

# Week 1 – Lecture

## Outline

1. Contemporary Issues - Tort Law's Responses
2. Defining tort law
3. Tort law and other laws
4. Theories about the role of tort law in society

## Contemporary Issues - Tort law's responses

- **Pabai v Commonwealth of Australia (No 2) [2025] FCA 796** (July 2025)
  - Torres Strait Islanders sued the Australian government, claiming its inadequate climate policies caused rising sea levels that damaged their islands and destroyed their traditional way of life
  - Unsuccessful
- **T2 (by his Tutor T1) v New South Wales [2024] NSWSC 1247** (October 2024)
  - 12 classmates assaulted a 14-year-old student with ASD after school hours, not on school premises. The attack was filmed and posted on Instagram. The student sued the school for negligence
  - Successful: damages of \$1.75m awarded

## Defining tort law

- Tort is derived from a Latin term "tortum" which means "something twisted, wrong or crooked"
- Tort law deals with civil wrongs
- It lays down rules and principles as to how one should behave about others:
  - Avoid causing harm to others
  - Otherwise remedy the harm (e.g., provide compensation)
- There are several prominent torts such as:
  - Trespass
  - Negligence
  - Defamation
  - Strict liability
  - Nuisance
- This then raises a hotly debated question: is it law of tort or law of torts?
- John Salmond held the view that law of torts is merely a collection of miscellaneous causes of action
- On the other hand, Pollock and Winfield argued that there are a set of fundamental principles that underpin the law of tort - e.g., duties imposed by law owed to all
- In common law countries, tort law is mostly judge-made law - so cases are critical
- However, statutes have increasingly become important for various reasons, e.g., responding to a societal challenge about the price and availability of insurance
- The Civil Liability Act 2002 (NSW) in a case in point
- Although statutes have not replaced or codified the common law, they have:
  - Modified or abolished the common law
  - Created new causes of action
- Co-existence of cases and statutes is the current life of tort law

## Tort Law and Other Laws

- One way to define tort law is to differentiate it with other laws
- Yet, we should not see tort law as a watertight compartment - rather, it is part of a governance ecosystem to regulate human behaviour
- Like other branches of law, it seeks to protect certain rights and interests

## Tort Law and Criminal Law

- While civil wrongs are the focus of tort law, criminal law deals with public wrongs (offences)
- Yet, the distinction between the two is not always very sharp:
  - A certain wrong may amount to both tort and crime (e.g., assault)

- Compensation may be obtained from injuries from crimes (e.g., Criminal Injuries Compensation Act 1967 (NSW))
- At the same time, certain broad distinctions can be made between these two branches of law:

	<b>Tort Law</b>	<b>Criminal Law</b>
<b><i>Nature of wrong</i></b>	Private	Public
<b><i>Main purpose</i></b>	Compensation	Punishment
<b><i>Primary principle of justice</i></b>	Redress / correction	Retribution / deterrence
<b><i>Action initiated by</i></b>	Individual	State
<b><i>Standard of proof</i></b>	Balance of probabilities	Beyond reasonable doubt

### **Tort law and contract law**

- Both tort law and contract law deals with civil wrongs - certain wrongs may create a cause of action under both (e.g., product liability, contracts for services)
- Yet, there are some key differences between the two branches of law
- We can note the following main distinctions between tort law and contract law:

	<b>Tort Law</b>	<b>Contract Law</b>
<b><i>Source of duties</i></b>	Law	Parties, Law
<b><i>Scope of duties</i></b>	General on all	Only on specific parties
<b><i>Relevance of motive</i></b>	Yes (in some cases)	No
<b><i>Nature of damages</i></b>	Unliquidated	Liquidated
<b><i>Privity</i></b>	Not relevant	Generally required

### **Tort Law and Human Rights Law**

- Tort law aims to protect the individual's bodily integrity, reputation and property
- This is similar to the purpose of human rights law - in fact, as we will see during week 5, tort litigation has been used to seek remedy for human rights abuses by corporations
- In most liberal democracies, there is a Bill of Rights protecting human rights.
- Such a Bill of Rights may influence interpretation of existing tort law or contribute to the creation of new tortious actions (e.g., privacy)
- However, there is no comprehensive human rights law in Australia at the federal level (a human rights law exists in ACT, Victoria and Queensland)
- Hence, there has been a limited use of tort law to protect human rights

## **Theories about the role of tort law in society**

- Scholars in their writings (and judges in their pronouncements) have invoked various theoretical justifications about the role of tort law in society
- These theoretical justifications may be descriptive or normative in nature
  - The role that tort law plays or ought to play in society
- These theories also provide a framework to critically analyse judicial decisions

### **Compensatory function**

- Under this theory, tort law is seen as a framework to provide compensation to people who are injured by a wrong
- The object of awarding compensation (damages) is to put back the victim into the position - so far as money can achieve that - she would have been in had the accident not happened
- The compensatory function, however, faces challenges in practice - e.g., miscalculations in computing loss of future earnings, high legal fees, problems with lump sum payment
- Hence, other purposes of tort law are proposed

### **Deterrence function**

- The deterrence theory postulates that if employers are made to pay for an accident at work, they will try to avoid such accidents in future