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# INDEX

# *The Law of Torts*

A tort is a civil wrong for which the innocent party is entitled to claim damages - money. A tort is an old French word meaning a wrong. Australian law is derived from English common law and knowledge of English history is essential for an understanding of this subject.

There is today a distinction between a tort and a crime. A tot is where an individual suffers a wrong or injury (such as personal injuries from an accident) the courts may assist that person – the plaintiff - to obtain redress or compensation. A crime is a wrong committed against the community (robbery or murder) and the courts will determine a proper punishment for that the guilty person – that is the criminal law. Criminal law is public law, tort law is private law.

A person who has by negligence caused harm to another person has committed a tort. The injured party (the plaintiff) may sue for compensation or damages. A person who commits murder is prosecuted by the community and is punished for that crime.

History

Australian law is derived from the English common law. The common law developed the law of tort over hundreds of years and the law of England was first introduced into Australia on the 26th January 1788 when Governor Arthur Phillip established the colony of New South Wales at Sydney Cove.

Examples of torts include:-

- Defamation
- Negligence
- Nuisance
- Trespass to goods
- Trespass to land
- Trespass to the person such as assault, battery and false imprisonment

We will now examine two of these torts in detail.

# Defamation

The tort of defamation is concerned with the protection of a person's reputation. It was originally divided into two parts, slander, which consisted of defaming someone orally, such as in a meeting. Libel was a written defamatory statement, as in newspapers and written reports. That distinction is no longer relevant.

A plaintiff who has suffered injury or loss due to a tort committed by the defendant will generally be seeking compensation by way of damages. Defamation is a tort. It is a communication (article, report, letter, news broadcast etc.), from one person to at least one other. It must be established that the communication lowers or harms the reputation of the plaintiff and that the publisher of that communication has no legal defence. The law of defamation claims to balance free speech with the right of an individual to enjoy a reputation free from unlawful attack.

For a defamation action to succeed, the person complaining of the defamation (the plaintiff) has to prove three things:

- That the communication has been published to a third person;
- That the communication identifies (or is about) the plaintiff; and
- That the communication is defamatory.
- There is no lawful excuse for making the defamatory statement

<u>The communication has been published to a third person</u> –

The statement must be published to persons other than the plaintiff. Publication can by via television, radio, newspapers, the Internet, pictures or cartoons. It may even be oral.

Case:

In *Pullman v Hill 1891*, the plaintiff must proved that the defamatory statement was published to some person. If the plaintiff is the only one to read the statement that is not publication and the tort of defamation is not made out. In this case publication occurred when an employee in an office opened a letter which contained a defamatory statement about the plaintiff.

<u>The communication identifies the plaintiff</u> -

Usually there will be little difficulty in proving that the communication referred to the plaintiff. Sometimes it will not be that clear cut; even fictional stories can be defamatory.

Case:

In *Hulton v Jones 1910* a fictitious story appeared in a newspaper about a married man by the name of Artemis Jones who was having an affair. The fictional character was a church warden living in a town called Peckham. Unfortunately for the publisher there was an actual Artemis Jones, who was a barrister. He did not live in Peckham, he was not a church warden but he was able to prove that several people thought that the fictional character was him. Accordingly the jury awarded him 1750 pounds in damages.
It may have helped that Mr Jones was a barrister and was very keen to enforce his rights. Over a century later would a court come to the same decision?

<u>The communication is defamatory</u> –

The key issue in a defamation action is damage to a person's reputation. The test of whether a communication is defamatory is: 'Does the communication lower/harm the plaintiff's personal or professional reputation, hold the plaintiff up to ridicule, or lead others to shun and avoid the plaintiff?' This is judged from the viewpoint of an "ordinary reasonable person in the community" and in light of contemporary standards. Contemporary standards are changing as society changes and adapts to different circumstances.

Where the defendant has made a defamatory statement such as the plaintiff is involved in crime or immoral behavior, there will be little difficulty in establishing the case. The difficulty arises where the communication can contain an innuendo which may or may not be defamatory.

There are three ways in which a defamatory imputation can arise in the communication:

- The natural and ordinary meaning of the words
- A false innuendo – A communication which insinuates a false suggestion innuendo
- A true innuendo – A communication which insinuates a true suggestion

Case:

In *Random House Pty Ltd v Abbott 1999* the defendant had published a statement indicating that two politicians had changed political parties after having sex with an unnamed female, who later married one of the politicians. The innuendo which was false was that each politician was prepared to abandon their political principles in exchange for sexual favours. The court awarded damages to the plaintiffs.

