

[415-95]

Halsbury's Laws of Australia

As to the abolition of the distinction between felonies and misdemeanours see CRIMINAL LAW [130-10], [130-13000].

- In Queensland, a convicted person cannot, whilst serving a sentence of three years or more, bring a tort action of a property nature or for the recovery of any debt or damage, including damages for personal injury: (QLD) Public Trustee Act 1978 ss 90(a), 95. See also *Fitzpatrick v Jackson* [1989] 2 Qd R 542; (1988) 33 A Crim R 382, SC(QLD), Full Court; *Tyler v Krause* [2003] 1 Qd R 453; (2002) 132 A Crim R 334; [2002] QCA 295; BC200204642.

**[415-100] Bankrupts** Where the defendant is a bankrupt, an action for damages in tort cannot be proved in bankruptcy.<sup>1</sup> A bankrupt remains liable to be sued in tort even after discharge.<sup>2</sup> Where a plaintiff has a right of action in tort against the estate of a deceased person and that estate is insolvent, the plaintiff may prove in the administration of the estate for unliquidated damages.<sup>3</sup>

Where the plaintiff is a bankrupt and the claim in tort relates to the property of the bankrupt, the trustee in bankruptcy is entitled to present the claim to the exclusion of the bankrupt.<sup>4</sup> However, the bankrupt is entitled to bring the claim personally where the claim relates to a personal wrong.<sup>5</sup> It is not clear who is the proper person to bring such a claim where the same act causes both personal damage and damage to property and there is no distinct cause of action.<sup>6</sup>

## Notes

- (CTH) Bankruptcy Act 1966 s 82(2). Where the facts give rise to a claim in both contract and tort, the claim is provable as a claim in contract: *Re Great Orme Tramways Co* (1934) 50 TLR 450. See also *Re Estate of Fitzhardinge; Ex parte Hely* (1894) 15 LR (NSW) B & P 132; *Re H/A Brown & Sons Pty Ltd and Companies Act 1961* [1964-65] NSWLR 575; (1964) 81 WN (Pt 1) (NSW) 402; *Cornelius v Barewa Oil and Mining (NL) (in liq)* [1982] WAR 311; (1982) 42 ALR 83; 64 FLR 287; *Re Southern Cross Coaches Ltd* (1932) 49 WN (NSW) 230. As to the situation where there is provision for indemnity under an insurance contract in relation to tortious liability see (CTH) Bankruptcy Act 1966 s 117.
- Ibid* s 153(1).
- Ibid* s 116(1).
- Ibid* s 60(2), 60(3). For the test regarding applicability of this section see *Cay v Journeaux (No 2)* (1935) 52 CLR 713 at 721; [1936] ALR 40; (1935) 9 ALJ 127 per Dixon J. See also *Faulkner v Bluet* (1981) 52 FLR 115; *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45; 79 ALR 591; 90 FLR 469; *Coyne v Commercial Equity Corp Ltd* (1998) 20 WAR 109 at 116 per Kennedy J. at 125 per Walsh J; BC9803480.
- Where there are clear causes of action, the property action is stayed, but the bankrupt can continue the action with regard to personal injury: *Bullock v Goodluck* 1983 Tas R 226; (1983) 48 ALR 217, SC(TAS); *Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd* (1984) 55 ALR 594; 73 FLR 88, SC(QLD).
- See *Wenlock v Moloney* (1967) 111 Sol Jo 437, CA (suggests that where the claim is based on a property interest, notwithstanding that alleged damage includes mental or physical suffering or loss of reputation, proceedings are stayed).

**[415-105] Assignees** Although a cause of action in tort cannot generally be assigned,<sup>1</sup> the damages from an action may be assigned.<sup>2</sup> An assignor must bring an action in the assignor's own name.<sup>3</sup> These rules do not operate when:

- (1) the cause of action is related to tangible property which has been assigned;<sup>4</sup>
  - (2) the cause of action is not a personal one and the assignee has a genuine and substantial interest in the success of the action;<sup>5</sup> or
  - (3) the damage suffered has been indemnified by an insurer.<sup>6</sup>
- The rights of action which pass to a trustee in bankruptcy can be passed by the trustee to another.<sup>7</sup>

