An Introduction to the law of torts

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Tort law

- A civil wrong – the focus is on case law rather than legislation

- Role of tort – adjustment of losses and ultimate allocation of these. Tort obligations are imposed by law, not agreed between the parties.

- Functions – compensation, deterrence and education
Common torts

- Trespass to the person – (assault, battery, false imprisonment, intentional infliction of emotional distress).
- Trespass to land and chattels (conversion)
- Nuisance, including strict liability
- Defamation, privacy (new)
- NEGLIGENCE
Examples of tortious wrongs

- (i) Car owner goes out for the day and returns to find his car missing from the garage. Investigations disclose that a towing company had been hired to pick the car up by a man who alleged he had purchased it. The towing company handed the car to the alleged purchaser who was never seen again. The car owner sues the towing company.

- (ii) A public figure discovers that a magazine proposes to write and article about him/her that will disclose that he/she has (i) spent some time in a psychiatric institution and (ii) been the subject of a police visit to his/her home. The public figure sues to prevent publication.

- (iii) the bulk water supply main bursts and floods depot where freight forwarding business stored consignments. Business sued to recover moneys paid to consignees.

- (iv) a bank dishonours a cheque when there are sufficient funds in the account. One of the signatories to the cheque sues the bank.
Examples of tortious negligence

- (i) A digger is excavating and negligently damages the power cable carrying electricity to the nearby mill. The Cable is owned by the power company. The mill has to cease production until the cable is repaired and power restored. It sues for the loss of profits it would otherwise have made.

- (ii) A solicitor is instructed to draw up a will by an 85 year old frail elderly woman. He takes instructions but in seven days the woman dies without the will being presented to her for signature. The intended beneficiary sues the solicitor.

- (iii) An auditor provides an inaccurate picture of the company accounts. In reliance on the accounts a buyer purchases all of the shares in the company. The buyer sues the solicitor.

- (iv) Leaky multiunit residential development given a code compliance certificate by the local council. Owners of the apartments sue the council.
Primary remedy is damages

- Purpose of damages in tort law is to put the Plaintiff in the position they would have been had the tort not been committed.

- That is, to **compensate** the plaintiff for the wrong done by the defendant.

- In respect of wrongs to the person if the plaintiff has suffered a personal injury they are barred from suing for compensatory damages by the accident compensation scheme. Most actions for trespass to the person are therefore barred.
Exemplary damages

- These damages are sometimes awarded in tort law – they are to punish the defendant for the outrageous wrong done to the plaintiff.

- They are rare.

- Usually awarded for intentional conduct.

- *Couch v AG* – the William Bell case.
Aktas v Westpac Banking Corporation Limited [2010] HCA 25

- Westpac dishonoured a number of cheques issued by Homelife and returned these marked "Refer to Drawer".

- At the time there was sufficient money in the account to cover the cheques.

- That is there was a bank error.

- Both Homelife and Atkas the sole shareholder who signed the cheques sued in defamation.

- Homelife recovered in contract.

- Atkas (eventually) in defamation............
Defamation

- Balances the right of the individual to his or her reputation unimpaired by false statements; AND
- The fundamental notion of freedom of speech.
- That is, it protects the plaintiff’s reputation from unjustifiable attack.
- Reputation - the right to have **the estimation in which you stand with others** unaffected.
- Often called a plaintiff’s tort.
The plaintiff must prove:

- That the words are defamatory.
- That the words were published to a third party.
- That the words are of and concerning the plaintiff.
Plaintiff’s case

- "Refer to Drawer".
- Widely understood to mean that there were insufficient funds to meet the cheque.
- Defamation - Evidence that various people in the community reacted with some hostility to Mr Aktas after it became known that trust account cheques had "bounced".
- Publication – cheques had been returned to someone other than the Plaintiff.
- Identification – he was a signatory.
Defences

- Privilege (absolute and qualified)
- Truth (previously known as justification)
- Honest opinion (previously known as fair comment)
- Others include
- Consent
- Innocent dissemination.
- Crucial defence here was qualified privilege.
Common law qualified privilege

- Common law arises when the person who makes the communication has a duty, legal social or moral to make the communication to the person to whom it is made; and

- The person to whom it is made has a corresponding duty or interest in receiving the communication.

- The privilege depends on reciprocity of duty or interest.

