



LAW OF TORTS Part 1

Introduction to Torts

Negligent acts causing damage

Ref: CACL chapter 14 and Moodle

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Learning outcomes

- We change direction for the next two weeks. We have explored your rights and obligations under **contract law** (mainly common law) and recently you have been exposed to your rights and obligations under **consumer protection law** (mainly statute law)
- Now we examine your rights and obligations under **tort law** (mainly common law) – at the end of the two weeks you should be aware of:
 - **What a tort is;** and
 - **The extent of your responsibility in tort** as a manufacturer, property owner, auditor, accountant, engineer, doctor, car driver, teacher etc etc **not to cause harm to others**

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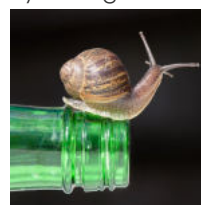
- **What is a tort?** (CACL 14.10)
 - A tort is a Latin word meaning 'twisted' or 'wrong'. Thus **tort law** is concerned with **legally binding obligations** that arise **when one person's wrongful conduct infringes another person's rights and loss or damage is caused**. These are **rights that exist because the law** – courts or parliaments – **has said they exist** – not because of agreement between the parties.
- **Examples of torts** – ask **what is the legal right** that is infringed in each example:
 - **Trespass to land** – the right?...**this is the right to enjoy your land or goods without interference**
 - **Assault** – the right?...**this is the right to....**
 - **False imprisonment** (eg unlawfully preventing someone from leaving a place) – **this is the right to....**
 - **Nuisance** (eg loud noise from your neighbour's chain saw at 6.00am on Sunday) – **this is the right to....**
 - **Defamation** – **this is the right to....**
 - **Negligence** – **this is the right...**
- **Note** that the **conduct** must be **wrongful**
 - just because X has suffered loss or damage because of the conduct of Y does **not** mean X can seek compensation (eg A's corner store has been put out of business by B's supermarket; the operation by Dr C is unsuccessful and D dies; E's audit damages F's business; G's news report damages H's reputation; I's driving causes J's injury; K's bridge collapses on L; M's goods poison N....etc....)
- **Compare tort and crime** (CACL 14.20)
 - Can be **same acts** – eg assault – but different parties (private, non-state), different procedures (civil procedures), different consequences (damages not criminal penalties)
- **Compare tort and contract** (CACL 14.30)
 - Both are civil law/private actions but **tort law** is about **rights and duties imposed by law** – **not** based on **agreements**.

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The tort of negligence

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- **Scope of the tort of negligence** – see CACL 14.40
 - In its **modern form** the **tort of negligence** began on 28 August 1928 in a café in Paisley, Scotland. **Read CACL 14.60 carefully**
- Man'er → Retailer → Friend → May Donoghue
- Who could May Donoghue sue?
 - The café owner who sold it to her friend?
 - Her friend who bought her the ginger beer?
 - The manufacturer who made it?
 - **Policy issue** – when someone is injured, **who should bear the loss?** Injured person? Person who caused injury? The state? What role does *fault* play? **Tort of negligence is about finding fault (ie 'negligence')** in the person who caused loss
 - It does not have to be that way – no-fault liability applies at work (Workcover) and road accident (Transport accident cover). The question is only whether you were injured – **NOT** whether the employer/other driver was at fault



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- **Common law and statute** (CACL 14.40-14.50)
 - Tort of **negligence** was largely a **common law** creation
 - Common law principles reformed by **statute in 2002** – **Victoria – Wrongs Act. NSW – Civil Liability Act**
 - Effect of statute has been to *limit* the scope of potential liability for negligence by:
 - Modifying common law principles (duty/breach/damage)
 - Restricting plaintiff's right to recover in particular categories – eg professionals/volunteers/public authorities
 - Placing cap on general or non-economic damages and for loss of future earnings
 - **Despite statutory reforms, principles remain the same and plaintiffs still have to prove duty, breach and damage**

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Elements of Negligence:

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1. Does D owe a duty of care to P?

- Reasonable foreseeability
- Proximity
- Broader policy considerations when a new situation arises – “salient features”

2. If so, has D breached that duty of care?

- Was it a foreseeable risk?
- If yes, how would a reasonable person in D's position have responded

3. If so, has P suffered damage

- Was damage caused by the breach? ('but for' test)
- Is the damage too remote? (reasonably foreseeability' test)

4. Are there any defences?

- Contributory negligence
- Voluntary assumption of risk

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Establishing the existence of a duty of care

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- 1. the '**reasonable foreseeability of harm test**'
 - Atkin: '...avoid acts or omissions which you can reasonably foresee would be likely to injure...'); **and**
- 2. consider whether P belonged to the class of people that D should have regarded as being "at risk" of being injured or suffering loss:
 - Atkin: '...law limits D's legal duty to his 'neighbour' – those who are 'so closely and directly affected' by my act that D *should have* foreseen the consequences to the plaintiff.
- Why limit scope of the tort of negligence in this way?
 - If injury is not foreseeable **and** there is no neighbour test, liability is too broad...