In *Morgan v Odhams Press 1971* the defendant – Odhams Press - published a story about a gang that had kidnapped a particular girl. The plaintiff – Morgon - sued for defamation on the basis that she was living with one of the gang members at about the time of the kidnapping and the innuendo was that she was part of the gang. The insinuation was that she was a criminal involved in this kidnapping. The defendant could

not prove she was and so the court awarded damages to the plaintiff. The media has to be extremely careful in identifying persons in their stories.

If the plaintiff establishes that the communication was defamatory the next step is to consider whether the publisher has a defense under the law.

The defenses include:

- Fair comment
- Truth/Justification
- Qualified privilege
- Other defences

Fair comment –

Fair comment on a matter of public interest is a defence. To take advantage of this defense, three things must be proved:

- The communication must, on the face of it, be comment – that is: an opinion, criticism, deduction, judgment, remark, observation or conclusion;
- The facts upon which the comment is based must be stated unless they are widely known. This is required so that the readers/viewers/listeners are able to form their own views on the facts. The comment must be clearly distinguishable from the facts upon which it is based
- The communication has to be on a matter of public interest.

The defence of fair comment is very relevant for reviewers and critics, but it can also be useful for satirists, comedians and other artists whose work incorporates an element of social commentary.

Case:

*Carleton v ABC 2002* An allegation of plagiarism and laziness were made against a well known journalist. A comparison was made between the article of the journalist and another - who had published first. The similarities between each article were identified and discussed on an ABC television program – Media Watch. The court examined both articles and found that the ABC was commenting fairly on the journalist's work. The defense of fair comment was upheld.

Truth/Justification -

If an imputation (accusation or assertion) is found to be defamatory, this defence requires the publisher to prove it to be true in substance or not materially different from the truth. This can be difficult as evidence admissible in a court is required. The courts have developed strict and sometimes complex rules of evidence. The defendant will need original documents and/or witnesses who are credible and willing to testify in court. Usually hearsay evidence will be excluded; hearsay evidence is a witness repeating

something he or she heard from someone else. A witness can give direct evidence, what they heard or saw. Hearsay evidence can be described as repeating gossip; someone told me something about another person.

In Queensland, Tasmania, ACT and NSW as well as proving that the information is true, the defendant has to prove that the publication was for the public benefit.

The court may find that the meaning of the published communication is different to that intended by the publisher. The defendant will then be required to prove the truth of an imputation that maybe was not intended, but which the plaintiff says arises.

The defendant must also prove the truth of all the defamatory imputations that are found to exist in the communication.

Qualified privilege –

The defence of 'qualified privilege' applies when the defendant has an interest or a legal, social or moral duty to communicate something to a person and that person has a corresponding interest or duty to receive the information.

Qualified privilege traditionally protects communications such as references given by employers or complaints to the police or other relevant authorities. The defence will fail if the plaintiff can show that the defendant was actually motivated by malice to make the communication. This defense was originally designed for one-to-one communications. It is less likely to be successful when the communication is published to a wider audience.

There are two important exceptions

- Firstly, if a person has been attacked publicly that person is entitled to defend themselves by making a public response.
- Secondly, the High Court has recognised (in the case Lange v ABC) a corresponding duty and interest between members of the Australian community in publishing and receiving information about government and political matters.

Other defences -

**Absolute privilege** applies to statements made in the course of parliamentary proceedings and statements made in the course of judicial proceedings.

Absolute privilege allows a complete defence if the statement is defamatory; if the statement is made in bad faith, maliciously or for an improper purpose. If a member of parliament, in parliament says a retired supreme court judge is engaged in child sex activities, the statement is privileged. Defamation proceedings would have been instituted if the parliamentarian had made that statement outside parliament.

On the other hand **qualified privilege** applies to statements made by members of the

public to police, to statements about the conduct of a magistrate to the attorney-general, references about prospective employees, all can be protected by qualified privilege. This privilege can be lost where the statement is made in bad faith, maliciously or for an improper purpose.

The High Court in *Theophanous v Herald and Weekly Time 1994* identified in the constitution an individual right of freedom of speech on constitutional and political matters. There is no written right to freedom of speech in the constitution. The High Court implied one. In 1997 in *Lange v ABC 1997* the High Court reconsidered this proposition and declared that the constitution did not create a defence to actions for defamation based on a right to freedom of speech contained within the Australian constitution. The law does not remain static and changes overtime, in Lange's case the High court took a more conservative view in the interpretation of the constitution to the more liberal view expressed by the court in Theophanous.

Australia's defamation laws have undergone extensive reform, with each state and territory parliament passing uniform legislation (with some minor variations amongst the states and territories). The new arrangement does three key things: It repeals previous legislation relating to defamation; it reinstates the common law of defamation in each state and territory and finally it specifies a set of common legislative defences.

Damages –

The principal remedy for defamation is damages. The NSW *Defamation Act 2005* now places a limit of $267,500 on the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings. Other states have similar legislation.

