

405 — TAXATION AND REVENUE

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(a) NATURE AND SCOPE OF TORT

(i) Nature of Tort

[415-1] **Definition** A 'tort' is a breach of a duty which has been imposed by law¹ and which gives rise to a civil right of action for unliquidated damages.²

The law of tort protects certain recognised interests, such as the protection of one's person³ and chattels,⁴ reputation⁵ and use of land.⁶

Notes

1. The duty may be imposed by common law or statute and is distinguishable from duties which have been assumed by agreement of the parties: *Phillip Morris Ltd v Ainaly* [1975] VR 345 at 348-9 per Menhennitt J (tort is a common law remedy which can enforce a right which is created either by the common law or by statute); *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 7)* [2001] 1 WLR 942 at 962 per Toulmin J ('a breach of non-contractual duty which gives a private law right to the party injured to recover compensatory damages at common law from the party causing the injury'). As to the distinction between tort and contract see [415-20]. See also *Jonstan Pty Ltd v Nicholson* (2003) 58 NSWLR 223; 184 FLR 247; [2003] NSWSC 500; BC200303036. Compare *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232 at 246-7; 194 ALR 319; [2002] NSWCA 272; BC200204999 per Spigelman CJ.
2. Other remedies are available, but it has been noted that the right to unliquidated damages is the only remedy which is common to all rights of action arising from tortious conduct: *Aaron v Aaron* (1944) 61 WN (NSW) 93 at 94 per Street J. Damages are not, however, an essential component in an action in tort: *Battiatto v Lagana* [1992] 2 Qd R 234. As to remedies generally see [415-215]-[415-235]. As to persons who may be held liable for tortious conduct see [415-85]-[415-175].
3. *Gibbons v Pepper* (1695) 1 Ld Raym 38; 91 ER 922; *Hillier v Leitch* [1936] SASR 490; *Dunn v Pain* (1991) 57 SASR 133; (1991) 7 ANZ Ins Cas ¶61-100. As to trespass to the person generally see [415-345]-[415-440].
4. *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204; 47 SR (NSW) 158; [1946] ALR 517 (conversion); *Brewer v Dew* (1843) 11 M & W 625; 152 ER 955; *City Motors (1933) Pty Ltd v Southern Aerial Super Service Pty Ltd* (1961) 106 CLR 477; [1962] ALR 184; (1961) 35 ALJR 206 (taking goods out of possession); *In the Marriage of Michiels* (1991) 14 Fam LR 587 (injury and loss to property). As to trespass to goods generally see [415-445]-[415-475].
5. *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; (1988) Aust Torts Reports ¶80-187. See DEFAMATION [145-15].
6. *Acton Corporation v Morris* [1953] 2 All ER 932, CA. As to trespass to land generally see [415-480]-[415-550].

[415-5] Rights of action A right of action in tort only arises when injury has been sustained as a result of a breach of a duty recognised by law.¹ Not all injuries will be sustained in a manner regarded as tortious.² The traditional view has been that a plaintiff can only succeed if the action is brought within a recognised rule of one of the existing torts.³ The current rules are, however, capable of expansion to cater for new or newly perceived needs.⁴

Notes

1. *SCM (UK) Ltd v WJ Whitall and Son Ltd* [1971] 1 QB 337 at 347-8; [1970] 3 All ER 245; [1970] 3 WLR 694 per Winn LJ. As to the nature of a legal injury see [415-35].
2. The injury might be one for which there is no compensation ('*damnum sine injuria*'): *Smith v Scott* [1973] Ch 314; [1972] 3 All ER 645; [1972] 3 WLR 783 (land owner not liable for nuisance caused to neighbours by tenants he selected). Certain losses may have a remedy only in criminal law (see [415-15]) or may be governed by the law of breach of contract (see [415-20]), breach of trust (see [415-30]) or restitution (see [415-25]).

[415-5]

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3. See Heuston R FV and Buckley R A, *Salmond & Heuston on the Law of Torts*, 21st ed, Sweet & Maxwell, London, 1996, p 1. Compare *J Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262 at 283; [1959] 3 All ER 800; [1960] RPC 16 per Danckwerts J ('the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another').
4. For example, the recognition of negligence in torts (see *Donoghue v Stevenson* [1932] AC 562; [1932] SC (HL) 31), damage in the infliction of mental harm (see *Wilkinson v Downton* [1897] 2 QB 57; [1895-99] All ER Rep 267) and interference with contractual relations (*Bowen v Hall* (1881) 6 QBD 333; 44 LT 75). As to interference with contractual relations, trade and business see [415-1550]-[415-1635]. As to the potential recognition of a tort of invasion of privacy as a tort see *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63; BC200107043; *Grosse v Purvis* [2003] QDC 151; (2003) Aust Torts Reports ¶81-706; *Giller v Procopets* [2004] VSC 113; BC200402552; *Kalaba v Commonwealth* [2004] FCAFC 326; BC200408581; *Wainwright v Home Office* [2004] 2 AC 406; [2003] 4 All ER 969; [2003] UKHL 53; *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] 2 All ER 995; [2004] UKHL 22. It is unclear whether racial discrimination is a tort at common law: *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232 at 247; 194 ALR 319; [2002] NSWCA 272; BC200204999 per Spigelman CJ.

[415-10] Forms of action There are two traditional forms of action in tort: trespass and case.¹ In trespass the injury must be caused by a direct, intentional act of the defendant.² Actions in trespass may be brought without proof of actual damage.³ Action on the case is available where the injury is due to an omission or an act which is injurious to the plaintiff's interests consequentially or indirectly.⁴ Case has become associated with harm caused by negligence.⁵ In actions on the case there must be proof of damage.⁶ In cases of direct, unintentional interference causing actual damage the plaintiff may sue either in trespass or on the case in negligence.⁷ There is also authority to suggest that, in cases of direct, intentional interference, the plaintiff may sue in negligence,⁸ although the correctness of this view may be doubted.⁹

Notes

1. *Williams v Milotin* (1957) 97 CLR 465; [1957] ALR 1145; BC5700520; *Venning v Chin* (1974) 10 SASR 299; *Wainwright v Home Office* [2004] 2 AC 406 at 417; [2003] 4 All ER 969; [2003] UKHL 53 per Lord Hoffmann. Trespass developed into nominate torts such as assault (see [415-355]), battery (see [415-345]), and false imprisonment (see [415-395]). Case developed into nominate torts such as negligence (see generally NEGLIGENCE) and nuisance associated with indirect injuries ([415-600]-[415-1090]).
2. *McHale v Watson* (1964) 111 CLR 384; [1965] ALR 788; BC6400440.
3. See, for example, *Law v Wright* [1935] SASR 20 at 25 per Piper J; *Dumont v Miller* (1873) 4 AJR 152. See further [415-55].
4. *Hillier v Leitch* [1936] SASR 490 (overruled on another point *Milotin v Williams* [1957] SASR 228, SC(SA), Full Court (affirmed *Williams v Milotin* (1957) 97 CLR 465; [1957] ALR 1145; BC5700520)). Note that in *Milotin v Williams* [1957] SASR 228 at 236 per Ligertwood J, the court held that *Hillier v Leitch* [1936] SASR 490 was wrongly decided, taking the wrong approach in asking whether the substance of an action was in trespass or case instead of asking whether it was available to the plaintiff to sue in either of trespass or case.
5. *Williams v Milotin* (1957) 97 CLR 465; [1957] ALR 1145; BC5700520. See generally NEGLIGENCE.