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- This is not difficult when there is **physical damage**:
 - Manufacturers and consumers, drivers and passengers, doctors and patients, teachers and students (eg Donoghue v Stevenson)
- Where **precedents** establish that a duty of care exists:
 - Psychological damage (eg Jaensch v Coffee)
 - Pure economic loss caused by negligent misrepresentation (eg Hedley Byrne)
- where **no established category/unusual situation**, the court considers public policy ("**salient features**" test):
 - Pure economic loss: eg Perre v Apand-type situation

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The duty of care in specific situations (fig 14.3)

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1. Duty of care and acts causing physical harm

- **Donoghue v Stevenson** – see earlier.
- **Australian Safeway Stores v Zaluzna** (CACL 14.101) – see facts – reasonably foreseeable? Proximity?
- **Modbury v Anzil** (CACL 14.102) – see facts – reasonably foreseeable harm? Proximity?

2. Duty of care and acts causing mental harm

- **Jaensch v Coffey** (CACL 14.106) – see facts – reasonably foreseeable harm? Proximity? How did HCA limit the number of claimants who could sue for psychological harm?
- **Tame v NSW** (see earlier) – what is the public policy behind this decision? (see last para of extract)
- **Annetts v Australian Stations** (CACL p357) – reasonably foreseeable that the parents would suffer psychological damage when son died because of employer's negligence
- **3. Duty of care and liability for omissions**
 - See **general principle** – no duty to act BUT... (CACL 14.110)
 - ***Rogers v Whitaker (CACL 120)** – why was there a duty to warn in that case (a HCA "failure to warn" case? Also see ***Nagel v Rofnrest Is** (CACL 14.160) – public authorities and failure to warn.
 - **CAL v MAB** – why no duty on the publican to act?

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4. Negligent acts causing pure economic loss (CACL 14.180)

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- What is "pure economic loss"?
- What is the "indeterminacy problem"? See *Ultramares* (CACL 14.180)
- **Example: Perre v Apand** (CACL 14.185)
 - Facts: read carefully – they are **unusual** – see how the damage was caused
 - Issue: Did A owe P a duty of care in these **unusual** circumstances?
 - Decision: Duty of care owed. In these **unusual** circumstances – no precedent - court considered:
 - 1. Reasonably foreseeability? – yes
 - 2. Indeterminacy of liability issue? – not here
 - 3. Individual autonomy? – not a problem here
 - 4. Vulnerability to risk? – yes – compare **Johnson Tiles v Esso** (CACL 14.185 p362) and **Marsh v Baxter** (CACL 14.185, p362)
 - 5. Defendant's knowledge of the risk and its magnitude? – yes
- **5. Negligent statements causing pure economic loss (next week)**

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2. Breach of the Duty of Care (CACL 14.390)

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- Assume there is a duty of care – then comes the ‘negligence question’: has there been a **breach** of the duty of care?
- Most duty of care questions haven’t settled – now the legal action is around whether there has been a **breach** of the duty – ie whether the defendant accountant, manufacturer, engineer, builder etc has been **negligent**
- So what is **negligence**? **When has a breach of duty occurred?** **What is the standard of care** expected of someone who owes a duty of care?
 - Perfection? No
 - Reasonable behaviour? Yes. The question is:
 - **what would a reasonable person, equipped with the same set of skills, have have done, in these circumstances, at that time?**
 - Apply to the manufacturer/engineer/auditor/accountant/pharmacist/builder/driver etc who has injured a person to whom it owed a duty of care?
- **Two step approach**
 - **Statutory reforms: Wrongs Act (Vic) s48(1)(2) (CACL 14.420)** A person is **not** negligent in failing to take precautions against a risk of harm unless:
 1. **The risk of injury was reasonably foreseeable: s48(1).** Under s48(1)(c) D will only be in breach of duty for a failure to respond if the risk of harm is **“not insignificant”**
 2. **If the risk was reasonable foreseeable, the Act asks how would a reasonable person have responded? s48(2).** The section sets out the things to consider (see next slide)

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1. The probability of the occurrence of risk or injury.

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When a risk is small, a reasonable person can ignore it. What a reasonable person must not do is create a risk that is substantial.