- It can be lost if improper use is made of the occasion of privilege.

- References are protected by qualified privilege.
Majority HCA

- Considered that:
  - The bank had an interest in the communication because it refused to pay on the cheque, but....
  - The payee had no interest in receiving the communication when the cheque was regular on its face, and where the drawer of the cheque had sufficient funds to meet its payment
  - Therefore the defence was not available to the bank who had to pay Mr Atkas
Minority disagreed

• The context for giving the advice was the conduct of the business of banking in which banks make decisions as to whether they will honour cheques.

• Westpac had an interest in advising those who had presented cheques of its decision.

• The customers clearly had an interest in knowing the bank’s decision.

• That is the necessary reciprocity interest was present.

• The statement was made only to those who had an interest in receiving it, and absent common law malice, it should have been protected by qualified privilege.
Negligence – burden of proof on the plaintiff to prove:-

- The defendant owes him/her a duty to take care that arises out of the relationship of the parties and is recognised by law.

- breach of that duty - a failure to conform to the required standard of care.

- Damage/loss that is:

  - (a) as a result of the breach where there is a causal nexus between D’s conduct and P’s injury; and

  - (b) which is foreseeable and not too remote
Leaky buildings – a case study

- Duty test Is it just and reasonable that a duty of care should be imposed **on two broad fields** of enquiry.

- The first is the **degree of proximity or relationship** between the alleged wrongdoer and the person who has suffered damage. Includes foreseeability and involves consideration of the degree of analogy with cases in which duties are already established and reflects an assessment of the competing moral claims.

- The second is whether there are other **policy considerations** which tend to negative or restrict - or strengthen the existence of - a duty in that class of case.
Some of the things a court will look at

- How serious is the harm?
- Will imposing a duty lead to a flood of claims?
- Are there any reasonable alternative means of self protection?
- Will a duty deter wrongdoing?
- Will a duty encourage reasonable care?
- What are the economic implications of imposing a duty?
- What is the type of loss incurred?
- Is there a contract in place? What is its impact?
- Is there a statute that covers the area? What is the impact of that statute?
Factors

- It was foreseeable that if there was a negligent inspection home owners would suffer loss.
- The council had undertaken responsibility for the building process.
- People relied upon the Council to do its job properly.
- Home owners had no real means of protecting themselves. They were vulnerable plaintiffs.
- A house was a big investment.
- Home ownership was promoted by both national and local government.
Negligence and leaky buildings – the law to date:

- In *Hamlin v Invercargill CC* the Privy Council confirmed the approach of the New Zealand courts and held the local authority liable for a failure to properly inspect the foundations of a domestic building when it was in the course of construction.

- Local authorities can be liable for negligence in:
  - the issue of a building permit
  - Inspection in the course of construction
  - Issuing a code compliance certificate.
Residential property to multi-unit apartments

- Hamlin applied to single unit domestic dwellings.

- *Sunset Terraces* and *Byron Avenue*

- Do owners of apartments in substantial complexes built under the Building Act 1991 have the same right to claim damages against a local authority for carelessness in the performance of their function of monitoring construction as *Hamlin* held was available to the owners of a modest house?
CA held

- No question of reconsidering the *Hamlin* approach until wide spread recognition of the leaky building problem.
- No material difference between the owners of leaky apartments and those of leaky buildings.
- Crucial test that of habitation.
- Working assumption of local authorities and those involved in the residential property market was that local authorities owed a *Hamlin* duty of care.
- This must have affected the behaviour of local authorities. And home purchasers.
- Concludes – the *Hamlin* duty applies to residential developments. The duty extends to investor and second and subsequent purchasers.
Next step – the Supreme Court – it will consider:

- (i) Whether and in what circumstances a local authority which performed regulatory functions under the Building Act 1991 in relation to the construction of a multi unit residential development owed a duty of care to purchasers of units in the building to ensure that it complied with the building code.

- (ii) Assuming such a duty exists whether it extends to:
  - (a) such persons who did not themselves at the time of purchase intend personally to occupy their units (investor owners) and
  - (b) Persons who subsequently acquired such units from the first purchasers after a claim for breach of duty to their predecessors had accrued; and

- (iii) In light of the conclusions reached on the foregoing grounds, how these issues should be determined in the particular case.