

LAWS1017: Torts and Contracts II

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I: Introduction to Torts and Contracts II

TORTS AND CONTRACTS GENERALLY

Torts

- Torts governs infringements of interests protected by the law independently of private agreement.
- Torts is concerned with compensation for injury or damage.
- Subject to a 6-year general limitation period and a 3-year limitation period for personal injury cases. This period begins when the damage is suffered.

Contracts

- Contracts is concerned with the enforcement of agreements.
- An agreement between parties may be relevant to liability in tort, for example a disclaimer. Liability in contract is strict (mostly) in the sense that a contracting party who fails to perform the contract is liable for breach without regard to the fault of that party.
- Subject to a 6-year general limitation period and a 3-year limitation period for personal injury cases. This period begins at the date of breach.

Concurrent liability in tort and contract

- The fact that there is a contractual relationship between the parties which may give rise to a breach of contract, does not exclude the co-existence of a right of action founded on negligence, independent of contract, though arising out of the relationship brought about by the contract: *Donoghue v Stevenson*.
- In a case of concurrent liability, the plaintiff must elect between an action in tort and contract, to be guided by damages or choices in law.
- Liability in tort is governed by the law of the place where the tort was committed (*lex loci delicti*).
 - Intranational: ***John Pfeiffer v Rogerson***.
 - International: ***Regie Nationale des Usines Renault v Zhang***.
 - Liability in contract is governed by the legal system which is identified as the proper law of contract: *Insight Vacations v Young*.
- Damages
 - In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed.... In tort, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed: ***Gates v City Mutual***
 - Exemplary damages and aggravated damages are not recoverable in contract.
- Causes of action and death
 - The rule that in a civil court the death of a human being may not be complained of as a legal wrong does not apply in an action to recover damages for a breach of contract where an element of those damages was the death of a third party: ***Jackson v Watson & Sons***.
 - The common law rule, action *personalis moritur cum persona* (a personal action dies with the person) does not apply to causes of action in contracts.

Structure

TORT

For interference with land

1. Trespass to land (actual possession) – Halliday v Nevill
2. Private nuisance (actual and exclusive possession) – Victoria Park v Taylor

For interference with goods

1. Trespass (actual possession) – Penfolds
2. Conversion (actual possession or immediate right to possession) - Penfolds
3. Detinue (immediate right to possession) – Reeve v Palmer
4. Found goods – Armony v Delamirie
 - a. Employment – Byrne v Hoare
 - b. Occupier – Armony v Delamirie

Intentional economic loss

1. Tort of deceit – Derry v Peek
2. Injurious falsehood – Palmer-Bruyn v Parsons
3. Inducement of breach – Hospital Group v Australian Rugby

For pure economic loss

1. Negligent misstatement – Hedley Byrne v Heller
 - a. Direct recipient – Shaddock v Parramatta
 - b. Third party recipient – Smith v Eris S Bush
2. Professional negligence – Voli v Inglewood Shire
 - a. Client – Hawkins v Clayton
 - b. Third party beneficiaries – Hill v Van Erp
 - c. Standard of care – s5O CLA
3. Damage to third party property – Caltex Oil; Perre
4. Injury to third party – Barclay v Penbarthy
 - a. Death – no claim
 - b. Injury – claim in tort or action per quod
5. Defective structures
 - a. Residential building – Bryan v Maloney
 - b. Commercial building – Woolstock v CDG
 - c. Statutory claim – Home Building Act
 - d. Defective products – Michillo v Ford Motor
6. Breach – s5B CLA
7. Causation – s5D CLA

CONTRACT

Client wants to claim damages in contract:

1. Misleading or deceptive conduct – s18 ACL
2. Unconscionable conduct – ss20,21 ACL
3. Unfair terms – s23 ACL
4. Remedies
 - a. Damages –s236 ACL
 - b. Declare contract void – s243 ACL
 - c. Injunction – s232 ACL
 - d. Other orders – s237-245 ACL

Client wants to rescind the contract:

