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## 1.1 WHAT IS A TORT?

- A broad definition: a “tort” is a “wrong” that the law will redress
- Originated from English Writ system of 12<sup>th</sup> century
- There are a variety of specific and quite different torts (wrongs)
- The term “torts” is therefore an umbrella term to describe a variety of specific causes of action with certain features in common
- Different facts or elements will have to be proved by a plaintiff to make out each different tort (although some of the torts we look at have some elements in common)

Examples of Different Torts
<ul style="list-style-type: none"> <li>- The tort of defamation</li> <li>- The tort of fraud</li> <li>- The tort of false imprisonment</li> <li>- Torts concerned with trespass to the person- battery, assault and false imprisonment</li> <li>- Trespass to land</li> <li>- The tort of private nuisance</li> <li>- The tort of negligence</li> </ul>
<p>* Negligence is a specific tort in itself, like defamation, or false imprisonment</p> <p>At the same time, negligence, in the sense of general carelessness, which is an element that must be satisfied if certain other torts are to be made out</p>

### I. Comparison with Criminal Law

Feature	Criminal Law	Torts Law
Instigation & Carriage of Proceedings	The State	Private persons
Standard of Proof	Beyond Reasonable Doubt	Balance of Probabilities
Sanctions	Imprisonment, non-custodial sentence, fines to State	Compensation, Injunctions, Declarations

### II. Comparison with Contract Law

Feature	Contract Law	Torts Law
Basis of Obligation	Arises by agreement of the parties	Imposed by law
Sanctions	Damages related to expectation	Damages to put you in the position prior to the tort

#### Concurrent Liability

Where the same action amounts to both a tort and a breach of contract, the plaintiff is generally given a choice as to which cause of action to bring. But it is controversial as it allows plaintiff to choose the action which is the most advantage to them.

## 1.2 COMMON FEATURES OF TORTS

Fault
<ul style="list-style-type: none"> <li>▪ Most torts are fault-based, which means it must be possible to show some fault on part of respondent <ul style="list-style-type: none"> <li>- Intention or careless</li> </ul> </li> <li>▪ Fault-based liability. Liability where fault is not required (strict liability) is rare</li> <li>▪ But prior to the 19<sup>th</sup> century, fault played only a modest role in English and Australian torts law <ul style="list-style-type: none"> <li>- Fleming: the law “displayed no marked disposition to hitch liability to any particular frame of mind of the actor who had caused the harm”</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>▪ Why did the change to a fault-based system occur? <ol style="list-style-type: none"> <li>1. <u>Prevailing philosophical and political views (individualism)</u></li> </ol> </li> </ul>

<p>The notion of people should not be liable unless he/she has somehow of fault. Individuals can choose to avoid liability by being careful. Conversely, a system in which liability regardless fault advance the notion of autonomy because the person held liable cannot choose to not liable</p> <p>2. <i>The industrial revolution</i></p> <p>Markesinis and Deakin: in “human terms the result of the introduction of fault-based liability was appalling for the injured workers, who were indirectly called upon to subsidise production at the expense of life and limb</p>	
<b>Interest protected</b>	
Physical well-being Freedom of movement Psychological well-being A person’s interest that arise due to his/her ownership of land A person’s interests in their financial security A person’s interest in her reputation	the torts of battery, and negligence the tort of false imprisonment the torts of assault, and negligence the torts of trespass to land and private nuisance the torts of negligence and fraud the tort of defamation
<i>*There is no well-established tort of privacy in Australia</i>	
<b>Who is liable?</b>	
<ul style="list-style-type: none"> <li>▪ <b>Tortfeasor:</b> the person who committed the tort</li> </ul>	
<ul style="list-style-type: none"> <li>▪ <b>Vicarious liability:</b> another party is found liable for the harm caused by the tortfeasor               <ul style="list-style-type: none"> <li>- Most commonly incurred by employers as a result of torts committed by their employees</li> <li>- The central feature of vicarious liability is that it is strict and requires no fault on the part of the employer</li> <li>- The employee is the actual wrongdoer. The employer may take the all possible care in the selection, training and supervision of his workers. If the plaintiff can prove the tort committed by the employee, then the liability of carelessness may be imposed on the employer.</li> <li>- Argument in favour of vicarious on the part of an employer                   <ol style="list-style-type: none"> <li>1. Employer better placed than employee to bear the costs of liability</li> <li>2. Employer has ultimate control of his/her organisation</li> <li>3. Employer enjoys the primary benefit from the enterprise which causes the damage</li> </ol> </li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>▪ <b>Multiple Tortfeasors</b> <ol style="list-style-type: none"> <li>1. <b>Joint tortfeasors:</b> two or more people have jointly committed the same tortious conduct and hence have caused the same damage</li> <li>2. <b>Several tortfeasors:</b> separate and distinct tortious conduct is engaged in by different people, but it contributes to the same harm</li> </ol> </li> <li>- Where two or more people have, through their tortious activity, either severally or jointly, caused the same harm, each will be principle liable to pay the whole sum of damages flowing from the harm.</li> <li>- The P can choose to sue either or all the people responsible for the harm, and enforce his judgement against each for all or part of his loss as he chooses, although he cannot collect more than he has lost</li> </ul>	
<b>Remedies</b>	
<p>I. <b>Damages</b></p> <ul style="list-style-type: none"> <li>▪ Compensatory: put in position would have been had tort not occurred</li> <li>- Aggravated: circumstances aggravate injury</li> <li>▪ Nominal: to vindicate the claimant’s rights</li> <li>▪ Exemplary or punitive: to make an example of, or to punish, the wrongdoer</li> </ul> <p>II. <b>Injunctions:</b> Order D to do or cease to do something</p> <p>III. <b>Declarations:</b> Declare rights of the parties</p>	