6. *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 230; 47 SR (NSW) 158; [1946] ALR 517 per Dixon J (damage must be permanent in nature); *Tancred v Allgood* (1859) 4 H & N 438 at 444; 28 LJ Ex 362; 157 ER 910 per Pollock CB; *Mears v London and South Western Railway Co* (1862) 11 CBNS 850 at 854; 142 ER 1029 per Williams J. As to proof of damage see further NEGLIGENCE [300-80]-[300-100].
7. *Venning v Chin* (1974) 10 SASR 299; *West v Peters* (1976) 18 SASR 338. As to actions for trespass see [415-320]-[415-550]. As to actions in negligence generally see NEGLIGENCE.
8. *Wilson v Horne* (1999) 8 Tas R 363 at 367-8 per Cox CJ, at 373-5 per Wright J, at 381-2 per Evans J; (1999) Aust Torts Reports ¶81-504; [1999] TASSC 33; BC9901200.
9. *New South Wales v Lepore* (2003) 212 CLR 511 at 602-3; 195 ALR 412; [2003] HCA 4; BC200300126 per Gummow and Hayne JJ.

(ii) Scope of Tort

[415-15] Distinction between tort and crime Certain acts or omissions will give rise to both a tort and a crime.¹ A crime is a public wrong which gives rise to criminal sanctions. A criminal law action is usually brought on behalf of the state,² while tortious actions are usually brought by the victim of the tort. The principal remedy for tort is compensatory damages,³ whereas the principal remedies for criminal offences are imprisonment, non-custodial sentences and fines paid to the state.⁴ The felonious-tort rule⁵ which previously operated in jurisdictions which maintained a distinction between felonies and misdemeanours is now abolished.⁶

Notes

1. Some trespasses are criminal offences. See, for example:
 - (ACT) Trespass on Territory Land Act 1932; (ACT) Enclosed Lands Protection Act 1943
 - (NT) Trespass Act 1987
 - (NSW) Inclosed Lands Protection Act 1901
 - (QLD) Summary Offences Act 2005 s 11
 - (SA) Summary Offences Act 1953 s 17
 - (TAS) Police Offences Act 1935 ss 14B-14D
 - (VIC) Summary Offences Act 1966 s 9
 - (WA) Criminal Code ss 70A, 70B.
 Certain types of defamation are a criminal offence:
 - (ACT) Crimes Act 1900 s 439
 - (NT) Criminal Code Pt VI Div 7
 - (NSW) Crimes Act 1900 s 529
 - (QLD) Criminal Code s 365
 - (SA) Criminal Law Consolidation Act 1935 s 257
 - (TAS) Criminal Code Ch XXIII
 - (VIC) Wrongs Act 1958 Pt I
 - (WA) Criminal Code Ch XXXV.
 See also DEFAMATION.

Theft and conversion (see CRIMINAL LAW [130-5000]-[130-5820]), assault and battery (see CRIMINAL LAW [130-1000]-[130-1160]), careless driving (see TRANSPORT [425-740]) and negligence (see CRIMINAL LAW [130-95]) are also tortious acts which can be criminal.
2. See CRIMINAL LAW [130-13225]-[130-13260].
3. As to damages see [415-215]. See generally DAMAGES.

[415-15]

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4. See CRIMINAL LAW [130-17220]-[130-17275].
5. The felonious-tort rule barred the bringing of a civil action prior to the completion of the criminal proceedings: *Smith v Selwyn* [1914] 3 KB 98; [1914-15] All ER Rep 229.
6. As to the statutory abolition and modification of the common law distinction between felonies and misdemeanours see CRIMINAL LAW [130-10], [130-13000].

[415-20] Distinction between tort and contract Tortious duties are imposed by law.¹ In contrast, contractual duties arise from private agreements between parties.² Tortious duties are owed to persons generally; contractual duties are owed only to persons party to the contract.³ A right to sue in tort is not generally assignable,⁴ but a cause of action in contract may be assigned.⁵ Contract and tort differ in the:

- (1) calculation of damages;⁶
- (2) type of damages available;⁷
- (3) purpose of the award of damages;⁸
- (4) test of remoteness;⁹
- (5) degree of foreseeability;¹⁰
- (6) liability of minors;¹¹
- (7) liability of bankrupts;¹² and
- (8) date of commencement of the limitation period.¹³

The same act or omission may provide a cause of action both in tort and in contract.¹⁴ Where there is concurrent liability, the plaintiff may sue in contract or tort and the contractual terms may define or limit the extent of any tortious liability.¹⁵ The choice of action will determine the availability of certain remedies and defences¹⁶ and will affect the calculation of damages and the right of contribution.¹⁷

Where the wrong was not committed in the country where the action is heard, the choice of action may determine which court hears the matter¹⁸ and the applicable law.¹⁹

Notes

1. See [415-1] note 1.
2. *MacPherson v Kevin J Prunty & Associates* [1983] 1 VR 573 at 587 per Murphy J. See further CONTRACT [110-240]-[110-452].
3. See CONTRACT [110-3010]. Note, however, that in Queensland and Western Australia the doctrine of privity of contract has been affected by statute in relation to contracts made for the benefit of third parties: (QLD) Property Law Act 1974 s 55 (WA) Property Law Act 1969 s 11(2). See also *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; 80 ALR 574; 62 ALJR 508 and CONTRACT [110-3095].
4. *Poulton v Commonwealth* (1953) 89 CLR 540 at 602; [1954] ALR 1; (1953) 27 ALJ 707 per Williams, Webb and Kitto JJ. Note, however, that there are exceptions to this general rule which suggest that in certain instances where an action is assignable, an action in tort may also be assigned: see [415-105].
5. A cause of action in contract may be assigned where it is for a liquidated sum (see *County Hotel and Wine Co Ltd v London and North Western Railway Co* [1918] 2 KB 251 at 281; [1918-19] All ER Rep Ext 1388; (1918) 119 LT 38 per McCardie J) or

if the assignee has a genuine and substantial interest in the success of the action: *Re Timothy's Pty Ltd and the Companies Act* [1981] 2 NSWLR 706; (1981) 6 ACLR 823; *Trendtex Trading Corp v Credit Suisse* [1982] AC 679; [1981] 3 All ER 520; [1981] 3 WLR 766. See also *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139; [2003] WASCA 299; BC200307539; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267 at 282-3; 188 FLR 278; [2004] NSWSC 1041; BC200408785 per McDougall J, SC(NSW); *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58; 80 ALJR 1441; [2006] HCA 41; BC200606677. Note, however, that an action in tort may also be assignable where the assignee has a genuine and substantial interest in the success of the action: see [415-105] note 5.

