, they get nothing

So, if the **new s 28F** were applied to **Tuohey's** case today, his economic loss would be capped at weekly earnings of \$3,221.10, despite the fact that his pre-injury earnings were \$10,550 per week.

Adjustments/discounts

From this calculation of LOEC, certain adjustments/discounts must be made:

1) Tax must be deducted: s 28A

2) Deduct any 'saved' items of expenditure

- items that were directly related to the job, e.g. uniforms, tools, trade magazines, equipment, no longer needed to be expended
- child care savings not deducted

Wynn v NSW IMC (HCA, 1995)

3) Discount for the 'vicissitudes of life'

- this varies and depends on individual P
- usual discount range varies between 5-20%, e.g. **Wynn v NSW IMC (HCA, 1995)** (above)
- **Note:** no deduction for insurance or superannuation payouts, or for government benefits or Medicare payments.

4) Discount to present value:

- Future economic losses (medical expenses, loss of earning capacity) discounted to recognise P can invest lump sum now, not in future, and so earn interest from now:
 - 5% discount rate: **s 28I Wrongs Act**

- 3% discount rate at common law

B) NON-ECONOMIC LOSS

Definition in *Wrongs Act 1958* (Vic)

At **ss 28B** and **28LB** as:

- a) pain and suffering
- b) loss of amenities of life
- c) loss of enjoyment of life

Note: at common law 'loss of amenities of life' = 'loss of expectation of life'

Torts reform post-2002: Caps and thresholds

Wrongs Act enacts caps and thresholds.

- **Note:** reforms N/A where 'the fault concerned is an intentional act done with intent to cause death or injury or that is sexual assault or other sexual misconduct': **ss 28C(a), 28LC(2)(a)**
- 'cap' for non-economic loss (NEL) in s 28G *Wrongs Act* is \$577,050 (as at Feb 2015) subject to annual indexation: **s 28H**
- 'threshold' test in **Part VBA *Wrongs Act***:
 - NEL only recoverable where P has sustained a '**significant injury**': **s 28LE**

What is a significant injury? s 28LF

- Must be assessed as a 'degree of impairment' of the whole person resulting from the injury
 - assessment must be by an approved medical practitioner or by a Medical Panel: **s 28LF**
 - determined by reference to AMA Guides 4th ed: **ss 28LH, 28LI**
- Impairment must be a '**permanent** impairment': **s 28LB**
 - e.g. sprained limb that fully heals, not a *permanent* impairment
- Must satisfy the 'threshold level' — Defined in **s 28LB** as:
 - (a) in the case of injury (other than psychiatric injury or spinal injury), impairment of more than 5 per cent (no changes from pre-2015);
 - (b) in the case of psychiatric injury, impairment of 10 per cent or more (pre-2015 this was 'more than 10%')
 - (c) in the case of spinal injury, impairment of 5 per cent or more (no specific reference to spinal injuries pre-2015)
- Other examples:
 - Loss of a foetus
 - Psychiatric injury arising from loss of a child
 - Loss of a breast

Remember: N/A to intentional act done with intent to cause harm, or sexual assault/misconduct: **ss 28C(a), 28LC(2)(a)**

'Significant' v not-significant injuries

Examples of not 'significant' injuries

- loss of taste (3%)
- loss of smell (3%)
- loss of little finger or big toe (5%)

Examples of 'significant' injuries

- sprained wrist, minor loss of motion (6%)
- soft tissue back injury (12%)
- moderate dislocation of shoulder (15%)
- loss of sight in one eye (28%)
- loss of one arm (60%)
- quadriplegic who needs a ventilator (100%)

Assessment of impairment 'objective'

- Degree of impairment assessed **objectively** — a medical determination of loss of physical and/or psychiatric function.
- when determining extent of physical impairment, 'psychiatric symptoms arising as a consequence of, or secondary to, a physical injury' not to be taken into account: **s 28LJ**

LOSS OF AMENITIES/ENJOYMENT OF LIFE

Loss of amenities = loss of enjoyment of life

- compensation for disability/impairment of P's ability to enjoy life
- largely subjective — modest sum if P is permanently unconscious (e.g. \$10,000-\$20,000)

Skeleton v Collins (HCA, 1966)

Pain and suffering

- compensation for physical pain and psychological consequences (worry, frustration, anxiety etc)
- completely subjective

Skeleton v Collins (HCA, 1966)

Loss of expectation of life

- consolidation or solace for P for shortened life
- modest awards (\$10,000-\$15,000)
- not included in *Wrongs Act* definition of NEL, so query whether this head of damages still available for negligence claims to which *Wrongs Act* applies (i.e. if it is an 'exhaustive' code)

AGGRAVATED AND 2) EXEMPLARY DAMAGES

(See topic 2)

Note —

'Aggravated' damages are compensatory (to compensate for the manner in which the tort was committed, i.e. to hurt feelings, humiliation, etc)

Whereas,

Exemplary/punitive damages are 'punitive' (not compensatory) for D's contumelious disregard of P's rights

Claims upon the death of a person

2 claims available:

- 1) Dependant's claim — Claim by dependents for loss of financial support under **Pt III Wrongs Act** (dependants' claim); and
- 2) Survival of causes of action claim — Claim by estate under the *Administration and Probate Act 1958* (survival of causes of action claim);

Note: both claims are available in conjunction — estate claim relates to past economic losses, dependants' claim relates to future losses.

1) Dependants' claim

s 16 Wrongs Act 1958 (Vic) — claimant (dependant) must show:

- (a) The death was 'caused by a wrongful act, neglect or default'
 - **Haber v Walker (VSC, 1963)**: words of **s 16** only require establishing causation, not 'the elements of negligence (i.e. DOC or reasonable foreseeability)'
 - conflicting authority whether the death must have been reasonably foreseeable. Majority in **Haber v Walker** said no; but see *Listle v Brice* [2002] 2 Qd R 168
- (b) The deceased could not have maintained a cause of action for damages had he/she not died; and
- (c) The claimant was wholly or partly dependent on the deceased, or would have been but for the death.

s 17(2) Wrongs Act dependants means such persons as were wholly mainly or in part dependent on the person deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent

- **Note:** must be a 'financial dependency' not merely a personal relationship
- ultimately, question is whether the claimant would reasonably expect a financial benefit from the relationship

Dependants' claims: heads of damages

Dependants' claim for:

(A) loss of expectation of financial support

- what was the 'reasonable expectation' of financial support from the deceased; 'loss of chance' of financial support recoverable
- a vicissitudes of life analysis applied
 - **De Sales v Ingrilli [HCA, 2002]** (5% rate upheld against 20% rate found by WASFC)