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## Tort

The general principle relating to damages in tort is to place the plaintiff in the place they would have been had the tort not been committed.<sup>1</sup> As such, this means that (P) is unable to recover more than what was lost.<sup>2</sup>

## Does the CLA Apply

The Civil Liability Act (CLA) will apply where the tort is as a result of negligence.<sup>3</sup>

D's act was/was not negligent.

## Causation

*CLA: Yes*

For causation to be established between the harm and D, both factual causation and the scope of liability must be satisfied.<sup>4</sup> To determine if there is factual causation, D's negligent act must be a necessary condition for the harm to take place, regardless of whether it was the only reason for the loss.<sup>5</sup>

D's [act] lead to [facts] and thus was a necessary condition for the harm to take place, as, but for [his action], [the harm] would not have taken place.

### Where CLA s 5D(1) does not satisfy causation:

As causation cannot be satisfied under 5D(1) of the CLA, the case may deem exceptional and thus rather than establishing factual causation, responsibility may be imposed upon D for the harm.<sup>6</sup> Used when:

- Impossible to determine the extent of Y's wrong<sup>7</sup>
- Material increase in risk to X<sup>8</sup>

*CLA: No*

As the tort is intentional, it will be governed by common law causation. To determine causation, the court will consider whether but for D's [actions], P would not have [suffered the loss].<sup>9</sup> D's wrong does not need to be the only cause of the loss, but rather, it is sufficient if it is a material cause amongst multiple causes of the loss.<sup>10</sup>

### *When there are multiple causes*

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<sup>1</sup> Livingston.

<sup>2</sup> Haines v Bendall.

<sup>3</sup> CLA s 5A(1).

<sup>4</sup> CLA s 5D(1).

<sup>5</sup> CLA 5D(1)(a); Strong v Woolworths.

<sup>6</sup> CLA 5D(2).

<sup>7</sup> Bonnington v Wardlaw.

<sup>8</sup> Fairchild v Glenhaven Funeral Service

<sup>9</sup> Barnett v Chelsea Hospital.

<sup>10</sup> March v E & MH Stramare

For causation to be established, D's wrongful conduct caused or materially contributed to P's loss.<sup>11</sup> The cause may be among other causes to cause the loss but was nonetheless necessary and materially contributed to the loss, even if the loss would have occurred anyway.<sup>12</sup> As such, while [other conduct that caused loss], D's wrong was a material cause as [facts]. This assessment of a causal link is a matter of common sense.<sup>13</sup>

Case examples:

- ***Bonnington v Wardlaw***
  - Wardlaw developed pneumoconiosis from exposure to silica dust which came from hammers due to Bonnington Casting and also from grinders that were not due to Bonnington Casting. The hammers were concluded to be the main source as the grinders only contributed a small amount of the silica dust.
  - It was held that Bonnington Casting was liable even if the disease would have been contracted had B not been negligent.
- ***Fairchild v Glenhaven Funeral Services***
  - Where science makes it difficult whether D's actions were material to P's loss, an increase of the risk of harm may be enough to prove causation.
  - Fairchild developed mesothelioma after exposure to asbestos, while working for 2 employers. Evidence could not show details of how the diseases was contracted, but it was held that causation was established with respect to the second employer. This is because the second employer had materially increased the risk of the asbestos developing.
  - **Note: not accepted as good law in AUS + exception was due to unique facts of the case**

## Remoteness

*CLA: Yes*

D's liability will be limited to what is appropriate with respect to the harm caused.<sup>14</sup> The loss must be reasonably foreseeable and it must have been reasonably contemplated by D.<sup>15</sup>

*CLA: No*

D's responsibility for the harm caused will be limited as appropriate.<sup>16</sup> As the tort was...

- Negligence
  - ... then D will only be responsible for damage that was foreseeable at the time of the wrong where the risk is one that a reasonable person in the place of D would taken seriously, even with a low probability of occurring.<sup>17</sup> [Apply]

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<sup>11</sup> March v E & MH Stramare.

<sup>12</sup> March v Stramare

<sup>13</sup> Stapley v Gypsum Mines

<sup>14</sup> CLA s 5D(1)(b).

<sup>15</sup> Monaghan Surveyors Pty Ltd.

<sup>16</sup> Chapman v Hearse.

