

LEGISLATION

- Below are abbreviations used herein to refer to legislation irrespective of specific jurisdiction and enactment:
 - Civil Liability Act (CLA);
 - Wrongs Act (WA);
 - Civil Liability (Wrongs) Act (CL(WA));
 - Personal Injuries (Liabilities and Damages) Act (PI(LD)A).

In this card

- 'CLA modifies' means that major civil liability legislation (listed below) of relevant jurisdictions modifies the common law position;
- 'CLA confirms' means that major civil liability legislation (listed below) of relevant jurisdictions confirms the common law position;
- an **asterisk (*)** means the legislation varies by jurisdiction; statute should be consulted;
- defendant** and **plaintiff** are abbreviated as **D** and **P** respectively;
- major civil liability legislation passed in 2002 or after includes:
 - ACT CLA(WA) 2002;
 - NSW CLA 2002;
 - NT PI(LD)A;
 - Qld CLA 2003;
 - SA CLA 1996;
 - Tas CLA 2002;
 - Vic WA 1986;
 - WA CLA 2002.

WHAT IS A TORT?

- Defined as a civil wrong, a tort is distinguished from contract, restitution and equitable wrongs.
- This card covers the major torts of negligence, wrongful death, breach of statutory duty, trespass and intentional torts, defamation and nuisance.

ACTIONS IN TRESPASS v ACTIONS ON THE CASE

- There are many areas of tort action, including actions in trespass and actions on the case.

DOES THE CLA APPLY?

- The first question to be asked in any torts case is, does the CLA apply? This is a matter of statutory interpretation.
- The CLA legislation is focused generally on negligence as a mode of action rather than necessarily as a cause of action, regardless of whether the claim is brought in tort, in contract, or under statute. Equivalent provisions exist in most other jurisdictions, although there is variation.
- Scope of CLA varies. In NSW and Tas matters arising because of an intention to harm or in cases of sexual assault are excluded. The other jurisdictions do not all have an equivalent provision. WA CLA s 5A is more restrictive. In regard to personal injury the Qld CLA excludes workers compensation among other matters.

Action in trespass

Direct: *Scott v Shepherd* (1773) 2 Wm Bl 802
No need to prove damage (except possibly in trespass to goods) ('actionable per se')

Intentional/unintentional

Onus of proof of (lack of) fault on defendant (except highway cases in Australia): *Werning v Chin* (1974) 19 SASR 299
NB: in England, onus of proof of fault lies on P. This is different from Australia.

Examples: assault, battery, false imprisonment, trespass to land, trespass to goods.

See also ACT (CL(WA) s 50); NT (PI(LD)A s 4) (far less restrictive). Vic (WA s 26C) no personal injury damages restrictions. SA has no equivalent provisions.

NEGLECTENCE

- Negligence is a common law tort that is an action on the case. Damage therefore must be proved.
- Elements of the tort required to establish a cause of action:
 - duty owed by D to P;
 - duty breached by D;
 - breach causing damage to P (where the damage is not too remote from the breach).

DUTY

- D owes a duty to P if it is reasonably foreseeable (see below) that if D carries out the act or omission contemplated, a person in P's position could be harmed ('neighbour principle': *Donoghue v Stevenson* [1932] 1 AC 562). This is enough to establish duty for personal injury or property damage caused by an act.
- For other categories reasonable foreseeability as above AND salient factors according to the category must be established: *Sullivan v Moody* (2001) 207 CLR 562; *Carter Resources (Qld) Pty Ltd v Staver* (2009) 75 NSWLR 549.
- Salient factors can include vulnerability to harm, type of harm, and the control a party has over another. As well, salient factors can emerge from public policy issues, eg, indeterminate liability according to the category of case.
- It is not necessary for the precise chain of events to be foreseeable, merely that the final outcome (ie, damage or injury) is reasonably foreseeable: *Chapman v Hearse* (1961) 109 CLR 112; *Palsgraf v Long Island Railroad Co* 248 NY 339 (1928) (US).

No duty situations

- Where plaintiff is unforeseeable: *Sydney Water Corporation v Turano* (2009) 239 CLR 51.
- Barristers and solicitors whose work is 'intimately connected' with 'court work'.

Action in case (or on the case)

Indirect
Must prove damage

Intentional/unintentional

Onus of proof of fault on plaintiff

Examples: negligence, nuisance, defamation, conversion, interference in public office, intentional infliction of personal injury, intentional interference with contract, deceit, malicious prosecution.

Attwells v Jackson Lalic Lawyers Pty Ltd (2016) 331 ALR 1.

- Military operations in wartime: *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344.
- Volunteers and good Samaritans acting in good faith: see CLA*.

CATEGORIES OF DUTY

Omissions (* failure to act)

- There is no duty to rescue: *Hargrave v Goldman* (1963) 110 CLR 40.
- Generally, there is no duty to act unless a person has the duty to control or supervise others, eg:
 - prison officers re prisoners: *L v Commonwealth* (1975) 10 ALR 209;
 - parents re harm caused to others by their child;
 - schools and school employees re children: *Geyer v Downs* (1978) 135 CLR 91;
 - employers: *Kondla v State Transport Authority* (1984) 154 CLR 672;
 - a person known of a hazard that they could diminish or eliminate by the exercise of reasonable care: *Hargrave v Goldman* (1963) 110 CLR 40; or
 - the person has created a danger and a rescuer is injured in rescuing someone from it: *Chapman v Hearse* (1961) 109 CLR 112.

Acts of third parties

- There is no general duty to prevent third parties from causing damage to others except where there is a pre-existing relationship, eg, between gaoler and prisoner or parent and child: *Horne Office v Dorset Yacht Co Ltd* [1970] AC 1004; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

Pure economic loss

- Traditionally, pure economic loss was the domain of contract law because of the risk of indeterminate liability to an indeterminate class of people: *Lithiumium Corporation v Bock, Allen & Co* 174 NE 441 (1921) (US).

Pure economic loss caused by act

- For relational loss: loss arises because of damage to property owned by third party;

Lexisnexis Study Guide New Torts

Karin Nielsen-Saines



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A Guide to Toxic Torts, 1987. *American Book Publishing Record*, 2005. *Legal Looseleaves in Print*, 2005.

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