# Negligence

The tort of negligence is a legal action which can be brought by a person to whom the defendant (the wrongdoer) owed a duty of care. Liability arises where there is a duty to take care and where a breach of that duty causes damage.

The tort consists of three elements, all of which must be established by the plaintiff (the injured person) in order to be successful.

1. A duty of care. A duty to take reasonable care owed at the time of the act of negligence by the defendant to the plaintiff

2. A breach of that duty by the defendant. The defendant failed to confirm to the required standard of care

3. Damage to the plaintiff from the breach of the duty which is not too remote

Negligence is somewhat similar to carelessness. But not every careless act will result in liability. It is only those that satisfy these three elements.

1 The Duty of Care -

In the 18th and 19th centuries the common law recognised a duty of care in a number of limited relationships, such as innkeeper and guest, carrier and passenger, surgeon and patient, occupier of land and visitor. There had to exist some form of relationship between the plaintiff and the defendant. It was necessary to establish one of these categories before a claim could be made. These categories were slowly expanding as society developed, especially after the Industrial Revolution in the 1800s. If the plaintiff's case did not fall within one of the categories there was no remedy at law.

Then in the 1932 after the case of Donoghue v Stevenson, the law of negligence took off and has been expanding ever since.

Case: *Donoghue v Stevenson 1932 AC 562*

Mrs Donoghue – the plaintiff – and a female friend went to the Wellmeadow Café in Paisley, Scotland. The friend purchased a bottle of ginger-beer for the plaintiff – Mrs Donoghue - to drink as they sat at a table in the café. The bottle was sealed and opaque, making inspection of its contents impossible. Mrs Donoghue drank a glass of the ginger-beer and later as she was pouring another glass a decomposed snail fell from the bottle.

As a result of the snail in the ginger-beer bottle Mrs Donoghue claimed she suffered from gastroenteritis and nervous shock. She brought an action against the manufacturer of the ginger-beer Mr Stevenson for negligence.

The relationships in the case –

- Mr Stevenson – the manufacturer of the ginger-beer – sold ginger-beer to the shopkeeper of the Wellmeadow Café.
  This is a contract and remedies at law are available for a breach of the terms of the contract.

- The shopkeeper sold Mrs Donoghue's friend a bottle of ginger-beer.
  This is a contract.

- The friend made a gift of the ginger-beer to Mrs Donoghue
  There is no contract, so there are no remedies under the law of contract.

The case eventually came before the House of Lords in London, the highest court in Great Britain. The question for the court was could Mrs Donoghue bring an action for negligence against the manufacturer.

The House of Lords in a majority decision of 3:2 found that the manufacturer of products owes a duty of care in the preparation of those products to the ultimate consumer.

Lord Atkin one of the judges in the majority set out a general principle concerning liability for the tort of negligence.

*The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? Receives a restricted reply. You must take 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? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.*

The statement by Lord Atkin contains two tests. The foreseeability test and the proximity test. (Proximity means closeness or nearness) What are they?

Lord Atkin's "acts or omissions which you can reasonably foresee" test can be described as a duty to avoid acts or omissions which one can reasonably foresee are likely to cause injury to another.

Lord Atkin's "persons who are so closely and directly affected" is the proximity test. The plaintiff and the defendant have some level of closeness which arises from their relationship, either physical or some other relationship.

After this case negligence as a tort was clearly established. It is unlikely if Lord Atkin envisaged how this tort would develop and expand over the next 50 – 60 years. It did not develop into fixed rules for particular acts or omissions but as a fluid principle which must be applied to all manner of circumstances, conditions and problems. The law of negligence has to be fitted into the facts of a case coming before a court.

In *Donoghue v Stevenson* the manufacturer had intended that the drink should reach the consumer unopened and without being inspected, he should have foreseen injury to the plaintiff if he did not take care to insure that harmful objects did not find their way into the bottles; therefore the manufacturer owed Mrs Donoghue a duty of care.

Civil Liability Act 2002 (NSW)

The parliaments in Australia have made changes to the law of negligence with the Civil Liability Acts. Where there is a risk of personal injury the Act has replaced the reasonable person test with a three-step test. Although the Act still uses the words reasonable and forseeability, the same words used by Lord Atkin.

Section 5B(1)

> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
> (b) the risk was not insignificant, and
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
> (a) the probability that the harm would occur if care were not taken,
> (b) the likely seriousness of the harm,
> (c) the burden of taking precautions to avoid the risk of harm,
> (d) the social utility of the activity that creates the risk of harm.

(Social utility means is the activity a worthwhile activity, does it serve some social purpose)

Breach of the Duty of Care – (Standard of Care)

If the defendant owes the plaintiff a duty of care then the next question must be has the defendant breached that duty?