## 1.3 AIMS OF TORT LAW

### I. *Compensation*

- Provision of compensation probably regarded as the primary function of law of torts – Damages are always compensatory. To determine whether the compensation is rewarded, in most cases the culpability of the defendant rather than the harm suffered by the plaintiff
- Problems with conception of torts as being concerned to provide compensation

- |   |
|---|
| - <b>Fault system means no compensation if</b> <ol style="list-style-type: none"><li>1. No one caused the injury – injured yourself (X)</li><li>2. Person who caused injury cannot be identified</li><li>3. Person who caused injury has no money</li></ol> |
| - <b>Inequality of bargaining power</b><br>Particularly when the plaintiff is suing the large company   |
| - <b>Financial inefficiency of system</b><br>The 85% of the operating costs of tort law system are provided from compensation   |

### II. *Loss Distribution*

- Loss distribution focuses not on the bare issue of compensation, but on who should bear the cost for harm caused in society
  - **Corrective Justice – Loss Shifting:** to shift the cost of harm to the person who caused the harm (a duty of pair)
  - **Distributive Justice – Loss Spreading:** to spread the loss among the community

### III. *Deterrence*

- The idea: an awareness of the financial sanctions to which an individual will be subject if he commits a tort will deter him from committing the tort in the first place

#### **Limitations as a means of deterrence**

- Effects of insurance  
damages are often paid by the insurance rather than the tortfeasor himself. If the defendant is in the business of applying goods or services to public, the cost of the increase insurance may be passed on to the public. For those who actually pay the increase insurance would be consumer and not tortfeasor. The perception of insurance may make people positively less costs and therefore more likely to commit tortious activities.
- Effects of lack of money  
If the tortfeasor is too poor to pay award of damages, then the prospect of such award is unlikely to deter him commit tortious activities
- Fails to provide specific guidance  
Negligence: how someone should be careful?

#### **Problems with idea of deterrence**

- Defensive medicine  
The availability of tortious liability gives rise to the defensive medicine whereby the doctors concern liability of negligence plays a significant role in the practice of medicine
- Chilling effect on technical innovation

### IV. *Appeasement/Vengeance*

- To appease those who are dissatisfied by the outcome of a criminal process
- E.g. the injured party or the representative decided to bring an action in tort because he/she feels the justice has not been done. See *Halford v Brookes*

## 1.4 ALTERNATIVE COMPENSATION SCHEMES

### ▪ **Transport Accidents Act 1986 (Vic)**

#### **When will a person be entitled to compensation?**

- A person will be entitled to compensation in accordance with the Act, if, amongst other things, the person is injured as a result of a *transport accident* (s.35)
- “transport accident” means an “accident directly caused by the driving of a motor car or motor vehicle, a railway train or a tram” (s.3)

#### **Who will be entitled to compensation?**

- A person who injured may receive compensation under the Act (s.35)
- If a person dies as a result of transport accident, her dependents are entitled to compensation (s.35(2))

#### **In respect of what will compensation be provided?**

- Reduced earnings (ss.44 and 45)  
An individual harmed by transport accident whom before injury earned the salary and is now completely unable to work will be entitled to a weekly payment to compensate those lost earning. If the individual is able to work but earn less now should be paid a portion of difference between what she earns before the injury and what she now earns.
- Medical expenses (s.44)  
Including the charge of ambulance and the hospital care.

#### **The availability of the law of tort**

- An action in tort can still be brought in respect of injuries suffered in a transport accident if the injury may be regarded as a “serious injury” (s.93)
- A serious injury means (s.93)
  - (a) Serious long-term impairment or loss of a body function; or
  - (b) Permanent serious disfigurement; or
  - (c) Severe long-term mental or severe long-term behavioural disturbance or disorder; or
  - (d) Loss of a foetus

### ▪ **Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)**

#### **When will a person be entitled to compensation?**

- If she has suffered an “injury arising out of or in the course of any employment” (s.39)

#### **Who will be entitled to compensation?**

- The worker who is injured;
- If the worker is killed as a result of the injury any dependents are entitled to compensation also (s.82)

#### **In respect of what will compensation be provided?**

- Earnings (s.160)  
The worker’s earning has been diminished; the worker may receive the compensation in a form of weekly payment. The amount that worker will receive depend upon whether he is entirely incapacitated or only partially incapacitated.
- Medical expenses (s.44)  
Including the charge of ambulance, the hospital care and rehabilitation

#### **The availability of the law of tort**

- An action can still be brought in tort if the injury is a serious injury (s.327) (the definition of “serious injury” is the same as in the *TAC Act*)

### ▪ **Limitation of statutory no-fault compensation schemes**

- ⇒ Anomalous results
- ⇒ Pre-occupation with injuries that are caused  
But of the National Disability Insurance Scheme