<sup>17</sup> Wagon Mound No 1

[facts]. Additionally, the risk must not be too far-fetched or fanciful.<sup>18</sup> [apply facts].

- Nuisance
  - ... then D will only be held responsible for damage where there was a real risk which would have occurred to a reasonable person in their position, and which would not be considered far-fetched, nor be neglected as it would be easy avoided (i.e. no difficulty, no disadvantage, no expense) (*Wagon Mound No 2*).
- Trespass- intentional
  - ... then the loss was natural and a probable consequence of D's actions.<sup>19</sup> This is a question of fact based on the circumstances of the case (*Anning*). [apply facts].
- Deceit- intentional
  - ... then D will only be held liable for any actual damage directly flowing from the fraud, whether irrespective of foreseeability (*Gould v Vaggelas*). [apply facts].

The kind of loss that is associated with D must be one that is not far-fetched and is reasonably foreseeable.<sup>20</sup>

- Exceptions
  - Egg shell skull rule:
    - D takes P as they find them, and thus P's sensitivity being unforeseeable is irrelevant.<sup>21</sup>
  - Mental harm
    - If mental harm is a foreseeable consequence of physical injury, then D will be held liable for the full extent of the mental harm caused.<sup>22</sup>
    - If the claim is pure mental harm (i.e. nervous shock), then P must prove that a person of normal fortitude would have suffered some kind of mental harm.<sup>23</sup>

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<sup>18</sup> Wyong Shire Council.

<sup>19</sup> Palmer-Bruyn.

<sup>20</sup> Hughes v Lord Advocate. Case: lamps left near uncovered manhole; children explored manhole and ended up suffering burns; held that the burn damage was foreseeable

<sup>21</sup> Smith v Leech Brain & Co. Case: burns activated P's underlying condition which developed into cancer; was held that the burn was foreseeable and thus the victim taken as found, meaning all loss was claimable

<sup>22</sup> Nader v Urban Transit Authority.

<sup>23</sup> Tame v NSW.

## Residual Issues

### *Novus Actus Interveniens*

Where an event follows **D's** wrong which overwhelms **D's** damage, it may be considered a novus actus interveniens and thus the real cause of **P's** loss, due to breaking the chain of causation.

The superseding event must clearly be the cause for the loss before **D** will be exonerated.<sup>24</sup> The event must be unforeseen, extraordinary, or coincidence, or the P or a third party acted unreasonably but voluntarily.<sup>25</sup>

- Case examples
  - **M'Kew**: plaintiff acted unreasonably by going downstairs after injury
  - **Mahony**: negligent medical treatment provided after a wrong that caused personal injury which worsened the damage was not a NAI as poor medical treatment is a foreseeable risk (unless the hospital's conduct was wholly unreasonable)

### *Contributory Negligence*

D's liability will be reduced where P has caused some of their loss by failing to take reasonable care.<sup>26</sup>

To be considered contributorily negligent, P must have failed to take precautions against the risk of that harm.<sup>27</sup> This is an objective test based on what a reasonable person in P's position would have done, with the knowledge that P had or ought to have had, and the fact of what P knew or ought to have known at the time.<sup>28</sup>

[facts: what did P know? Was it reckless action with the knowledge P had? NOTE: Actions prior to loss!]

- The entire conduct of each negligent part is to be examined when comparing culpability.<sup>29</sup>

### *Mitigation/Betterment*

P has a duty to act reasonably upon the harm occurring to prevent further losses. P [... did they do anything to mitigate loss? Reasonable steps taken?].

P does not have to take unreasonable or risky steps to mitigate loss.<sup>30</sup>

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<sup>24</sup> Mahoney v J Kruschich.

<sup>25</sup> M'Kew v Holland.

<sup>26</sup> Section 9(1) Law Reform (Miscellaneous Provisions) Act 1965 (NSW)

<sup>27</sup> Section 5R(1) CLA.

<sup>28</sup> Section 5R (2) CLA; Boral Bricks.

<sup>29</sup> Podrebersek v Australian Iron and Steel Pty Ltd.

<sup>30</sup> British Westinghouse Manufacturing Co Ltd.

Despite P taking reasonable steps to mitigate the loss, the losses increased. As such, D will be held liable for those additional losses.<sup>31</sup>

The onus is on D to raise mitigation as an issue and prove that P failed to mitigate their loss.