To determine a breach the court must consider the following factors.

1 The foreseeabity of the risk. The higher the risk the greater the efforts the defendant must make to avoid it.

2 The reasonableness of the defendant's actions, may include a number of factors, the cost and burden imposed by removing the risk, the public and social utility of the defendant's conduct

**SUMMARY:**

**WAS THE RISK OF INJURY TO THE PLAINTIFF REASONABLY FORESEEABLE**
**IF IT WAS, WAS THE DEFENDANT'S ACTIONS OR RESPONSES REASONABLE IN THE CIRCUMSTANCES?**
**DID THE DEFENDANT MEET THE REQUIRED STANDARD OF CARE**

Therefore if the defendant failed to meet the required standard of care, then a breach of that standard will be established.

There is no strict formula which can be used to determine whether a defendant is negligent or not. The results of each case do not make binding precedents; each case must be looked at separately on its own facts. Therefore it is possible for two similar cases to have different results.

The court may regard a small risk of harm as reasonably foreseeable by the defendant.

*Chapman v Hearse (1961) 106 CLR 112*

The defendant Chapman negligently collided with another vehicle from behind. As a result of that collision the door on Chapman's vehicle flew open and he was flung onto the road, where he lay unconscious. A short time later Dr. Cherry drove his car from the nearby golf course. He stopped his car and went to Chapman's assistance. The weather conditions were dark and wet and visibility was poor. While rendering medical assistance to Chapman, Dr. Cherry was hit and killed by a vehicle driven by Hearse.

At the trial Hearse was found to be negligent in the control and management of his vehicle. Chapman was also liable because it was his negligence which caused the accident in the first place. He had brought about the situation by his negligent driving in colliding with the rear of another vehicle - the first collision.

Chapman appealed to the High Court on the grounds that he owed no duty of care to Dr. Chapman because the events were not reasonably foreseeable. (Chapman runs into a car, is thrown onto the road, a passerby comes to his aid and is killed by a car traveling on the road.)

The High Court said what is important to consider is whether a reasonable man might foresee, as the consequence of such a collision, the attendance on the roadway, at some risk to themselves, of persons fulfilling a moral and social duty to render aid to those incapacitated or otherwise injured. Dr. Cherry had a moral obligation to help and stopped his car to do so. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

Chapman's negligence was regarded as a cause of Dr. Cherry's death and was within the realm of reasonable foreseeability. The Court dismissed the appeal.

Sometimes the court will consider the risk, while it may be foreseeable, as deemed so small that it does not constitute a breach of the duty of care.

*Bolton v Stone [1951] AC 850*

Miss Stone, the plaintiff, was injured by a cricket ball while standing on the street outside her house. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground. Cricket matches had been regularly played on the ground, since about 1864. The cricket field, at the point at which the ball left it, was protected by a fence 2.1 metres high but the upward slope of the ground was such that the top of the fence was some 5.2 metres above the cricket pitch. The distance from the striker of the cricket ball to the fence was about 71.3 metres and to the place where the Plaintiff was hit, just under 91.5 metres. The court found that the hit was exceptional to anything previously seen on the ground and that it was very rare indeed that a ball was hit over the fence during a match.

The House of Lords held that the defendant was not liable. The risk of injury may have been foreseeable. On rare occasions a ball was hit out of the ground and it was foreseeable or a conceivable possibility that if it was it may injure some person outside the ground. The plaintiff was not successful because of the small or slight risk of injury, the defendant was justified in taking no steps to prevent it. The plaintiff received no compensation for her injuries.

In order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused. It is not enough that the event should be reasonably foreseeable; but what is also required is a reasonable person would consider it likely. The remote possibility of injury occurring was not enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been taken.

**Review**: If the cricket club had been found liable they would then have had two choices, stop playing cricket or raise the height of the fence. If the same thing happened again, the Club may have been liable because they were now on notice that an injury had occurred. Raising the height of the fence would have been a sensible precaution after this incident. In modern cricket the ball is hit into the crowd on regular occasions, the spectators accept this as a possibility but do those that are passing by outside the ground?

A slight risk of harm may be regarded by the court as reasonably foreseeable.

*Wyong Shire Council v Shirt (1980) 146 CLR 40*

An accident occurred at Tuggerah Lakes in New South Wales in January 1967. Mr. Shirt (the plaintiff) was skiing in a circuit which was habitually used by water-skiers when he fell and struck his head on the bed of the lake thereby suffering quadriplegic paralysis. Mr. Shirt claimed that, being an inexperienced skier, he wanted deep water in which to ski, and that he believed that the part of the lake in which he fell satisfied that description. The basis for his belief was his interpretation of a sign projecting above the water in the vicinity of his fall which bore the words "DEEP WATER". The sign faced the shoreline of the lake, and Mr Shirt explained that he understood it to mean that all the water beyond and beside the sign was deep water. He believed it was safe to ski there. He made a tragic mistake because the sign was erected at the edge of a channel to warn swimmers of its existence. There was shallow water on either side of the channel.