6. See, for example, *Ellul v Oakes* (1972) 3 SASR 377 (action in tort failed because damage was not proved, whereas in contract damages were awarded because of a breach of warranty); *Walker, Hobson & Hill Ltd v Johnson* [1981] 2 NZLR 532 (damages given in contract and in tort because a contractual relationship followed and for negligent representations leading to economic loss).
7. For example, exemplary damages are available in tort (see *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 470-2; 57 ALR 639; BC8501117 per Brennan J; *Lamb v Cotogno* (1987) 164 CLR 1; 74 ALR 188; 61 ALJR 549; (1987) Aust Torts Reports ¶80-124) but not in contract: *Miles v Commercial Banking Co of Sydney* (1904) 1 CLR 470 at 477-8; 22 WN (NSW) 67; 8 ALJ 465 per Griffith CJ; *Butler v Fairclough* (1917) 23 CLR 78 at 89; [1917] VLR 175; (1917) 23 ALR 62 per Griffith CJ; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 5-12; 158 ALR 485; [1998] HCA 70; BC9806067 per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 307-10 per Spigelman CJ, at 360-5 per Heydon JA; 197 ALR 626; [2003] NSWCA 10; BC200300149; *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678 at 690-3; (2004) Aust Torts Reports ¶81-746; [2004] NSWCA 140; BC200402421 per Giles JA. Similarly, damages for emotional distress may be recovered in contract only if the defendant expressly or impliedly promised to provide enjoyment or prevent vexation: *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344; 111 ALR 289; BC9303547; *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd* (1986) 65 ALR 500 at 524; 6 IPR 431 per Wilcox J, Fed C of A; *Aldersea v Public Transport Corp* (2001) 3 VR 499 at 515-18; 183 ALR 545; [2001] VSC 169; BC200102731 per Ashley J. As to the types of damages available in contract see CONTRACT [110-11050]-[110-11415].
8. *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-12; 63 ALR 600; 6 IPR 462 per Mason, Wilson and Dawson JJ ('in contract, damages are awarded with the object of placing the plaintiff in the position in which he or she would have been had the contract been performed... in tort, damages are awarded with the object of placing the plaintiff in the position in which he or she would have been had the tort not been committed'); *Brown Falconer Group Pty Ltd v South Parklands Hockey and Tennis Centre Inc* (2005) 91 SASR 152; [2005] SASC 75; BC200500931.
9. The test of remoteness in tort is reasonable foreseeability of damage at the date of breach: *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388; [1961] ALR 569; (1961) 34 ALJR 451; [1961] 1 All ER 404; [1961] 2 WLR 126. The risk of damage must be more than a fanciful possibility: *Wyong Shire Council v Shirt* (1980) 146 CLR 40; 29 ALR 217; 54 ALJR 283. The measure of remoteness in contract is what was in reasonable contemplation of the parties at the time of entering into the contract: *Hadley v Baxendale* (1854) 9 Exch 341; [1843-60] All ER Rep 461; (1854) 156 ER 145; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; [1949] 1 All ER 997; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350; [1967] 3 All ER 686; [1967] 3 WLR 1491; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 612-16; 154 ALR 361; [1998] HCA 38; BC9801853 per McHugh J. If the obligation is one concurrent in contract and tort, then, in the absence of any provision in the contract, the remoteness test in tort is applied, whatever cause of action was relied on: *Woodman v Rasmussen* [1953] St R Qd 202 at 214; (1953) 48 QJPR 41 per Philp J; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791; [1978] 1 All ER 525; [1977]

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- 3 WLR 990. See also *National Australia Bank Ltd v Nennur Variety Pty Ltd* (2002) 4 VR 252 at 268-70; (2002) Aust Torts Reports ¶81-645; [2002] VSCA 18; BC200200672 per Batt JA. As to causation and remoteness in contract law see CONTRACT [110-11150]-[110-11195].
10. *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 365; 12 ACLR 202 per McHugh JA.
 11. Although some contractual obligations entered into by a minor are not enforceable against the minor, the minor may be liable for torts committed in the course of a contractual relationship: *Burnard v Haggis* (1863) 14 CBNS 45; 143 ER 360; *Ballett v Mingay* [1943] 1 KB 281; [1943] 1 All ER 143; (1943) 168 LT 34. See also *Walley v Holt* (1876) 35 LT 631; *Bristow v Eastman* (1794) 1 Esp 172; 170 ER 317; *Re Seager*; *Sealey v Briggs* (1889) 60 LT 665; *Peters v Tick* (1915) 11 Tas LR 30. As to the liability of minors in contract see CONTRACT [110-2580]-[110-2745]. As to the liability of minors in tort see [415-90].
 12. Claims may be made in bankruptcy for unliquidated damages for breach of contract, but not for unliquidated damages arising from tort: (CTH) Bankruptcy Act 1966 s 82(2). The discharge of the bankrupt will terminate the contractual liability, but not the tortious liability: *ibid* s 153(1). See *Coventry v Charter Pacific Corp Ltd* (2005) 222 ALR 202 at 203-4; 80 ALJR 132; [2005] HCA 67; BC200509687 per Gleeson CJ, Gummow, Hayne and Callinan JJ, HC of A.
 13. In an action for breach of contract, the limitation runs from the time of the breach (see *Ward v Lewis* (1896) 22 VLR 410; 2 ALR 103; 17 ALT 304; *Bean v Wade* (1885) 2 TLR 157, CA; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197; [1964] 3 All ER 577; *Hawkins v Clayton* (1988) 164 CLR 539 at 583; 78 ALR 69; 62 ALJR 240 per Deane J) whereas in torts derived from case, it runs from the suffering of the harm: *Williams v Milotin* (1957) 97 CLR 465; [1957] ALR 1145; BC5700520; *Sanella v Leticia* (2000) 51 NSWLR 302 at 306; (2001) Aust Torts Reports ¶81-589; [2000] NSWCA 289; BC200006725 per Handley JA; *O'Neill v Foster* (2004) 61 NSWLR 499 at 511; [2004] NSWSC 906; BC200406789 per Campbell J. As to actions on the case see [415-10].
 14. *Hawkins v Clayton* (1988) 164 CLR 539; 78 ALR 69; 62 ALJR 240 (in the case of a will); *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642; (1990) ANZ ConvR 230 (duty of a solicitor); *Defries v Milne* [1913] 1 Ch 98; (1912) 82 LJ Ch 1; 107 LT 593.
 15. *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 at 402-3; [1978] 3 All ER 571; [1978] 3 WLR 167 per Oliver J; *Astley v Austmist Ltd* (1999) 197 CLR 1 at 20-3; 161 ALR 155; [1999] HCA 6; BC9900546 per Gleeson CJ, McHugh, Gummow and Hayne JJ. See, however, *Hawkins v Clayton* (1988) 164 CLR 539 at 549; 78 ALR 69; 62 ALJR 240 per Brennan J (terms of a contract cannot impose a tortious liability upon the defendant, or impose a duty of care on him or her, breach of which would be compensable in tort law).
 16. The apportionment legislation (see NEGLIGENCE [300-105]-[300-135]) which allows for a reduction in damages where there is contributory negligence does not apply if the defendant's contractual obligations are strict and the claim is brought in contract alone: *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 at 377-8; [1965] 3 All ER 801; [1966] 2 WLR 430 per Paull J (affirmed on other grounds *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370; [1966] 2 All ER 283; [1966] 2 WLR 1017, CA). If concurrent duties are owed to the plaintiff in tort and contract, the apportionment legislation cannot reduce the damages awarded for the contract claim, even if they would reduce the damages for the tort claim: *Astley v Austmist Ltd* (1999) 197 CLR 1 at 31, 37-8; 161 ALR 155; [1999] HCA 6; BC9900546 per Gleeson CJ, McHugh, Gummow and Hayne JJ.
 17. If a defendant is sued in contract he or she will be unable to claim contribution from others: *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100; (1988) 13 ACLR 283, SC(WA), Full Court. This is so for all jurisdictions except Victoria (see (VIC) Wrongs Act 1958 s 23A). If the obligation is one concurrent in contract and in tort it appears that the defendant may seek contribution from others liable in tort to the plaintiff, whether the claim is made in contract or tort: *MacPherson v*

- Kevin J Prunty & Associates* [1983] 1 VR 573, SC(VIC), Full Court; *Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322 at 354; (1979) CLC ¶40-575 per Samuels JA. As to contribution see further [415-195].
18. *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57; [1959] 2 All ER 345.
19. *Coupland v Arabian Gulf Petroleum Co* [1983] 3 All ER 226; [1983] 1 WLR 1136; *Bussell v Lotsirh Nominees Pty Ltd* [2003] 1 Qd R 477 at 478-80; [2002] QCA 296; BC200204643 per Davies JA.

