

Introduction to the Law of Torts

1.1.1 What is tort law?

At its core, a tort is a civil wrong. Deriving from the Latin word *tortum* ('wrong'), a tort is an act or omission that infringes upon the rights of individuals in society, allowing the aggrieved individual to seek a legal remedy. It is difficult to provide a comprehensive definition of a tort or the types of actions that lie

| Characteristic | Tort | Contract |
|--------------------|--|---|
| Obligations | Obligations imposed by the law based on reasonable standards of conduct | Promises made by parties either expressly or implicitly |
| Remedies | Damages | Damages and equitable remedies such as an injunction and specific performance |
| Purpose of damages | To restore the plaintiff to the position they would have been in if the wrong had not occurred | To place the plaintiff in a position they would have been in if the contract had been performed |

- A person who occasions a wrong by infringing the legal rights on another is known as 'tortfeasor' who becomes a defendant in action brought by a plaintiff.
- The two main sources of tort law are common law and statute

Causes of action in tort

| | |
|---------------------------|---|
| Intentional torts | Intentional infringement- hitting someone intentionally is a violation of bodily integrity of another; battery Failure to take care, negligent driving, can amount to battery Individual torts can be categorised as intentional- trespass to the person (assault, battery, false imprisonment). Trespass to chattels (trespass to good, conversion and detinue |
| Negligence | Does not require an intentional act by tortfeasor. Plaintiff must prove defendant owed duty of care |
| Torts of strict liability | The law imposes legal responsibility regardless of the tortfeasor's intention or negligence. Liability such as the vicarious liability of an employer for the employee actions. Defamation etc. |

Purpose of tort law: The main purpose of tort law is to provide a remedy to those whose legal rights have been infringed

The remedy is damages- aggravated damages and **exemplary damages**.

Tort Law can be non-monetary- *Janney vs Stellar Works Pty LTD (2017)* court awarded and injunction for a tower near residents.

| Characteristic | Tort | Crime |
|----------------------------|--|--|
| Parties | Plaintiff v defendant (the 'v' is said as 'and') | Prosecution v defendant (the 'v' is said as 'against') |
| Party taking action | Individual or entity | Police/Director of Public Prosecutions (DPP) |
| Type of wrong | Private wrong against individual or entity | Public wrong against the state or society |
| Purpose | To restore or compensate | To protect, deter, punish and rehabilitate |
| Outcome | Damages or injunction | Criminal punishment (fines, imprisonment) |
| Burden of proof | On the plaintiff | On the police |
| Standard of proof | On the balance of probabilities | Beyond reasonable doubt |

Main differences between a TORT and a CRIME

- In both **tort** and **contract** the purpose of damages is to return the plaintiff to the position they would if not for defendant's wrongdoing- a contract looks forward to non-performance- in tort damages looks back to the position the plaintiff would be in.
- Chappel v Hart the doctor performed negligently , but Gummow J acknowledged there was more in tort law to recover

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Negligence:

Topic 2: Sources of torts law

1. Common Law – case precedents.

- Cases create a body of legal principles that future courts follow, known as (*Stare decisis*) - Where facts are sufficiently similar courts must follow ***ratio decidendi*** of higher courts.
- Persuasive precedents & use of principles & policy in judicial decisions allows scope within the doctrine of precedent for the law to change.

2. Statute law – created by parliament. Superior to Common Law yet Common Law often defines statutory provisions.

Topic 2 a) From Contracts to Negligence

- Negligent acts causing injury to a contractual party: “A *bundle of frayed ends*”
- E.g., manufacturers owe a Duty of Care (DOC) to consumers with whom they contract based on ***Privity of Contract Rule!*** - *Tweddle v Atkinson* (1861)
- No DOC for 3rd party injuries:
 - **Fear of opening ‘floodgates’ of litigation**
 - *Langridge v Levy 2 Meeson & Welsby (1837)* - Father purchased a gun for his son, it was defective and injured the son when shot - Father could sue for fraud – BUT NOT for injury of son.



Winterbottom v Wright (1842)

Court considers expanding to a law of negligence but...Fear of ‘floods’ of litigation & absurdity remains too strong!



‘There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.’

- Lord Abinger CB

3rd party contract was just too far a stretch of privity of contract- if today your brakes were not fixed by a mechanic, you’d have negligence

George v Skivington (1869)

Extends duty to those whom the seller knew would be using the product.
Manufacture fraudulently declared his product safe when it was not.

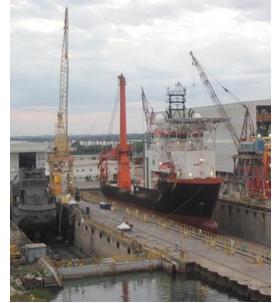


- Did not use the word negligence “fraudulent” to declare the product safe- this was the first time a 3rd party (here the wife) could seek remediation

Heaven v Pender (1883)

Heaven is injured while painting ship at Pender's defective dock. No contractual relations with dock owner Pender. **Did he have a duty of care even if he did own the dock because the rope broke?**

Whenever one person is, by circumstances placed in such a position... whereby he may cause danger of injury [to another]... a duty arises to use ordinary care and skill to avoid such danger'



Heaven v Pender (1883) 11 QBD 503, at 509

Closing the Gap...