The court found that a reasonable man may have concluded that the sign was ambiguous and that it could be read as an indication that there was a continuous zone of deep water around the sign. That same reasonable man may have concluded that a water-skier, so reading the sign, might be induced to ski in that zone of water, mistakenly believing it to be deep. If he had known that there was only a channel and no continuous area of deep water he would conclude that it would be unsafe for an inexperienced water-skier.

The plaintiff was thrown into the shallow water near the sign at a high speed. His head struck the bed of the lake and he suffered his serious injury.

The council was held liable for the injury to Mr. Shirt.

Sometimes even though the injury to the plaintiff is reasonably foreseeable the plaintiff may still not recover.

*Romeo v Conservation Commission (NT) (1998) 192 CLR 431*

In 1987 Nadia Romeo (the plaintiff) fell 6½ metres from the top of the Dripstone Cliffs onto the Casuarina Beach in suburban Darwin. She was nearly 16 at the time. She suffered serious injuries and claimed damages against the Conservation Commission, the responsible authority managing the land.

There was a car park at the Dripstone Cliffs, the perimeter of which consisted of a low post and log fence. The low wooden post and log fence constructed as a perimeter of the car park was a short distance back from the edge of the cliff. Between this fence and the edge of the cliff there was an open space. Some low vegetation was growing along the cliff top. There was a gap in the vegetation and the plaintiff was found on the beach at a point below that gap. She was not able to remember the events leading up to her fall and had consumed alcohol on the night of her fall.

One of the considerations for the High Court was the cost and burden of the Conservation Commission fencing off the entire length of reserve, some 8 kilometres. The Court found that the accident was reasonably foreseeable but the majority of the court found there had been no breach of the duty of care, accordingly the plaintiff lost.

In this case the Commission owed visitors who lawfully entered land which it managed, a duty to take reasonable care to avoid foreseeable risks of injury to them. The duty is a duty to take *reasonable care*, not a duty to prevent any and all reasonable foreseeable injuries.

What is reasonable care must be judged in the light of *all* the circumstances. The court said in the case of a public authority or government department which manages public lands, it may or may not be able to control entry onto the land in the same way that a private owner may; it may have responsibility for an area of wilderness or a park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters must be taken into account to determine what the reasonable response of the authority should be.

Although in the end what is reasonable, is a question of fact to be judged in all the circumstances of the case. The majority of the judges decided there had been no breach of duty to the plaintiff in the commission failing to erect a fence which would have prevented the plaintiff from falling.

The plaintiff, Romeo was unsuccessful in her claim. She was denied compensation.

**Review:** It was not necessary to fence off the entire length of the coast just the area where the Commission had built a car park. The cost of construction would have been minimal. This argument was not accepted by the majority.

The greater the risk to the plaintiff is a relevant factor in determining if the duty of care was breached,

*Paris v Stepney Borough Council [1951] AC 367*

The plaintiff worked for the defendant Council in a garage. Previously he had lost one eye in an air-raid during World War 2. In 1947 he was dismantling a vehicle which had

been raised on to a ramp. In an endeavour to remove a rusty U-bolt he was striking it with a hammer when a piece of metal flew off and entered his good eye, blinding him.

The House of Lords found that the employer was negligent in not providing him with protective goggles. It found that where a workman is suffering, to the employer's knowledge, from a disability which, though it does not increase the risk of an accident's occurring while he is at work, does increase the risk of serious injury if an accident should happen to him; then the special risk of injury is a relevant consideration in determining the precautions which the employer should take in fulfilment of the duty of care which he owes to the workman.

This man had one eye only; a greater duty was owed to him than was owed to other persons because the consequences of an accident would be so much more serious.

The duty of an employer towards an employee is to take reasonable care for the employee's safety in all the circumstances. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances.

Over time there will be changes to the standard of care. Technological changes, changing attitudes to occupational health and safety mean that what was once acceptable behaviour and practice is no more. Professional standards change and the law changes to keep up.

Civil Liability Act 2002 (NSW)

Section 5B(2) defines the standard of care for personal injuries. The Act says:

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
(a) the probability that the harm would occur if care were not taken,
(b) the likely seriousness of the harm,
(c) the burden of taking precautions to avoid the risk of harm,
(d) the social utility of the activity that creates the risk of harm.

DAMAGE

The law will only compensate damage which has occurred. This damage may involve physical injuries – a loss of sight, deafness, broken limbs, brain injury etc... In Donoghue v Stevenson, the plaintiff claimed damages for gastroenteritis. It may also involve psychiatric illness, previously called nervous shock. Claims have been successfully made by the victims, as well as family members who have learnt of the injuries at some later date.