### **If P successfully mitigated loss:**

As P mitigated the loss, he will have to account for betterment accrued as a result of the mitigation.<sup>32</sup>

- Damage to real property/fixtures:
  - P does not have to account for replacing old property with better quality, where P had no choice.<sup>33</sup>
    - **Harbutt Case:**
      - Wayne messed up and Harbutt had to reconstruct a new building when their one burnt down
      - New building: newer and not exact replica
      - But: H had no choice but to rebuild and because it was impossible to build the same factory as before the fire, and noting factory was rebuilt without adding any extras, then H could claim the entire costs of rebuilding
    - **Gagner:**
      - Tried to argue they should be accounted to after entire story was refitted; held that C did not achieve any additional benefits above and beyond restoration of the store to a functioning jewellery store
    - **Hoad v Scone Motors Pty Ltd:**
      - Facts
        - S destroyed H's tractor which was worth 1500 and their mower worth 350
        - H needed to replace tractor quickly
        - Looked for a second-hand tractor- forced to buy a new one for 5000
      - Held
        - Awarded 4000 for it
        - Only had the old one to sell it with the farm, not intending to get much for it
        - Had to account for additional benefit they would receive by selling this new tractor

### *Proportionate Liability*

Note:

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<sup>31</sup> Simonius Vischer.

<sup>32</sup> Clark v Macourt.

<sup>33</sup> Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd.



- **Joint tortfeasors:** responsible for the same tort and either act in concert or are vicariously liable
- **Concurrent tortfeasors:** act independently and not in concert but inflict the same damage
- **Successive tortfeasors:** act independently but the damage inflicted is different

Where tortfeasors cause the same loss, they are jointly and severally liable. This means P can sue one tortfeasor and receive full compensation, and D can sue the other tortfeasors for their contribution to the loss.<sup>34</sup>

Applies where the claim is one for economic loss OR for damage to property in action for damages, contract or otherwise, arising from a failure to take reasonable care, excluding any claim arising out of personal injury.<sup>35</sup>

In apportioning damages, the court will have regard to each defendant's responsibility regarding the damage or loss, and only to that extent.<sup>36</sup>

- In *Mitchel Morgan v Vella*: cited *Podrebersek v Australian Iron & Steel* which is about considering the whole conduct of each negligent party in relation to the circumstances of the accident
  - But difference: deliberate or intentional conduct will usually be liable for a larger proportion of the loss (*Mitchel v Vella*)
- If any concurrent wrongdoer is unable to pay their proportion, the liability of other concurrent wrongdoers is not affected (**34(4)**)
- Cannot be apportioned more than amount that reflects responsibility (**35(1)(b)**)
- If P was contributorily negligent then the court will reduce damages to reflect P's CN and then apportion the damages (**35(3)**)
- The liability of a concurrent wrongdoer who intended to cause economic loss or damage to property is not benefited by apportionment.<sup>37</sup>
- The liability of a concurrent wrongdoer who fraudulently caused the economic loss or damage to property will not be benefited by apportionment.<sup>38</sup>
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<sup>34</sup> Section 5(1)(c) Law Reform (Miscellaneous Provisions) Act 1965 (NSW).

<sup>35</sup> Section 34 (1)(a) CLA.

<sup>36</sup> Section 35(1) CLA.

<sup>37</sup> 34A(1)(a).

<sup>38</sup> 34A(1)(b).

## Remedies

### Property

#### Property Damage

As the loss is damage to P's property, it may be remedied through either payment for repairing the property or providing the loss in value to the property due to the tort.

- Repair/Rectification:
  - Where the cost for repair is greater than the loss in value, it will be considered unreasonable.<sup>39</sup>
  - P may choose to have the cost for repairing the property as compensation for the loss caused by D. P must prove that the work to be undertaken is necessary and reasonable, which is a question of fact.<sup>40</sup> The repair is necessary and reasonable as ... [facts].
  - Case examples:
    - ***Evans v Balog*:**
      - Facts
        - P's home was situated on a hill
        - D's property lower down the hill
        - D developed property using heavy machinery- leading to serious cracks and signs of collapse in P's house
        - House began uninhabitable when room split from house
      - Held
        - Sued developer in negligence and nuisance
        - Awarded damages for home to be restored to pre-tort condition
        - The nature of the loss was the loss of a family home not just the loss in value of the undeveloped land
    - ***Pantalone v Alaouie*:**
      - Facts
        - A built 2 storey building with parking in basement
        - P owned building next door and relied upon an easement of support that intruded onto A's land
        - Work in basement destroyed the support and P's building collapsed
      - Held
        - Sued in nuisance and negligence
        - Cost of rebuilding was considered unreasonable to sue for as it was more than the loss of value
          - Was a commercial investment- not loss of a family home

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<sup>39</sup> Pantalone v Alaouie.