[415-25] Distinction between tort and restitution An action for restitution differs from an action for damages in tort in that the claim in restitution is not for compensation.¹ Where a tort involves not only loss to the plaintiff, but benefit to the defendant, the plaintiff may choose to bring the action in restitution.²

The principal advantage of suing in restitution is the measure of damages available,³ although there might also be advantage with regard to the applicable limitation period.⁴ The effect of bankruptcy⁵ on the claim and the assignability of the claim⁶ will be different if the action is in restitution rather than tort.

Once the plaintiff has signed judgment in restitution, the claim in tort against the defendant is barred.⁷

Notes

1. *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 at 903; (1977) 35 LGRA 291; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; 69 ALR 577; 61 ALJR 151; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 621; (1989) NSW ConvR ¶55-488.

The object of a restitutionary claim is to restore to the plaintiff the benefit which the defendant has unjustly gained at the plaintiff's expense. In restitution it is immaterial that the plaintiff has suffered a loss, if the defendant has not gained a benefit: *Hambly v Trott* (1776) 1 Cowp 371 at 376; 98 ER 1136 at 1139 per Lord Mansfield. See also *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382; [1978] 1 WLR 93 at 112 per Slade J. Compare *Anglia Television Ltd v Reed* [1972] 1 QB 60; [1971] 3 All ER 690; [1971] 3 WLR 528; *Lloyd v Stanbury* [1971] 2 All ER 267; [1971] 1 WLR 535. See also RESTITUTION [370-425]-[370-440].

2. For example:

- (1) conversion — *Suttons Motors Pty Ltd v Campbell* (1956) SR (NSW) 304; 73 WN (NSW) 212, SC(NSW), Full Court; *Chesworth v Farrar* [1967] 1 QB 407; [1966] 2 All ER 107; [1966] 2 WLR 1073;
- (2) trespass to goods — *Oughton v Seppings* (1830) 1 B & Ad 241; 109 ER 776; *Rodgers v Maw* (1846) 15 M & W 444; 153 ER 924; *Neate v Harding* (1851) 6 Exch 349; 155 ER 577;
- (3) trespass to land by removing minerals — *Powell v Rees* (1837) 7 Ad & El 426; 112 ER 530; and
- (4) deceit — *Hill v Perrott* (1810) 3 Taunt 274; 128 ER 109; *Mahesan (T) s/o Thambiah v Malaysia Government Officers' Co-op Housing Society Ltd* [1979] AC 374; [1978] 2 All ER 405; [1978] 2 WLR 444, PC.

3. Historically there were procedural advantages in suing in restitution, and a cause of action in restitution survived the death of one of the parties, where a cause of action in tort did not. There are no longer any procedural advantages to waiver of tort, and it is now possible to combine claims in contract, quasi-contract and tort: *Kelly v Metropolitan Railway Co* [1895] 1 QB 944 at 946 per Lord Esher MR; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 18 per Viscount Simon LC, at 26 per Lord Atkin, at 42 per Lord Porter; [1940] 4 All ER 20. Regarding survivorship, the situation

in tort has been altered by the provision of statute and causes of action now survive death and vest in the estate of the deceased. See:

- (ACT) Civil Law (Wrongs) Act 2002 Pt 2.4
- (NT) Law Reform (Miscellaneous Provisions) Act 1956 Pt II
- (NSW) Law Reform (Miscellaneous Provisions) Act 1946 Pt 2
- (QLD) Succession Act 1981 s 66
- (SA) Survival of Causes of Action Act 1940 s 2
- (TAS) Administration and Probate Act 1935 s 27
- (VIC) Administration and Probate Act 1958 s 29
- (WA) Law Reform (Miscellaneous Provisions) Act 1941 s 4.

Damages may be recovered in restitution for the value of the use of a chattel or land: *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 255; [1952] 1 All ER 796; [1952] 1 TLR 939 per Denning LJ. No exemplary damages may be recovered if a plaintiff sues in restitution: see RESTITUTION [370-3825]. As to where exemplary damages may be recovered in tort see [415-215].

There may be policy reasons for refusing to allow a claim in restitution. For example, if the plaintiff would be circumventing a statutory defence by suing in restitution: *Waterhouse v Keen* (1825) 4 B & C 200; 107 ER 1033; *Brocklebank Ltd v R* [1925] 1 KB 52; (1924) 132 LT 166; 40 TLR 869, CA (defence under the (UK) Indemnity Act 1920); *Handie and Lane Ltd v Chiltem* [1928] 1 KB 663 at 695 per Lord Hanworth MR (defence under (CTH) Trade Disputes Act 1906 (repealed) s 4). See also *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366; [1982] 2 All ER 67; [1982] 2 WLR 803 (trade union which was immune from liability in tort could not be sued in restitution); *Chandler v Chandler* [1951] QWN 20 (one spouse could not avoid, by waiver, the tortious immunity granted to the other spouse).

4. See, for example, *Chesworth v Farrar* [1967] 1 QB 407; [1966] 2 All ER 107 at 113; [1966] 2 WLR 1073. Compare *Beaman v ARTS Ltd* [1948] 2 All ER 89 at 92-3; (1948) 64 TLR 285 per Denning J.
5. A tort is not provable in bankruptcy, but if the claimant waives the tort he or she can prove in a tortfeasor's bankruptcy for any liquidated sum received by the tortfeasor: *Johnson v Spiller* (1784) 1 Doug KB 163; 99 ER 109; *Watson v Holliday* (1882) 20 Ch D 780; 46 LT 878; 30 WR 747 (claim is for liquidated sum and therefore for purposes of the legislation is treated as contractual). See also BANKRUPTCY.
6. It is possible to assign a claim in restitution even though a bare claim to damages in tort may not be assigned: *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 121; [1964] 1 All ER 216 per Roskill J. As to assignment see further [415-105].
7. *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; [1940] 4 All ER 20; *Suttons Motors Pty Ltd v Campbell* (1956) SR (NSW) 304; 73 WN (NSW) 212, SC(NSW). Full Court; *Mahesan (T) s/o Thambiah v Malaysia Government Officers' Co-op Housing Society Ltd* [1979] AC 374; [1978] 2 All ER 405; [1978] 2 WLR 444, PC.

[415-30] **Distinction between tort and trusts** Tortious duties are owed to persons generally; in contrast, trusts exist for the benefit of specified persons¹ and the trustee stands in a fiduciary relationship to the beneficiary.² The restitutionary obligation of a trustee held liable for a breach of trust is fundamentally different from the obligations of a tortious wrongdoer.³ The trustee's liability is not limited to what he or she has actually received or to the benefit which he or she derived from the breach,⁴ nor can the liability of the trustee be decreased by taking into account a sum corresponding to the amount of tax that would have been payable if no breach of trust had been committed.⁵

The duty regarding trust is in personam and is fixed partly by law and partly by the parties.⁶ Breach of a trust gives rise to equitable remedies⁷ whereas torts usually give rise to damages.⁸