1. Misrepresentation (voidable) – Redgrave v Hurd
 - a. If innocent → only can rescind contract
 - b. Fraudulent →tort of deceit – Derry v Peek
 - c. Negligent →tort for negligent misstatements
2. Common mistake
 - a. Subject to implied condition (void) – McRae CDC
 - b. Equitable relief (voidable) – Solle v Butcher
3. Mutual mistake (void) – Raffles v Wichelhaus
4. Unilateral mistake (voidable) – Taylor v Johnson
 - a. Reification (mainly for common mistake; sometimes unilateral) – Joscelyne v Nissen
 - b. Non est factum (void) – Petelin v Cullen
5. Duress (voidable) – Crescendo Management v Westpac
6. Undue influence (voidable)
 - a. Presumed established category – Johnson v Buttress
 - b. Presumed on the facts – Johnson v Buttress
 - c. Actual undue influence – Allcard v Skinner
 - d. Third party – Bank of NSW v Rogers
 - e. Yerkey principle – Yerkey v Jones
7. Unconscionable conduct (voidable) – CBA v Amadio
8. If fail to prove unconscionable conduct, consider claim for unfair contract – ss4, 9 Contracts Review

Bars to recession

1. Restitution impossible – Clarke v Dickson
2. Affirmation – Coastal Estates v Melevende
3. Lapse of time – Leaf v International Galleries
4. Third party acquired rights prior to recession – Car and Universal Finance
5. Sale of land executed →no right to rescind for innocent misrepresentation – Seddon's case

PROPORTIONATE LIABILITY FOR ECONOMIC LOSS OR PROPERTY DAMAGE

Under the Civil Liability Act

1. Failure to take reasonable care in tort or contract – s34 CLA
2. Liability limited to proportion court thinks just having regard to the extent of responsibility for the loss – s35 CLA
3. Limited by contributory negligence – s34 CLA
4. CAN contract out of proportionate liability – s3A(2) CLA

Under the Competition and Consumer Act

1. Breach of s18 ACL – misleading or deceptive conduct – s87CB CCA
2. Liability limited to proportion court thinks just having regard to the extent of responsibility for the loss – s87CD CCA
3. Limited by contributory negligence – s87CD CLA
4. CANNOT contract out of proportionate liability – s87CF CCA

T2: Trespass to Land

TRESPASS TO LAND

A direct, intentional or negligent, unauthorised or unlawful interference with land in the possession of another person.

- 2. Title to sue: Actual exclusive possession of the subject land (Newington)
 - Look at the conduct of parties to determine whether there is possession.
 - Ownership over the land for a sufficiently long period of time supports possession (Newington).
 - However, an owner out of possession may bring an action on the case for damages to the owner's reversionary interest if damage can be proven (Rodrigues v Ufton)

Starting questions

- Is it actually trespass to land?
- Direction intrusion → trespass to land
- But occurs outside of the rectangle up to the heavens, down to the depths but has effect inside the P's land → nuisance
 - Tree - roots spreading
 - Jackhammer in D's land causes cracks next door - physical injury, indirect
 - Changing watercourse so that lower property gets inundated with water

Actionable per se: *Plenty v Dillon*, quoting Denning LJ

1. Does P have title to sue

- The only person who could maintain an action of trespass was the person who was in possession of the property: ***Rodrigues v Ufton* (1894) 20 VLR 539, 543.**
 - Onus on the plaintiff to prove actual possession at date of trespass ***Newington v Windeyer* (1985) 3 NSWLR 555.**
- **Test: Actual and exclusive possession on the date of trespass: *Newington v Windeyer* (1985) 3 NSWLR 555.**
 - Lecture - lessee has possession, could even sue landlord
 - 1. De facto (factual control) or de jure (legal title) control of the land
 - Legal co-tenant not in occupation remains entitled to enter: *BA v The King* [2023] HCA 14
 - 2. Adverse possession (old laws but held to still apply to the ***Real Property Act 1900* (NSW)**) (***Newington v Windeyer* (1985) 3 NSWLR 555, 563**):
 - Person in possession of land adverse to the true owner can claim legal title if continuous occupation for 12+ years and the true owner has not objected
 - Factors which suggests asserting of ownership (***Newington v Windeyer* (1985) 3 NSWLR 555, 563**)
 - 1. Employed man to mow the lawn
 - 2. Engaged in maintenance of garden, trees and rockeries
 - 3. Told uninvited visitors to leave their 'private land'
 - A person in adverse possession nonetheless retains a legal interest in the land even if the 12 year period has not yet expired – *Perry v Clissold*, cited with approval in ***Newington v Windeyer* (1985) 3 NSWLR 555, 563**
 - As long as a person does not abandon possession, possession for less than twelve years enables him to exclude from the land any person who does not have a better title.
- No title