Nervous Shock

The courts have for some time recognized that mental harm may be suffered by someone who are not themselves injured. This was not always the case. The courts were originally very skeptical of persons claiming for mental illness (nervous shock) for what they had seen or heard. In ***Chester*** *v Waverley Corporation (1939) 62 CLR 1* the High Court denied a mother's claim for mental illness after searching for her lost son and then eventually seeing his body pulled from a ditch. The court determined that the injury was not foreseeable.

*Jaensch v Coffey (1984) 155 CLR 549*

The plaintiff was the wife of a policeman injured in a road accident. She was not present at the accident and was told of the serious condition of her husband when she went to the hospital. As a result of the experience at the hospital she developed a psychiatric illness, which involved anxiety and depression, because of what she heard and saw at the hospital.

The High Court unanimously decided that she was entitled to recover damages from the defendant – the person responsible for the accident which injured her husband, even though she developed her injuries not at the accident but on attending at the hospital. The court decided that those injuries were foreseeable. Forty five years later the High Court's decision in **Chester's** case was overruled.

*Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317*

Mr. and Mrs. Arnetts' 16 year old son went to work as a jackaroo on a property in Western Australia. Seven weeks after commencing work he was sent to work as a caretaker on a remote property. This was contrary to the assurances given to his father by the employer. In December 1986 he went missing. When his father was informed of this by the police, over the telephone, he collapsed. There was a prolonged search for the boy. His bloodstained hat was found in January 1987. In April 1987 the body of the boy was found in the desert. He had died of dehydration, exhaustion and hypothermia.

Both parents claimed damages for psychiatric illness as a result of the news of their missing son and the trauma of the prolonged search. The Arnetts' were successful in their claim. The law expands continually – in the case of Chester the claim was rejected as not being foreseeable while in Arnetts' case it was. In 1939 medical authorities and the courts were skeptical of any claim for mental illness, in 2002 mental illness was a recognizable medical condition.

The government in the Civil Liability Act 2002 has placed some limitations upon recovery for mental illness. The courts expanded the area of nervous shock and now parliament has placed restrictions on it. The government stated that these restrictions were for policy reasons, they were concerned about the costs of claims and wanted to place restrictions on the amounts and type of claims.

Damages in negligence or personal injury claims consist of compensation for pecuniary and non-pecuniary loss. A pecuniary loss is one such as the cost of medical and hospital treatment, loss of the person's earning capacity or the cost of rehabilitation services. Non-pecuniary is harder to value; it consists of placing a value on the person's pain and suffering, their loss of enjoyment of life, the fact that they cannot undertake normal activities. The courts have developed guidelines when determining these amounts.

As a result of the "tort law crisis" parliament passed the Civil Liability Act which now limits the amount of damages a person can recover in personal injuries claims.

## CIVIL LIABILITY ACT 2002 - SECT 16

**Determination of damages for non-economic loss**

**16 Determination of damages for non-economic loss**

(1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
(2) The maximum amount of damages that may be awarded for non-economic loss is $442,000 but the maximum amount is to be awarded only in a most extreme case.

The plaintiff has established a duty of care, a breach of that duty of care and damage, is that enough? No! There must be some causal connection between the breach of the duty of care and the damage suffered.

We can see how the law evolves when studying the laws regarding claims for mental illness by family members. At first it was hesitant to accept such claims. This may have had more to do with the medical knowledge of the illness at the time. As the condition was more readily understood in was accepted by the courts. Eventually parliament decided to apply limitations to personal injury law and has placed restrictions on persons claiming damages.

Negligent Acts Causing Pure Economic Loss

The law of negligence may allow a plaintiff to recover damages for pure economic loss. That is where there is no personal injury or no property damage caused directly to the plaintiff or the plaintiff's property. That is a plaintiff can claim compensation for the damage to property belonging to another in which the plaintiff has no legal interest.

In *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstedt" (1976) 136 CLR 529* – The dredge Willemstedt was operated by the defendant and while it was working in Botany Bay it damaged a pipeline which ran from the oil refinery on one side of the Bay to the terminal on the other. The damage to the pipeline disrupted the flow of oil and required Caltex to use road transport to transport the oil to the refinery. The pipeline did

not belong to Caltex but is claimed damages for pure economic loss; that is the cost of transporting the oil.

The defendants in the case argued that Caltex could not recover as it was not the owner of the pipeline and that was a case of pure economic loss. The High Court unanimously held that the plaintiff Caltex could succeed. This decision has been criticized because it places no limit on the number of plaintiffs who might claim as a result of one negligent act. Also there are good policy reasons why these claims should not be allowed – the defendants can insure against loss by taking out the appropriate insurance. If these actions were allowed there may be an explosion in litigation. Every motorist, business or consumer who suffered damage or loss could sue. There would be an avalanche in legal claims. The court attempts to control this expansion.