<sup>40</sup> Bellgrove v Eldridge; Pantalone v Alaouie.

- Building was a fairly typical commercial building, easy to replace
  - Inconvenience of looking for another building was no more onerous than seeing the building
- ***Westpoint Management Ltd v Chocolate Factory Apartments Ltd:***
  - Property sold prior to trial
  - Rectification work is thus impossible and is reason not to award damages
- Loss of Value:
  - As the cost is considered unreasonable and unnecessary, P will be awarded damages for the loss in value to the property as a result of the damage.<sup>41</sup>

### **Property Damage to Chattels**

The damage caused was in relation to goods. In such cases, it is more often that the loss of value is awarded to the claimant rather than repair, as a replacement chattel is generally easier than repair.<sup>42</sup>

However, if the chattel is rare, expensive, or personal then it is more likely that cost of repair is an appropriate assessment by the court.<sup>43</sup>

- ***Beaumont v Cahir:***
  - negligent landing of parachute on property, leading horse to take flight and injure itself
  - horse was used for contests, old, and blind in one eye
  - cost \$23k for vet
  - P sued for medical care received
  - Would have cost less to put the horse down BUT court held P was acting reasonably reinstating the horse due to:
    - Nature of the chattel- sentient being
    - Special relationship b/w horse and owner
    - Cited *Evans v Balog*

Where the chattel has been destroyed, disappeared, or sold to a third party, then the cost of replacement is the only option.

### **Consequential Loss**

Consequential losses may be claimed where the loss is not too remote and is caused by the wrong. These are costs incurred by P due to D's wrong, which are additional to the direct repair or replacement costs.

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<sup>41</sup> *Pantalone v Alaouie*.

<sup>42</sup> *Darbishire v Warran*.

<sup>43</sup> *Beaumont v Cahir*.

- Pantalone: damages for lost rent awarded
- Gagner: damages for lost profits awarded for the 10-day closure

### **Non-Economic Loss**

Non-economic loss may be awarded for property damage where the damage causes pain, suffering, distress, anxiety, humiliation, etc. The loss must be caused by the wrong and not be too remote.<sup>44</sup>

- **Mackay:**
  - was reasonably foreseeable the house would be acquired by a young family, proud of purchase, and if house collapsed, they would suffer anxiety, distress etc
  - Hence: awarded substantial damages for the mental harm
  - Claim prior to CLA, would now be moderated by s16

### **Aggravated/Exemplary Damages – Feelings**

Only for intentional torts.

Aggravated damages are awarded to compensate injured feelings caused by the humiliating or cruel way in which D treat P.<sup>45</sup> Such damages must be specifically claimed and are separate to an award for non-economic loss.

Exemplary damages are awarded to punish D.<sup>46</sup> They are awarded where D has engaged in conscious wrongdoing in disregard of another's rights.<sup>47</sup> As such, D must have intended to act in such a way to P.<sup>48</sup>

- Not awarded if P has provoked D to commit the wrong.<sup>49</sup>

### *Trespass to Land*

Trespass to land is actionable per se, meaning that proof of damage is not necessary. This may lead to the provision of general damages, aggravated/exemplary damages, consequential loss, and a reasonable use fee.

### **General Damages**

P may be awarded general damages to vindicate his right to exclusive possession of the land.<sup>50</sup> However, there must be more than just an infringement of a legal right.<sup>51</sup> This is because to do otherwise would override the principle of damages in tort to be compensatory

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<sup>44</sup> Campbelltown City Council v Mackay.

<sup>45</sup> Lamb v Cotogno; Appleton v Garrett.

<sup>46</sup> Uren v John Fairfax.

<sup>47</sup> Gray v Motors Accidents Commission.

<sup>48</sup> Ibbett.

<sup>49</sup> Fontin v Katapodis.

<sup>50</sup> Anning; Dillon.