To whom is a duty owed? Pre 1932 :

Liability depended on relationships between parties fitting within established categories:

- Physicians
- Lawyers
- Common carriers
- Employers
- Occupiers of land
- Manufacturers...

Donoghue v Stevenson (1932) AC 562

Ms Donoghue's friend bought her a bottle of ginger ale that contained a decomposed snail- She became ill



Did the manufacturer owe Ms Donoghue a duty of care?

- No action in contract due to privity
- Not one of recognised relationship categories

Neighbour Principle: Reasonable Foreseeability Test

You must take **reasonable care** to avoid acts or omissions which you can **reasonably foresee** would be **likely** to injure your **neighbour**.

Who then in law is my neighbour?

Those 'so closely and directly affected by my act that I ought reasonably to have them in contemplation' when I direct my mind to such acts or omissions.

-Lord Atkin in *Donoghue v Stevenson (1932) AC 562, at 580*

House of Lords Strikes a Balance

Compensation for unintentional injury without expanding the law to create an absurdity.

...a manufacturer of products, who sells those products (shows he intends them to reach the ultimate consumer) in the form in which they left him, with no reasonable possibility of intermediate examination, & knowing that an absence of reasonable care in the preparation... of such products could harm, owes a duty to the ultimate consumer to take reasonable care.

Topic 2 b) Protecting Citizens; 'Rubber Band' Theory...

Theories of Tort Law

 **Corrective Theory** – negligent person must repair injured person's loss through compensation

 **Distributive Theory** – addresses justice across a community based on a criterion of merit.

 As **Economic or 'Rubber Band' Theory** – society & technology expand & develop → our interests & need to protect them expands



Social Justice & Protecting Vulnerable People

As society & technology expand & develop → our interests & need to protect them expands

Interests not yet contemplated by the law, can be initially unprotected → leaves citizens vulnerable.

Courts aim to protect our interest by expanding the 'rubber band' around them - but with care not to snap the rubber band & create an absurdity.

Government can introduce legislation to curb courts developing law beyond economic benefits of society.

Rubber band theory in action

Justices can make *suggestive comments in their decisions* to the legislature to regulate unprotected interests that should be protected

Torts: Negligence- Duty of Care & Scope of Duty

Topic 1. Meaning of Negligence

Topic 2. Sources of negligence law

a) Statute – *Civil Liability Legislation*

b) Common law

Topic 3. Duty of Care (DOC) –

i) Neighbour Principle (reviewed)

ii) Applying Neighbour Principle (categories)

iii) Novel Circumstances

Landmark Cases

- Donoghue v Stevenson [1932] AC 562
- Chapman v Hearse (1961) 106 CLR 112
- Perre v Apand Pty Ltd (1999) 198 CLR 180,
- Modbury Triangle Shopping Centre Pty Ltd (2000) 205 CLR 254;
- Brodie v Singleton Shire Council (2001) 206 CLR 512;
- Sullivan v Moody (2001) 207 CLR 562;
- Graham Barclay Oysters Ltd v Ryan (2002) 211 CLR 540

Tame v New South Wales (2002) 211 CLR 317 In this negligence law case, the court found that conduct which causes pure mental harm is only reasonably foreseeable if it would have the harmful effect on a person of normal mental fortitude

Jaensch v Coffey (1984) 155 CLR 549 test of Proximity was established: that is, a requirement was established that for mental harm, the cause of the harm must be sufficiently proximate to the person harmed.

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269 His children were dependent on him and proximate by relationship.

Graham Barclay Oysters Ltd v Ryan (2002) 211 CLR 540 In this negligence case, the court found that a duty of care cannot result in a duty to do things that are not reasonably practicable. Ryan failed in his claims

Topic 1: What is Negligence?

You need to show damage is suffered- most tried type of tort law.

3 Key elements:

1. Defendant (D) owed Plaintiff (P) a DOC;
2. Defendant breached that duty;
3. The breach caused the P's harm (damage)

We all owe a duty not to inflict harm by failing to consider others and take due care.

Any form of human activity & Different types of harm
→ most common tort claim



Topic 2: Sources of Negligence Law

Statute Law: *Civil liability legislation*, based on the Ipp Report recommendations, modifies common law negligence. It aims to limit the scope of potential liability and affects specific categories like professionals and public authorities.

Common Law Cases establishes precedents for DOC

Interaction

In case of inconsistencies between statute and common law, statute prevails!

a) Statute Law: Civil Liability Legislation

- Civil Liability Acts Modify Common Law Negligence
- Based on Ipp Report recommendations - (variations in jurisdictions) (Review by Justice David Ipp, after big insurance claims after Sept 11 2008, HIH went down etc, doctors could not pay premiums so Howard stepped in to prop up HIH)
- Limit scope of potential liability.
 - Interestingly s5 limits tobacco smoking related harm!



Civil Liability Act 2003

Current as at 1 July 2016

a) Statute Law: Key Provisions CLA (Qld) Cont'd