Notes

1. See TRUSTS [430-800]-[430-875].
2. See TRUSTS [431-1]-[430-155].
3. *Re Dawson (dec'd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWLR 211 at 214; (1966) 84 WN (Pt 1) (NSW) 399 per Street J (the obligation of a defaulting trustee is essentially one of effecting a restitution to the estate; the obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness). See also *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515; [1980] 2 All ER 92; [1980] 2 WLR 430; *Wills v Trustees Executors and Agency Co Ltd* (1900) 25 VLR 391.
4. *Adair v Shaw* (1803) 1 Sch & Lef 243 at 272; *Dalrymple v Melville* (1932) 32 SR (NSW) 596; 49 WN (NSW) 206. See also TRUSTS [430-5270]-[430-5385].
5. *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 346 per Kearney J (applying *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515; [1980] 2 All ER 92; [1980] 2 WLR 430; *Re Bell's Indenture*; *Bell v Hickley* [1980] 3 All ER 425; [1980] 1 WLR 1217).
6. See TRUSTS [430-4140]-[430-4280].
7. See TRUSTS [430-5270]-[430-5380].
8. As to damages see [415-215]. See also DAMAGES. The trust and fiduciary obligations which were recognised in equity courts were not at first recognised by common law courts at all and hence did not find way into torts: see TRUSTS [431-1]-[430-155]. Equitable remedies may be obtained in many circumstances today for breach of tortious duty, however, there is no civil injury (tort) if the action can be classed as breach of trust or some other merely equitable obligation: see TRUSTS [430-5270]-[430-5380]. It would appear that the preferable view is that exemplary damages are not available for equitable wrongs in Australia: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 422; 197 ALR 626; [2003] NSWCA 10; BC200300149 per Heydon JA.

(b) CONJUNCTION OF DAMAGE AND INJURY

[415-35] Nature of a legal injury A legal injury is the infringement of a right protected by law¹ and the granting of a legal remedy recognises the existence of a legal right.² Not all acts which give rise to harm constitute a legal injury,³ and a legal injury may exist where a right has been infringed, although no harm has been caused.⁴

Notes

1. *Allen v Flood* [1898] AC 1 at 92; [1895-99] All ER Rep 52; (1897) 77 LT 717 per Lord Watson ('any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed whether the motive prompting it be good, bad or indifferent').
2. See, for example, *Ashby v White* (1703) 2 Ld Raym 938 at 953; 1 Sm LC 216; 92 ER 126 at 136 per Holt CJ; *Constantine v Imperial Hotels Ltd* [1944] KB 693; [1944] 2 All ER 171; (1944) 172 LT 128.

[415-35]

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3. See, for example, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; 38 SR (NSW) 33; [1937] ALR 597; (1937) 11 ALJ 197.
4. As to legal injury without damage see [415-50].

[415-40] Damage in tort A distinction may be made between the infringement of a legal right and the harm which is caused by the infringement of that right.¹ Damage in tort gives rise to a legal right to recompense for the loss caused by the damage, provided the loss is caused by damage of a kind which the law recognises² and is a consequence of the infringement of the legal right.³

Notes

1. *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442; [1942] 1 All ER 142 per Simon LC ('injury' is limited to actionable wrong, while 'damage' in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not).
2. For example, nervous shock will be compensable where 'ordinary grief or anguish' will not: *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172. As to nervous shock see further NEGLIGENCE [300-25]. See also DAMAGES.
3. That is, there must be causation: *Langridge v Levy* (1837) 2 M & W 519; 150 ER 853 at 868. As to causation see further NEGLIGENCE [300-80]-[300-95].

[415-45] Damage without legal injury There may be harm or hurt caused to a person without infringement of any legal right¹ and where this happens there is no cause of action.² Damage may exist without injury because the act which gave rise to the damage was lawful,³ or it may exist because the unlawful act did not give rise to damage which the law recognises.⁴

Notes

1. It is *damnum absque injuria* which means loss without wrong or without legal remedy: *Butterworths Encyclopaedic Australian Legal Dictionary*. See *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 84; (1915) 113 LT 1032 per Lord Parker (damage alone is not sufficient to give rise to a right of action: there must be some right in the person damaged to immunity from the damage complained of). See also *Tamworth Borough Council v Fazeley Town Council* (1977) 76 LGR 608; *Pryce v Belcher* (1847) 4 CB 866; 136 ER 749; *Clark v London General Omnibus Co Ltd* [1906] 2 KB 648 at 663; (1906) 95 LT 435; 22 TLR 691 per Gorell Barnes P; *Sweeney v Coote* [1907] AC 221; (1907) 96 LT 748.
2. *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442; [1942] 1 All ER 142 per Simon LC (if A is damaged by the action of B, A nevertheless has no remedy against B if B's act is lawful in itself and is carried out without employing unlawful means; A must endure *damnum absque injuria*; it makes no difference that B in so acting had the purpose of damaging A).
3. *Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles* [1895] AC 587; [1895-9] All ER Rep 984; (1895) 64 LJ Ch 759; *Thomas and Evans Ltd v Mid-Rhondda Co-op Society Ltd* [1941] 1 KB 381; [1940] 4 All ER 357.
No use of property which would be legal if due to a proper motive can become illegal if it is prompted by a motive which is improper or even malicious: *Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles* [1895] AC 587; [1895-9] All ER Rep 984; (1895) 64 LJ Ch 759. See also *Allen v Flood* [1898] AC 1; [1895-99] All ER Rep 52; (1897) 77 LT 717; *Chapman v Honig* [1963] 2 QB 502; [1963] 2 All ER 513; *Wylid v Silver* [1963] Ch 243; [1963] 1 QB 169; [1962] 3 All ER 309.

Malice, however, can form the basis for the illegality of some actions. In malicious prosecution, malicious falsehood and sometimes in nuisance, malice can transform a reasonable use of land into an unreasonable one: see, for example, *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468; [1936] 1 All ER 825; (1936) 155 LT 288.

4. For example, the fact that an act is criminal and leads to damage does not mean that the plaintiff will have a cause of action in tort: *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173; [1981] 2 All ER 456; [1981] 3 WLR 33; *Westwood v Perrett* (1887) 13 VLR 732; 9 ALT 144 (perjurer cannot be sued for damage sustained by the plaintiff as a result of the perjury).

[415-50] Legal injury without damage There may be an infringement of a legal right without the causation of actual harm, that is, harm which the law recognises as damage.¹ Mere infringement of a legal right, without proof of harm or loss, may give rise to a cause of action.² In most tortious actions, however, damage is the substance of the action.³

Notes

1. It is *injuria sine damno* which means wrongdoing without damage: *Buttenworths Encyclopaedic Australian Legal Dictionary*.
2. For example, in torts actionable per se: see, for example, *Battiato v Lagana* [1992] 2 Qd R 234 (battery); *Law v Wright* [1935] SASR 20 at 25 per Piper J (assault); *Dumont v Miller* (1873) 4 AJR 152 (trespass to property); *Dymocks Book Arcade Ltd v McCarthy* [1966] 2 NSWLR 411 at 417 per Jacobs JA (trespass to goods). See also [415-10]. As to trespass to the person see [415-345]-[415-440]. As to trespass to goods see [415-445]-[415-475]. As to trespass to land see [415-480]-[415-550].
3. As to damage as substance of the action see [415-55].

[415-55] Damage as substance of the action In tort, there must be damage for a plaintiff to have a cause of action.¹ However, in torts that are actionable per se, the infringement of the legal right alone will be treated as giving rise to damage.² Damage may be imputed into the infringement of a legal right.³ Other torts require both the infringement of the legal right and proof of damage⁴ as a consequence of that infringement.