In the *Willemstedt* case Caltex succeeded for the cost of the road transport. If the damage to the pipeline had caused an interruption to petrol supplies in Sydney then why couldn't every business or motorist who had to pay higher petrol prices lodge a claim?

Subsequent court cases have placed a limitation on the recovery for pure economic loss. There is no liability for pure economic loss where the person claiming such a loss is a member of an indeterminate class. In other words to be successful the class of plaintiffs has to be known or ascertained in some way; the defendant must have some knowledge of their circumstances.

These are the policy reasons the courts use to limit claims for pure economic loss.

Negligent Statements Causing Pure Economic Loss

The law has been most reluctant to allow a plaintiff to recover because a person (the defendant) made a negligent statement which caused economic loss. As with all law in this area the position changed over time.

One of the earliest cases was in America. - *Ultramares Corporation v Touche (1931) 255 NY 170*. In that case a firm of accountants had been engaged to prepare the accounts for Fred Stern & Co. Inc. The accountants prepared certified accounts showing that the company was solvent and had $900,000US in assets. Thirty-two certified copies of the accounts were distributed to interested parties. One party, Ultramares Corporation loaned money to Fred Stern & Co. on the basis of these certified accounts.

The company was in fact insolvent as the assets set out in the accounts did not exist. The company went into liquidation. Ultramares Corporation sued the accountants and lost on appeal. The court was concerned about an explosion of litigation against accountants if liability was extended to third parties not in any contractual relationship with the accountants. That position changed over time.

In 1964 the House of Lords in the case of *Hedley Byrne & Co v Heller {1964] AC 465* decided that in certain circumstances a defendant who made a negligent misstatement owed a duty of care for pure economic loss.

The facts in that case were; Hedley Byrne were advertising agents and asked their bank to make inquiries about one of their customer's (Easipower Ltd) financial stability. The bank made inquires of Heller & Partners who were the customer's bankers. The bank replied in a letter that Easipower Ltd were a respectable company and could pay its debts. Relying on this letter Hedley Byrne entered into contracts on behalf of Easipower Ltd.

Easipower Ltd went into liquidation and Hedley Byrne sued the bank claiming that it breached its duty of care.

The House of Lords decided that in certain circumstances a duty of care did arise in relation to negligent misstatement which causes economic loss. The court made it clear that there had to be a special relationship between the defendant and the plaintiff before the duty of care would arise. Deciding what a special relation is has proved difficult over time.

(Hedley Byrne, although successful on the negligence action, lost the case because the bank had inserted an exclusion clause in the letter, disclaiming any liability for the advice.)

The next case to discuss regarding this special relationship is – *MLC Assurance Co Ltd v Evatt (1968) 122 CLR 556*. In that case a Mr. Evatt who was a policy holder in the company MLC Assurance, sought advice from an employee of that company about the financial health of a subsidiary company - HG Palmer (Consolidated) Ltd. The advice was that HG Palmer was financially sound and acting on that advice Mr. Evatt invested further funds.

HG Palmer (Consolidated) Ltd later went into liquidation and Mr. Evatt lost both his capital and the interest owing. He sued MLC Assurance for damages in negligence. The High Court found for Mr. Evatt. MLC Assurance then appealed to the Privy Council in England. There the decision was reversed, Evatt lost.

(In 1968 a party could appeal to the Privy Council in London. That right has been abolished. The final court of appeal in Australia today is the High Court.)

*L Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225.*

In that case a purchaser of land relied upon a certificate issued by the local council that said there was no road widening scheme affecting the property. After the purchase was completed the fact that there was a road widening scheme was revealed. This reduced the value of the property and prevented future development. The purchaser sued the local council for negligence. The High Court ruled that there was a breach of the duty of care. The council was ordered to pay damages.

Again we can see how the law developed. Initially the courts rejected claims for negligent advice causing loss. Then the case of Hedley Byrne opened the way for claims. Evett's case placed some limitations on it, but later cases have continued to expand the duty of care in this area. Now accountants, doctors, consultants, banks, builders and nearly all persons or bodies giving advice need to be careful, as negligent advice which causes economic loss may incur liability.

We should always remember the statement of Lord Atkin in Donoghue v Stevenson; "the categories of negligence are never closed".

Causation & Foreseeability

If a plaintiff establishes that the defendant had a duty of care, that there was a breach of that duty and damage is that the end? No. Now the questions of causation and remoteness must be considered.

Causation -

The court will not attach liability to a defendant unless the damage or loss which occurred was as a direct result of the breach of the duty of care.

