

## NOTES ON TORTS

### What is a tort?

A broad definition:

- A tort is an injury or a wrong, which the law will redress.
- The distinction between negligence, as a tort in itself, with its own elements, and carelessness as an element of particular torts.

### Examples of different torts:

The tort of defamation, the tort of fraud, the tort of false imprisonment and the tort of negligence

### Comparison with other areas of the law:

Refer to my notes at the end.

### What are common aspects of various torts?

- Fault:
  - Most torts are fault-based *cf* strict-liability torts
  - But prior to the 19<sup>th</sup> century, fault played only a modest role in English and Australian torts law.
    - Fleming: the law “displayed no marked disposition to hitch liability to any particular frame of mind of the actor who had caused the harm”.
  - Prevailing philosophical and political views
  - The industrial revolution
    - 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”
- The question of who is liable:
  - Vicarious liability – another party is found liable for the harm caused by the tortfeasor
  - Arguments in favour of vicarious liability on the part of employer
    - Employer better placed than employee to bear the costs of liability.
    - Employer has ultimate control of his organisation.
    - Employer enjoys the primary benefit from the enterprise which causes the damage.
  - Concurrent liability
- Interests protected:
  - Physical integrity
  - Psychological well-being
  - Freedom of movement
  - Freedom of speech and freedom of belief
  - Interest in property or goods
  - but *cf* privacy
- Redress:
  - Damages
    - Compensatory damages
    - Lord Blackburn, where, in tort,
      - “an injury is to be compensated by damages, in settling the sum of money to be give for reparation of damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would

have been in if he had not sustained the wrong for which he is now getting his compensation”.

- Aggravated damages
- Nominal damages
- Exemplary damages

- o Injunction and declaration

### What is the purpose of the law of torts?

- Appeasement / Vengeance
  - o *Halford v Brookes*
    - “I have no doubt that Mrs Halford is not in the slightest interested in the financial aspect of her claim. The progress of this trial...[makes] it plain that her basic motive is to target and expose the first defendant who she firmly believes is the primary, and perhaps only, author of her daughter’s death”
- Deterrence
  - o Matters undermining torts’ deterrent force
    - Insurance
    - Lack of money
    - Lack of specific guidance
  - o Problems with deterrence
    - Defensive medicine
    - Chilling effect on technical innovation
- Compensation
  - o Limitations re compensation
    - Because torts fault based cannot provide compensation if:
      - no-one caused the injury
      - the person who caused the injury cannot be identified
      - that person has no money
  - o Further problems re torts and compensation:
    - Inequality of bargaining power
    - Financial inefficiency
  - o Alternate schemes
    - *Transport Accidents Act 1986*
      - 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 incident “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 is injured may receive compensation under the Act (s 35)
        - If a person dies as a result of a transport accident, her dependents (s 35(2)).
      - In respect of what will compensation be provided?
        - Reduced earnings (ss 44 and 45)
        - Medical expenses (s 44)
      - 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” (s93)
- 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.
- *Accident Compensation Act 1985*
  - When will a person be entitled to compensation?
    - If he has suffered an “injury arising *out of or in the course of* any employment”, and (in some cases)
    - “the worker’s employment was a significant contributing factor” with respect to the suffering of the injury (s 82).
    - See also ss 83 and 86.
  - Who will be entitled to compensation?
    - The worker who is injured;
    - if the worker is killed as a result of the injury any dependents will be entitled to compensation also (s 82).
  - In respect of what will compensation be provided?
    - *Earnings* (s 93)
    - *Medical expenses* (s 99)
    - *Maims* (s 98)
  - The availability of the law of tort
    - An action can still be brought in tort
    - If the injury is a serious injury and
      - Permanent disfiguring or permanent mental disorder or loss of foetus. more than 30%.
      - Suffered a serious injury go to the court to be treated as a serious injury.
    - The injury arose on or after 20 October 1999.
- *Victims of Crime Assistance Act 1996*
  - When will a person be entitled to compensation?
    - if he is the primary or secondary victim of an *act of violence* (ss 7 and 10).
    - An act of violence is a criminal act, or a series of related criminal acts, that has directly resulted in injury or death to one or more persons (s 3).
    - See ss 7 and 9 for when a person will be a primary victim of violence and when he will be a secondary victim
      - Able to seek compensation, or try to rescue somebody on reasonable grounds that they are a primary victim.
      - Harmed by directly witnessing. A secondary victim.
  - Who will be entitled to compensation?
    - Primary victim of a crime, or secondary victim or a related victim (s 11)