Notes

1. *Rogers v Dutt* (1860) 13 Moo PCC 209; 15 ER 78 ('It is essential to an action in tort that the act complained of should be legally wrongful as regards the party complaining, that is, it must prejudicially affect him or her in some legal right. The fact that it will, however directly, do him or her harm in his or her interests is not enough'). See also *Allen v Flood* [1898] AC 1; [1895-99] All ER Rep 52; (1897) 77 LT 717; *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889) 23 QBD 598; 61 LT 820; 5 TLR 658; *Grant v Australian Knitting Mills Ltd (Woollen Underwear Case)* (1935) 54 CLR 49; [1936] AC 85; [1935] All ER Rep 209 at 217 per Lord Wright; *Reitano v Jones* (2001) 54 NSWLR 661 at 663-5; [2001] NSWSC 1076; BC200107310 per Young CJ in Eq; *Harriton v Stephens* (2006) 226 ALR 391; 80 ALJR 791 at 824 per Hayne J, at 839-41 per Crennan J; [2006] HCA 15; BC200603032. As to the basis of liability see further [415-60]-[415-80].
2. See [415-50] note 2. As to forms of action in tort see [415-10].
3. *Ashby v White* (1703) 2 Ld Raym 938 at 953-5; 1 Sm LC 216; 92 ER 126 at 136-7 per Holt J (if plaintiff has a right he or she must have means to vindicate and maintain it, and a remedy if he or she is injured in the exercise and enjoyment of it) (cited

- with approval *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 at 350 per Lord Wright, CA; followed *Constantine v Imperial Hotels Ltd* [1944] KB 693; [1944] 2 All ER 171; (1944) 172 LT 128. See also *Embrey v Owen* (1851) 6 Exch 353 at 368; 155 ER 579 at 585 per Parke B; *King v Rochdale Canal Co* (1851) 14 QB 136 at 137; 117 ER 55 per Parke B; *Stimson v Farnham* (1817) LR 7 QB 175; 20 WR 182.
4. *Cable v Rogers* (1625) 3 Bulst 311 at 312; 81 ER 259 per Dodderidge J. See also *Winsmore v Greenbank* (1745) Willes 577; 125 ER 1330 per Willes J; *Best v Samuel Fox & Co Ltd* [1950] 2 All ER 798.

(c) BASIS FOR LIABILITY IN TORT

[415-60] **Fault as general basis for liability** The fact that a defendant interferes with a legal right of the plaintiff and causes damage by that interference will not of itself give rise to tortious liability.¹ Liability in tort is fundamentally connected with notions of fault.² 'Fault' may be considered as the falling below a standard of behaviour required by law³ and may be in the form of intentional conduct or negligent conduct.⁴ Further, strict liability⁵ and vicarious liability⁶ will impose tortious liability in the absence of fault.

Notes

1. *Wakelin v London and South Western Railway Co* (1886) LR 12 App Cas 41; 55 LT 709; *Metropolitan Railway Co v Jackson* (1877) LR 3 App Cas 193; 47 LJQB 303; 37 LT 679; *Sayers v Perrin (No 2)* [1966] Qd R 74; *Davis v Bunn* (1936) 56 CLR 246 at 255; [1936] ALR 411 per Starke J.
2. *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 549; 120 ALR 42; BC9404607 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Wakeman v Robinson* (1823) 1 Bing 213; [1814-23] All ER Rep 760; (1823) 130 ER 86.
3. *McHale v Watson* (1964) 111 CLR 384 at 388; [1965] ALR 788; BC6400440 per Windeyer J; *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861 at 879 per Singleton LJ, at 881 per Morris LJ; [1951] 2 All ER 310; *Weaver v Ward* (1607) Hob 134; 80 ER 284; *Holmes v Mather* (1875) LR 10 Ex 261; [1874-80] All ER Rep 345; (1875) 33 LT 361; *Stanley v Powell* [1891] 1 QB 86; [1886-90] All ER Rep 314; (1890) 63 LT 809.
4. *Stanley v Powell* [1891] 1 QB 86; [1886-90] All ER Rep 314; (1890) 63 LT 809; *McHale v Watson* (1964) 111 CLR 384; [1965] ALR 788; BC6400440. As to intentional conduct generally see [415-320]-[415-340]. As to negligent conduct generally see NEGLIGENCE.
5. As to strict liability see [415-75], [415-600]-[415-1090].
6. *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57; [1957] ALR 505; (1957) 31 ALJ 208 per Fullagar J (vicarious liability arises by virtue of the special relationship between the parties, in this case as between employer and employee). See further [415-80], NEGLIGENCE [300-125], [300-157].

[415-65] **Intention as fault** Intention in tort may take a number of forms. A voluntary¹ act by the defendant may be sufficient to establish intention, without any desire to infringe the plaintiff's legal rights or to inflict damage.² Certain torts depend on proof that the defendant acted with the purpose of injuring the plaintiff and in the knowledge that damage would result to the plaintiff.³ The fact that a defendant foresees the harmful consequences of the action but does it anyway, that is, the defendant is reckless, may also be treated

as intention.⁴ Finally, if a particular result is substantially certain to follow an act, the defendant may be treated as having intended the result of that act.⁵

Notes

1. The defendant must consciously bring about the bodily movement for which he or she is being held liable. The defendant will not be liable if the act is done while in a state of automatism (see *Roberts v Ramsbottom* [1980] 1 All ER 7; [1980] 1 WLR 823; *Morriss v Marsden* [1952] 1 All ER 925 at 927; [1952] 1 TLR 947; (1952) 96 Sol Jo 281 per Stable J; *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263 at 1266-7; [1998] RTR 390 per Leggatt LJ (compare *Carrier v Bonham* [2002] 1 Qd R 474 at 478-80 per McMurdo P, at 484-8 per McPherson JA, at 489 per Moynihan J; [2001] QCA 234; BC200103216)) or while being used as an unwilling instrument (*Weaver v Ward* (1607) Hob 134; 80 ER 284). If the defendant 'meant to do it' the act will be regarded as intended: *McNamara v Duncan* (1971) 26 ALR 584 at 587; 45 FLR 152 per Fox J.
2. *Wilson v Pringle* [1987] QB 237 at 249; [1986] 2 All ER 440 per Croom-Johnson LJ, CA. See also *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 743; 34 A Crim R 364 per Clarke JA, CA(NSW).
3. For example:
 - (1) conspiracy — see *Vickery v Taylor* (1910) 11 SR (NSW) 119 (agreement to raise price of a company's shares by making false statements held not actionable since there was no intention to injure plaintiff, even though he suffered foreseeable loss as a consequence); and
 - (2) intimidation — see *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367; *Latham v Singleton* [1981] 2 NSWLR 843; *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Assn of Australia* [1971] 1 NSWLR 760, CA(NSW); *Hullich v Hall* [1973] 2 NZLR 279 (intimidation not established where defendant issued threat to plaintiff and plaintiff took action to own loss, where that action was not intended by defendant).
4. *Beals v Hayward* [1960] NZLR 131. See NEGLIGENCE [300-65]-[300-75].
5. This is an objective test. A reasonable person in the defendant's position must know with substantial certainty that the particular result would follow. The test has been applied in American cases such as *Garnatt v Dailey* 279 P 2d 1091 (1955), despite an absence of any intention on the defendant's part to cause the plaintiff harm. Similarly, in England, there must be a substantial chance or sufficient probability of injury resulting, before a defendant is liable for negligence; a conceivable possibility is insufficient: *Bolton v Stone* [1951] AC 850 at 858; [1951] 1 All ER 1078 per Lord Porter. See also *Bolton v Stone*, above (AC) at 867 per Lord Reid (risk of damage so small that reasonable person in position of defendant considering the matter from point of view of safety would take steps to prevent the danger).