- **Bolton v. Stone (CACL 14.426)**
 - Read facts carefully
 - Interesting case that could have threatened the future of cricket!
 - Duty of care? Yes
 - Breach – negligence? No. Why?
- **RTA v Dederer (CACL 14.428)**
 - Read facts carefully – very interesting case
 - Boy leapt off bridge into river – struck submerged sandbar – quadriplegic. Sued Roads Authority
 - Duty of care? Yes
 - Breach - negligence? No. Why?
 - See how court applied the Wyong factors

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2. The gravity of the harm if an injury occurs

- **The more serious the risk the greater need for precautions.** This has relevance where:
 - (a) the activity is dangerous
 - (b) P has a particular vulnerability
- **Brakoulis v Karunaharan (CACI 14.435)**
 - Read facts carefully
 - Doctor's liability for heart attack of patient
 - Duty of care? Yes
 - Breach – negligence? No
 - see extract on standard of care expected of professionals – and note **peer professional opinion** test
- **Paris v. Stepney Borough Council (CACI 14.437)**
 - Read facts carefully
 - Employer's liability for one-eyed worker
 - Duty of care? Yes
 - Breach – negligence? Yes
 - See significance of only one eye – if P has two eyes different standard?

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3. the burden of eliminating the risk – the expense, difficulty & inconvenience

Denning LJ “One must balance the risks against the measures necessary to eliminate the risk” (CACI 14.438)

- **Graham Barclays Oysters Pty Ltd v Ryan (CAC 14.438)**
- **Woods v Multi-Sport Holding Pty Ltd (CACI 14.440)**
- **Wrongs Act s49 restates three common law principles relating to the reasonableness of D's response:**
 - Burden of taking precautions to avoid risk of harm includes the burden of taking precautions to *avoid* similar risks (do it National Park A you have to do it National Park B-Z)
 - The fact that the risk could have been avoided by doing something a different was does not of itself give rise to liability (hindsight is always 20/20)
 - The fact that subsequent action was taken does *not* constitute an admission of liability

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4. Utility of the defendant's conduct

- Did the conduct have such high social value that we forgive the breach (eg ambo driving at speed or drone attacks on terrorist targets - if conducted on Aust soil?)
- **Watt v Hertfordshire CC (CA 14.460)**
 - The claimant was a fireman. A woman had been involved in a traffic accident and was trapped underneath a truck. This was 200-300 yards away from the fire station. The fire services were called to release the woman. They needed to transport a heavy jack to the scene of the accident. The jack could not go on the fire engine and the normal vehicle for carrying the jack was not available. The fire chief ordered the claimant and other firemen to lift the jack on to the back of a truck. There was no means for securing the jack on the truck and the firemen were instructed to hold it on the short journey. In the event the truck braked and the jack fell onto the claimant's leg causing severe injuries.

Held: There was no breach of duty. The emergency of the situation and utility of the defendant's conduct in saving a life outweighed the need to take precautions.

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3. Damage – Causation and Remoteness

- There are two aspects: **causation** and **remoteness**:
 - The breach of duty must *cause* the loss
 - The loss must not be too *remote* from the breach – ie must be reasonably foreseeable

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■ Causation

- P must show that **'but for'** the breach, the loss or damage that would not have occurred - **"factual causation"** - a **"common sense" test is applied**. The Wrongs Act says the same thing but in different words:
 - (a) the negligence was a **"necessary condition"** of occurrence of the harm: s51(1)(a) (factual causation) **and**
 - (b) that it is appropriate for the scope of the liability to extend to the harm: s51(1)(b) (scope of liability)
- Usually causation not an issue where P suffers physical injury but see:
 - **Strong v Woolworths (CA 14.508)**
 - HCA 'the main question is...plaintiff's loss'.
 - **Tabet v Gett (CA 14.509A)**
 - Wrong medical diagnosis. P suffers irreversible brain damage. Issue: Did the wrongful diagnosis **cause** the brain damage?
 - Decision: P failed – even if the doctor had been negligent in not ordering a CT scan earlier, there was **no clear causal link** between that omission and her brain damage. It may have occurred anyway.

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■ Remoteness of damage

- **Policy question:** to what extent should a defendant be made responsible for all the loss **'caused by'** the breach?
- **Answer at common law and statute** (Wrongs Act s51(1) (b) is that a defendant should only be responsible for damage that is **reasonably foreseeable**
 - **Wagon Mound (No 1) (CA 14.520)**
 - **Decision** – "a man must be considered to be responsible for the probable consequences of his/her act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of conduct". What about Wagonmound (No 2)? (CA 14.530)
 - **Rowe v McCartney (CA 14.540)**
 - Note facts carefully
 - Is the damage reasonably foreseeable?

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4. Defences to negligence claims

- **Contributory negligence** (CACL 14.560)
 - D's defence – P failed to take reasonable care of his/her own safety.
 - Damages that are assessed will be reduced to reflect the defendant's own contribution to the damage. (Wrongs Act ss62-63)
- **Volenti non fit injuria** (CACL 14.570)
 - A person cannot complain of damage which results from a risk which was accepted (Wrongs Act 54)
 - Complete defence
 - Eg AFL footballers who suffer concussion and later are brain damaged – *volenti* a probable defence. (Probably no breach not to provide helmets)