- Lessor/reversioner/landlord has no title because they have no possession: **Rodrigues v Ufton (1894) 20 VLR 539, 543, 544; Macintosh v Lobel**
 - NB: this may give rise to an action on the case if there was an injury to the reversion for the owner: **Rodrigues v Ufton (1894) 20 VLR 539, 543, 544.**
- Licensee has no title e.g., a hospital patient (**Kaye v Robertson** [1991] FSR 62) ~~or guests at a hotel or function (**Douglas v Hello!** [2003] 3 All ER 996).~~

2. Does this fall within the scope of the plaintiff's interest in land?

- Is the trespass against the plaintiff real property or something affixed to the property?
 - Land is realty or real property and includes things which are affixed to the land (per doctrine of fixtures).
 - Land includes anything fixed to the physical land: **XL Petroleum v Caltex Oil (1985) 155 CLR 448, casebook, p 89.**
 - Not movable things
 - Note: parts of the land, such as sandstone blocks or flowers, might become goods once separated, giving rise to multiple causes of action.
- Is the trespass against the airspace above the plaintiff's property?
 - Incursions by cranes and permanent structures (can be easier - can influence use of land)
 - Test: Whether the incursion is of a nature and at a height which may interfere with the ordinary use and enjoyment of his land and the structures upon it: **LJP Investments v Howard Chia Investments; Bernstein v Skyviews & General [1978] QB 479, 488.**
 - Whether the incursion actually interferes with the occupier's use of land is irrelevant; focus is on the what use of land might be reasonable – **LJP Investments v Howard Chia Investments**
 - Aircraft/drones harder: likely no trespass by an aeroplane flying many hundreds of feet above the land – **Bernstein v Skyviews & General [1978] QB 479, 488, 489; s72 CLA**
 - 1. Is the aircraft flying at a **reasonable** height above the ground (having regard to wind, weather and all the circumstances of the case)? – s72(1) CLA
 - 2. Is the aircraft complying with Air Navigation Regulations? – s72(1) CLA
 - 3. Is the only reason the tort of trespass or nuisance is being brought is because the aircraft is over the property? - s 72(1) CLA, **Bernstein v Skyviews & General [1978] QB 479, 489.**
 - Primary consideration is safety - statutory interpretation - what is reasonable
- Is the trespass against the sub-soil beneath the plaintiff's property?
 - A person has substantial control over land underneath his or her soil for a considerable depth: **Di Napoli v New Beach Apartments [14], [17], [28].**
 - The owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else: **Bocardo SA v Star Energy UK 991[27].**
 - A pipeline extending 800-2800 feet underground but going underneath P's land was found to be trespass: **Bocardo SA v Star Energy UK 991[27].**
 - The fact that strata can be worked on at such a depth points to that it is trespass: **Bocardo SA v Star Energy UK 991[27].**
 - Another way of thinking about this - if the D can drill to that depth, it is in the P's interest in land. Even if P cannot drill themselves, they could sell to someone who could and get compense.
 - Has the plaintiff's ownership been revoked by contract or statute: **Bocardo SA v Star Energy UK 991[27].**
- Not material: whether the P is suffering financial loss - people are entitled to exclusive use of their land: **Di Napoli v New Beach Apartments [28].**