[415-70] **Negligence as fault** In certain torts,¹ the defendant will only be liable if the conduct which gives rise to the harm is intentional. However, often liability can be established if the conduct is negligent.² Negligence is the failure to take reasonable precautions to avoid foreseeable risks of injury.³ The standard of conduct which determines whether an action is negligent is an objective standard of 'reasonable' conduct.⁴

Notes

1. Such as conspiracy (see [415-65] note 3, [415-1600]-[415-1615]) and intimidation (see [415-65] note 3, [415-1575]-[415-1595]).
2. As is the case for all forms of trespass: see [415-320]-[415-340].
3. See *Blyth v Co of Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781 at 784; [1843-60] All ER Rep 478 at 480; (1856) 156 ER 1047 at 1049 per Alderson B.

Taylor v Cmr for Main Roads (1945) 46 SR (NSW) 117 at 119; 63 WN (NSW) 23; 16 LGR (NSW) 24; SC(NSW); *R v Newman* [1948] VLR 61 at 67; [1948] 1 ALR 109 per Barry J; *Tucker v McCann* [1948] VLR 222; [1948] 2 ALR 57. As to the elements of the tort of negligence see NEGLIGENCE [300-1].

4. As to the 'reasonable person' see, for example, *Vaughan v Menlove* (1837) 3 Bing NC 468 at 475; 132 ER 490 at 493 per Tindal CJ; *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205 at 224; (1932) 147 LT 404 per Greer LJ; *Hawkins v Coulsdon and Purley Urban District Council* [1954] 1 QB 319 at 341; [1954] 1 All ER 97; [1954] 2 WLR 122 per Romer LJ; *London Passenger Transport Board v Upson* [1949] AC 155 at 173 per Lord Uthwatt, at 176 per Lord Du Parcq; [1949] 1 All ER 60; *AC Billings & Sons Ltd v Riden* [1958] AC 240 at 255; [1957] 3 All ER 1; [1957] 3 WLR 496 per Lord Reid.

[415-75] **Strict liability** If a plaintiff is not required to prove fault, and a defendant cannot escape liability by proving lack of negligence or intention to cause harm, liability is said to be strict. Strict liability arises under the principles of tort¹ and can also be created by statute.² Strict liability is to be distinguished from absolute liability.³ Vicarious liability can also be considered a form of strict liability.⁴

Notes

1. For example, in liability for dangerous animals, scienter liability and cattle trespass: see ANIMALS [20-500]-[20-560] and [415-600]-[415-1090].
2. Examples of statutory provisions which give rise to liability in the absence of fault include industrial health and safety legislation (see [415-1300]-[415-1435] and EMPLOYMENT [165-435]); workers' compensation schemes (see [415-225], [415-240], [415-1300]-[415-1435] and WORKERS' COMPENSATION); statutes imposing strict liability on airlines (see AVIATION [35-775], [35-780]); product liability legislation (see CONSUMER PROTECTION [100-775]-[100-963]) and dog control legislation (see ANIMALS [20-510]).
3. It depends on the interpretation of a statute which imposes liability without fault as to whether liability is absolute or strict: *Barrett v Steel Products Distributing Co Pty Ltd* [1962] NSW 981 (duty to cover all dangerous parts of machinery absolute); *Dairy Farmers Co-op Ltd v Azar* (1990) 170 CLR 293; 95 ALR 1; (1990) Aust Torts Reports ¶81-035 (duty to securely fence off all dangerous parts of machinery absolute). For the definition of 'absolute liability' see *Butterworths Encyclopaedic Australian Legal Dictionary*.
4. As to vicarious liability see [415-80].

[415-80] **Vicarious liability** Vicarious liability arises when one person is held liable for the wrongful act or omission of another, even if the specific act or omission was unknown to that person at the time it occurred.¹ As this liability does not depend upon proof of any actual wrongdoing by the party to be held vicariously responsible, it is a form of strict liability.² The most common form of vicarious liability is when an employer is responsible for the torts of an employee which are committed in the course of employment.³ Vicarious liability can also be imputed to a principal where his or her agent commits a tort whilst acting in a representative capacity,⁴ and to the owner of a vehicle which has been driven by another person.⁵ Where vicarious liability exists, the

person who commits the tort and the person who is held vicariously liable are joint tortfeasors.⁶ A person who is held vicariously liable for a tort may not be liable for exemplary damages.⁷

Notes

1. *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57; [1957] ALR 505; (1957) 31 ALJ 208 per Fullagar J (vicarious liability arises by virtue of the special relationship between the parties). See also NEGLIGENCE [300-125], [300-157].
2. As to strict liability see [415-75], [415-600]-[415-1090] and [415-1300]-[415-1435].
3. See, for example, *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57; [1957] ALR 505; (1957) 31 ALJ 208 per Fullagar J. As to the course of employment see *New South Wales v Lepore* (2003) 212 CLR 511 at 535-46; 195 ALR 412; [2003] HCA 4; BC200300126 per Gleeson CJ. However, see now *Sweeney v Boylan Nominees Pty Ltd (t/as Quirks Refrigeration)* (2006) 227 ALR 46; 80 ALJR 900 at 904; [2006] HCA 19; BC200603256 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. As to the distinction between employees and independent contractors see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36-40; 181 ALR 263; [2001] HCA 44; BC200104558 per Gleeson CJ, Gaudron, Gummow and Kirby JJ.
4. *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-op Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 49-50; [1932] ALR 73; (1931) 5 ALJ 355 per Dixon J. See also *Bonette v Woolworths Ltd* (1937) 37 SR (NSW) 142; 54 WN (NSW) 57.
5. In most Australian jurisdictions third party insurance schemes will cover this area with regard to personal injuries: see TRANSPORT [425-1500]-[425-1670].
The common law remains relevant, however, in regard to property damage: see *Morgans v Launchbury* [1973] AC 127; [1972] 2 All ER 606; [1972] 2 WLR 1217 (approving *Hewitt v Bonvin* [1940] 1 KB 188; (1939) 161 LT 360); *Orinrod v Crossville Motor Services Ltd* [1953] 2 All ER 753; [1953] 1 WLR 1120. Vicarious liability may also be imposed on persons other than the owners of the motor vehicles, as it stems from the agency relationship. Therefore a bailee (see *Soblusky v Egan* (1960) 103 CLR 215 at 231; [1960] Qd R 204; [1960] ALR 310; (1960) 33 ALJR 463 per Dixon CJ, Kitto and Windeyer JJ) or a thief (see *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 at 320; 59 WN (NSW) 10, SC(NSW)) may be held to be the principal. However, the presumption of agency, as the foundation of vicarious liability, is limited at common law to motor vehicles and does not extend to aircraft or boats: *Scott v Davis* (2000) 204 CLR 333 at 339-40 per Gleeson CJ, at 420 per Gummow J, at 440 per Hayne J, at 460 per Callinan J; 175 ALR 217; [2000] HCA 52; BC200005826 (aircraft); *Gutman v McFall* (2004) 61 NSWLR 599 at 601; [2004] NSWCA 378; BC200407028 per Giles JA.
6. As to joint and several tortfeasors see [415-180]-[415-210].
7. *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* (1993) Aust Torts Reports ¶81-246; BC9302234. However, if the person ratified or was involved with or responsible for the act, there may be liability for exemplary damages: *Schumann v Abbott* [1961] SASR 149.