<sup>51</sup> Lewis v ACT.

in nature, thus making nominal damages pointless.<sup>52</sup> Where there is no identifiable loss, then nominal damages will be awarded, which are vindictory rather than compensatory.<sup>53</sup>

[D trespassed upon the land... facts; was there more to it? Just mere trespass, then nominal damages. If more, then general damages].

### **Aggravated/Exemplary Damages**

Where the trespass is aggressive, insulting, or malicious, then aggravated or exemplary damages may be awarded, as well as general damages, regardless of whether there is damage to the land itself or not.<sup>54</sup>

Aggravated damages are awarded to compensate injured feelings caused by the humiliating or cruel way in which D treat P.<sup>55</sup> Such damages must be specifically claimed and are separate to an award for non-economic loss.

Exemplary damages are awarded to punish D.<sup>56</sup> They are awarded where D has engaged in conscious wrongdoing in disregard of another's rights.<sup>57</sup> As such, D must have intended to act in such a way to P.<sup>58</sup>

- Not awarded if P has provoked D to commit the wrong.<sup>59</sup>

[Apply facts; anything that made the trespass aggressive, etc? ].

### **Reasonable Use Fee**

P can claim a reasonable use fee for D's unauthorised use of the property or for a chattel. These fees are restitutionary rather than compensatory and require no loss to be suffered by P. P must show that D trespassed and that he used the property. [Apply facts].

For the assessment of the fee, the court will have regard to the market rate for the use and if there is evidence of what P would have charged.<sup>60</sup> [Apply Facts; market value, any sign of previous interactions that hinted towards what P would have charged].

- ***LJP Investments v Howard Chia Investments***
  - Facts
    - Chia was constructing building and needed access to L's land to erect scaffolding

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<sup>52</sup> Lewis v ACT.

<sup>53</sup> NSW v Stevens.

<sup>54</sup> Anning; Ibbett.

<sup>55</sup> Lamb v Cotogno; Appleton v Garrett.

<sup>56</sup> Uren v John Fairfax.

<sup>57</sup> Gray v Motors Accidents Commission.

<sup>58</sup> Ibbett.

<sup>59</sup> Fontin v Katapodis.

<sup>60</sup> LJP Investments v Howard Chia Investments; Sydney Local Health District v Macquarie International Health Clinic Pty Ltd.

- L would allow for a few of 30k + rental of 570/per week
- Chia refused to pay
- Built scaffolding anyway
- Scaffolding intruded into airspace of about 1.5m
- Held
  - Fee was calculated as to what the parties would have reasonably agreed to had they properly negotiated
  - Found C would have paid the fees L proposed ; awarded such damages

### *Economic Loss in Deceit or Negligence*

Pure economic loss which is caused by negligence (including negligent misstatement), or deceit (fraudulent misrepresentation) may be claimed by P.

The aim is to restore P to a pre-tort position.<sup>61</sup>

- ***Toteff v Antonas***

- Facts
  - T purchased shop from A for 2,200 pounds
  - Prior to sale, A had fraudulently misrepresented the profits of shop
  - T discovered truth, sold business for 900 pounds and sued for difference from A
- Held
  - Damages are 1300 pounds
  - Was necessary to restore T to the position he would have been in had he not relied upon the deceit

[Apply facts; negligence or deceit?]

P must prove that at the time of purchase, the asset was worth less than what he paid, and that any loss which diminishes the value of the asset is not too remote to D, as D will only be held liable for flaws at the time of sale.<sup>62</sup>

[Apply facts; cost of asset at the time, any issues with the asset that D did not reveal].

Consequential losses may be claimed where the loss is not too remote to D.<sup>63</sup> P must have relied on D and, but for the reliance, P would not have suffered the loss.<sup>64</sup>

**NOTE: BOTH COAs HAVE BEEN OVERTAKEN BY SECTION 18 ACL AS IT IS EASIER TO ESTABLISH LIABILITY; THIS CAUSE REMAINS RELEVANT WHERE D'S CONDUCT WAS NOT 'IN TRADE OR COMMERCE.'**

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<sup>61</sup> Livingston; Toteff v Antonas.

<sup>62</sup> Potts v Miller; Twycross v Grant.

<sup>63</sup> L Shaddock & Associates v Parramatta City Council.

<sup>64</sup> L Shaddock & Associated v Parramatta City Council.