*McWilliams v Sir William & Company Ltd Arrol Limited [1962] 1 WLR 295*

The deceased was a steel erector of many years' experience and was erecting a steel tower when he fell to his death. On the day of the accident he was not wearing a safety belt. His widow sued the employer, claiming that the employer was in breach of the duty to provide a safe system of work. Her claim failed because the court did not accept that if a safety belt had been provided the deceased would have worn it. The employer avoided liability because there was no causal connection between the breach of duty and the damage. It was established by evidence and accepted by the court that the worker would not have worn the belt. This case demonstrates the principle but it is unlikely that a court today would decide the same way. Occupational Health & Safety Acts seek to ensure the safety of all workers.

In some cases it is difficult to establish a clear causal link; in others it is relatively simple.

Another complication for the plaintiff claiming damages is that the law says that the damage must be foreseeable.

*Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co Ltd (The Wagon Mound No 1) [1961] AC 388*

Morts Docks carried on the business of ship-building and repair at Balmain from a timber wharf. Overseas Tankship had chartered the vessel "Wagon Mound" which was moored at another wharf about 200 metres away. During the night of the 30th October, 1951, a

large quantity of oil escaped from the "Wagon Mound" due to negligence and spread across the water to Morts Docks.
The oil settled under the wharf at Balmain and was ignited by welding operations taking place there. The fire caused considerable damage to the wharf and equipment.
The owners of the wharf sued the operators of the "Wagon Mound" for negligence in allowing the oil to escape. They lost. The court held that the defendants were only liable for the foreseeable consequences of the escape of the oil; which ignition of the oil was not reasonably foreseeable.

*Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2) [1967] 1 AC 617*

From the same circumstances another case was brought by the owners of a ship moored at the wharf when it caught fire. They sued the operators of the "Wagon Mound" for negligence in allowing the oil to escape. They won, as they were able to prove that the defendant was aware that there was a real risk as a result of the spillage of the oil.
Same facts, two different results. Ever case is different. In Wagon Mould No 2 there was a different plaintiff and the evidence produced to the court was able to establish that the damage was foreseeable. The evidence in Wagon mound 1 did not do this. It all depended on the evidence produced in a particular case.

The court said: "*If it is clear that the reasonable man would have realised or foreseen and prevented the risk then it must follow that the defendants are liable in damages."*

Now the plaintiff has established a duty of care, a breach of that duty, damage which was foreseeable and that there was a causal link between the plaintiff's conduct and the injury or loss. Is that the end? No. The defendant may seek to establish that the plaintiff contributed to their own loss or injury.

Contributory Negligence

Contributory negligence allows the court to apportion liability between the plaintiff and the defendant where both have been negligent. As an example, a driver of a vehicle sues the other driver for negligence. It is found that the plaintiff was not wearing a seatbelt and that accordingly the injuries sustained are more severe than if a seatbelt had been worn. The court may reduce the plaintiff's damages because of contributory negligence.

If the court was prepared to award the plaintiff $100,000 in damages and it is established that there was contributory negligence on the part of the plaintiff; those damages may be reduced by 10%, 15%, 25% or some other figure representing the damage caused by the plaintiffs actions.

Summary

To succeed in a tort claim the plaintiff must:

1 Establish that there is a duty of care
2 That there is a breach of that duty of care
3 That the damage to the plaintiff from the breach of the duty which is not too remote
4 That there is a causal connection between the breach of the duty of care and the damage suffered.
4 Only reasonably foreseeable damage is recoverable
5 Finally there may be a question of contributory negligence, did the plaintiff contribute in someway to the damage caused

# Conclusion

Tort law is one of the most significant areas of law. It is a branch of law which has been developed over hundreds of years. It is there to protect a range of interests by members of the community. It allows a plaintiff to sue for damages (compensation) or some other remedy when their rights have been infringed by a defendant.

Torts were developed by common law courts; the courts must interpret previous decisions to ascertain what the law is and then apply it to the case before the court. Where the previous decisions are unclear or there are none, a court may in fact make law.

The case of Donoghue v Stevenson was historic in that it led to the explosion of negligence cases. The law expanded far beyond what was envisaged by the judges in the majority. Also, it is important to remember that the court in that case was not unanimous. It was a majority decision. The law is always subject to interpretation, it is not an exact science. Judges will disagree.

The law moves on and as our society changes, it ambles along behind. The law must always represent society. As an example nervous shock cases were not accepted when claims were first made. It took many years for the common law courts to accept such an injury. It did so as medical science recognized and accepted the illness, the law came around to declaring it an injury which was entitled to compensation.

The law of torts by its very nature will continue to expand, although it will be subject to restrictions placed upon it by parliament.

# CREDITS

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