(d) PERSONS WHO MAY BE LIABLE IN TORT

[415-85] Persons with intellectual disabilities In tort the liability of a person with an intellectual disability depends on the constituent elements of the tort itself and the degree to which the person's abilities are impaired.¹ If the tort requires an intention to cause harm,² a disability which makes a person unable to form such an intention will also mean that he or she cannot be liable

for that tort. If the tort requires only that the person intend the act, and not the consequences of that act, the person will be liable for that tort³ unless it is established that the disability was such that the person was incapable of a volitional act.⁴ In the case of torts such as negligence, which include an objective standard such as the standard of care,⁵ liability may arise if the person had the capacity to intend the negligent act.⁶

Notes

1. For example, a person would be liable for an intentional tort when the nature and quality of the act was appreciated, although it was not understood to be wrong: *Morris v Marsden* [1952] 1 All ER 925; [1952] 1 TLR 947; (1952) 96 Sol Jo 281; *Beals v Hayward* [1960] NZLR 131.
2. For example, torts of conspiracy (see [415-1600]-[415-1615]) and inducing breach of contract (see [415-1550]).
3. *Morris v Marsden* [1952] 1 All ER 925 at 927; [1952] 1 TLR 947; (1952) 96 Sol Jo 281 per Stable J; *Beals v Hayward* [1960] NZLR 131; *Lauson v Wellesley Hospital* (1975) 61 DLR (3d) 445; *Carrier v Bonham* [2002] 1 Qd R 474 at 478-80 per McMurdo P, at 484-8 per McPherson JA, at 489 per Moynihan J; [2001] QCA 234; BC200103216.
4. *Roberts v Ramsbottom* [1980] 1 All ER 7 at 15; [1980] 1 WLR 823 per Neill J.
5. See NEGLIGENCE [300-65]-[300-79].
6. *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56 at 67 per Wolff SP; *Carrier v Bonham* [2002] 1 Qd R 474 at 478-80 per McMurdo P, at 484-8 per McPherson JA, at 489 per Moynihan J; [2001] QCA 234; BC200103216.

[415-90] Minors In the case of a tort which requires only an intentional act and not an intention to cause harm, a minor¹ will be liable if he or she was capable of intending the act.² In negligence, the standard of care expected of a minor is one which could be expected of a reasonable person of similar age, experience and intelligence.³ The minor's capacity for contributory negligence will also be determined by the minor's age and experience.⁴ If the tortious act is a breach of a contract upon which the minor could not be sued in contract law, then the minor may not be sued in tort.⁵

Notes

1. A 'minor' is a person who has not yet attained the age of 18 years:
(ACT) Age of Majority Act 1974 s 5
(NT) Age of Majority Act 1974 s 4
(NSW) Minors (Property and Contracts) Act 1970 s 9
(QLD) Law Reform Act 1995 s 17 (replacing (QLD) Age of Majority Act 1974 (repealed) s 5)
(SA) Age of Majority (Reduction) Act 1971 s 3
(TAS) Age of Majority Act 1973 s 3
(VIC) Age of Majority Act 1977 s 3
(WA) Age of Majority Act 1972 s 5.
2. *Hart v A-G (Tas)* (1959) 14 Tas R 1 (minor will be liable so long as he or she is of sufficient age to have intended to carry out the act of trespass, even though, by reason of youth, he or she did not realise the wrongful nature of the act: five year old child who intended to slash playmate held liable even though seriousness of the act not

- appreciated by the child); *Smith v Leurs* (1945) 70 CLR 256; [1945] ALR 392; (1945) 19 ALJ 230. See also *Tillander v Gosselin* (1966) 60 DLR (2d) 18 (minor held too young to intend the act).
3. *McHale v Watson* (1964) 111 CLR 384 at 386; [1965] ALR 788; BC6400440 per Windeyer J; *Bullock v Miller* 1987 14 Tas R 129; (1987) 5 MVR 55; BC8700006, SC(TAS); *Chan v Fong* (1973) 5 SASR 1 at 5-6 per Walters J; *H v Pennell and South Australia* (1987) 46 SASR 158 at 177; (1987) Aust Torts Reports ¶80-112 per Olsson J, SC(SA), Full Court; *Mullin v Richards* [1998] 1 All ER 920 at 924-5; [1998] 1 WLR 1304 per Hutchison LJ.
 4. *Bullock v Miller* 1987 14 Tas R 129; (1987) 5 MVR 55; BC8700006, SC(TAS); *Charles v Zadov* (1981) 28 SASR 492. No rule of law would preclude a child of any particular age from being capable of negligence: *Cotton v Cnr for Road Transport and Tramways* (1942) 43 SR (NSW) 66; 60 WN (NSW) 42; *Farrall v Stokes* (1954) 54 SR (NSW) 294; 71 WN (NSW) 213; *Griffiths v Doolan* [1959] Qd R 304; *Goode v Thompson* (2001) Aust Torts Reports ¶81-617; [2001] QSC 287; BC200104606 at [28]-[36] per Ambrose J, SC(QLD). Compare *Cirjak v Todd* (1977) 17 SASR 316 at 317-18 per Bray CJ (child of four years and 11 months too young to be liable for contributory negligence); *Beasley v Marshall* (1977) 17 SASR 456.
 5. *Jennings v Rundall* (1799) 8 Term Rep 335; 101 ER 1419; *R Leslie Ltd v Sheill* [1914] 3 KB 607; [1914-15] All ER Rep 511. This is not the case if the tortious action falls outside the contract: *Burnard v Haggis* (1863) 14 CBNS 45; 143 ER 360; *Ballett v Mingay* [1943] 1 KB 281; [1943] 1 All ER 143; (1943) 168 LT 34. See also *Walley v Holt* (1876) 35 LT 631. Note that the position has been modified by statute in New South Wales: (NSW) *Minors (Property and Contracts) Act 1970* s 48.

[415-95] Convicted persons In most jurisdictions, a person who has been convicted or is serving a sentence is not subject to any limitations regarding capacity to sue or be sued in tort.¹ In Queensland, the disability of a convicted person is subject to the length of that person's sentence.²

Notes

1. The ancient common law doctrine of attainder, which extinguished various civil rights of persons convicted and sentenced to death for treason or other capital felonies, is part of the common law of Australia, but now has very limited application due to the operation of statute law in most jurisdictions and the repeal of the death penalty in all jurisdictions: *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; 22 ALR 439; 53 ALJR 166. A person who was sentenced to death but whose sentence was commuted is **thereby attainted and disabled** from suing in the courts for the duration of his or her sentence, **subject to abrogation of the effect of this common law rule by statute law in some jurisdictions:**
 - (ACT) *Crimes (Sentencing) Act 2003* s 144
 - (NT) *Criminal Code* s 435A
 - (NSW) *Felons (Civil Proceedings) Act 1981* (abolished the common law rule but provides that convicted felons in custody must obtain leave from the court to sue; but see *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216; *Prus-Grzybowski v Everingham* (1983) 45 ALR 468; 67 FLR 132, Fed C of A; *Jol v New South Wales* (1998) 45 NSWLR 283 at 290; 104 A Crim R 516; BC9806449 per Sheller JA)
 - (SA) *Criminal Law Consolidation Act 1935* s 329
 - (TAS) *Prisoners (Removal of Civil Disabilities) Act 1991* s 4(1), 4(2) (prisoners may sue and be sued, however, leave of court is required to institute relevant proceedings); see also *Smith v Coleman* (1996) 5 Tas R 469 (exercise of the discretion to grant leave); *O'Neill v Australian Broadcasting Corp* [2005] TASSC 75; BC200505763
 - (VIC) *Crimes (Amendment) Act 1973* (repealing (VIC) *Crimes Act 1958* s 549)
 - (WA) *Criminal Code* ss 3. 683 (repealed) (attainder and the distinction between felonies and misdemeanours abolished).