## Notes

1. *Prosser v Edmonds* (1835) 1 Y & C Ex 481; 160 ER 196; *Defries v Milne* [1913] 1 Ch 98; (1912) 82 LJ Ch 1; 107 LT 593; *Re Great Orme Tramways Co* (1934) 50 TLR 450; *Poulton v Commonwealth* (1953) 89 CLR 540 at 602; [1954] ALR 1; (1953) 27 ALJ 707 per Williams, Webb and Kitto JJ; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 121; [1964] 1 All ER 216 per Roskill J.
2. *Glegg v Bromley* [1912] 3 KB 474; [1911-13] All ER Rep 1138, CA; *Campbells Cash and Carry Pty Ltd v Fosfif Pty Ltd* (2006) 229 ALR 58; 80 ALJR 1441 at 1459; [2006] HCA 41; BC200606677 per Gummow, Hayne and Crennan JJ.
3. *New Zealand Loan and Mercantile Agency Co (Ltd) v Mitchell* (1906) 26 NZLR 433; *Poulton v Commonwealth* (1953) 89 CLR 540 at 602; [1954] ALR 1; (1953) 27 ALJ 707, HC of A.
4. *Re Kenneth Wright Distributors Pty Ltd (in liq); WJ Vine Pty Ltd v Hall* [1973] VR 161; *Campbells Cash and Carry Pty Ltd v Fosfif Pty Ltd* (2006) 229 ALR 58; 80 ALJR 1441 at 1459; [2006] HCA 41; BC200606677 per Gummow, Hayne and Crennan JJ. Assignment of property is not invalidated merely because the property is the subject of litigation or cannot be recovered without litigation: *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 at 271; [1904] WN 210 per Stirling LJ. If A transfers property to B, A may also assign a right of action for breach of contract in relation to that property: *Ellis v Torrington* [1920] 1 KB 399 at 412-13; (1919) 122 LT 361 per Scrutton LJ. This may also apply if the cause of action is a tort: *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 at 657; [1980] 3 All ER 721; [1980] 3 WLR 367 per Lord Denning MR, CA.  
If A makes a voluntary payment to B to compensate B for loss caused by C, A may take a valid assignment of B's claim in tort against C: *Esso Petroleum Co Ltd v Hall Russell and Co Ltd* [1989] AC 643; [1989] 1 All ER 37; [1988] 3 WLR 730 at 738 per Lord Goff.
5. *First City Corp Ltd v Downsviue Nominees Ltd* [1989] 2 NZLR 710 at 757 per Gault J (affirmed on other grounds *Downsviue Nominees Ltd v First City Corp Ltd* [1993] AC 295; [1993] 3 All ER 626; [1993] 2 WLR 86; (1992) 11 ACLC 3101, PC); *Monk v Australia and New Zealand Banking Group Ltd* (1994) 34 NSWLR 148 at 152 per Cohen J; *South Australian Management Corp v Sheahan* (1995) 16 ACSR 45 at 57-8; 13 ACLC 328 per Debelle J, SC(SA); *National Mutual Property Services (Aust) Pty Ltd v Citibank Savings Ltd* (1995) 132 ALR 514 at 537-9 per Lindgren J; *Beatty v Brashes Pty Ltd* [1998] 2 VR 201 at 214-15; (1995) 13 ACLC 925 per Smith J.
6. In this case, the doctrine of subrogation allows the insurance company to bring the action in its own name. The right arises only where the policy is one of indemnity, and thus will generally apply only to property insurance: *King v Victoria Insurance Co Ltd* [1896] AC 250; (1896) 74 LT 206; 12 TLR 285, PC; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101; [1964] 1 All ER 216. As to subrogation generally see INSURANCE [235-930]-[235-995].
7. *Guy v Churchill* (1888) 40 Ch D 481.

[415-110] **The Crown** The Commonwealth and State or Territory Crowns have the same tortious liabilities as a subject.<sup>1</sup> The Crown can be held vicariously

liable,<sup>2</sup> but this liability does not always extend to its officers<sup>3</sup> or the armed forces.<sup>4</sup> The Crown may exempt itself from liability in a particular case and legislation imposing statutory duties may exclude the liability of the Crown in a particular case.<sup>5</sup>

## Notes

1. The liability of the Commonwealth is established by Commonwealth Constitution s 75 and (CTH) Judiciary Act 1903 ss 56, 64 in combination with the common law. See further *Baume v Commonwealth* (1906) 4 CLR 97; 13 ALR 22; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; 66 ALR 412; 5 Aust Const LR (Pt 4) 55; *Commonwealth v Mewett* (1997) 191 CLR 471 at 495-502 per Dawson J. at 532 per McHugh J. at 552 per Gummow and Kirby JJ; 146 ALR 299; [1997] HCA 29; BC9703255. The (CTH) Judiciary Act 1903 enables an action in tort by a State or Territory against the Commonwealth in the High Court of Australia (ibid ss 57, 64) and by the Commonwealth against a State or Territory in either the Supreme Court of the jurisdiction or the High Court of Australia if the High Court of Australia has original jurisdiction (ibid ss 58, 64). See also *Commonwealth v New South Wales* (1923) 32 CLR 200; 29 ALR 289; BC2300035. (CTH) Judiciary Act 1903 ss 59, 64 enable actions between States and Territories.

As to the capability of a State or Territory to be held liable for a tortious action see:

- (ACT) Court Procedures Act 2004 ss 21, 25
- (NT) Crown Proceedings Act 1993 s 5
- (NSW) Crown Proceedings Act 1988 s 5
- (QLD) Crown Proceedings Act 1980 s 8
- (SA) Crown Proceedings Act 1992 s 5
- (TAS) Crown Proceedings Act 1993 s 5
- (VIC) Crown Proceedings Act 1958 ss 23, 25
- (WA) Crown Suits Act 1947 ss 5, 7; see *Bell v Western Australia* (2004) 28 WAR 555 at 563-4; (2004) Aust Torts Reports ¶81-777; [2004] WASCA 205; BC200406299 per McLure J.

Note that the liability of the Crown is subject to certain exceptions: see notes 3-5 below.

2. *Commonwealth v Connell* (1986) 5 NSWLR 218, CA(NSW); *Parker v Commonwealth* (1965) 112 CLR 295; [1965] ALR 1094; (1965) 38 ALJR 444; *RESI Corp v Sinclair* (2002) 54 NSWLR 387 at 404-7; [2002] NSWCA 123; BC200202174 per Hodgson JA. The Crown cannot rely for a defence on the fact that the tortious act of the servant was performed under the authority of void legislation: *James v Commonwealth* (1939) 62 CLR 339; [1939] ALR 141; (1939) 13 ALJ 34.
3. As to officers of the Crown see [415-115].
4. *Joseph v Colonial Treasurer of New South Wales* (1918) 25 CLR 32; 18 SR (NSW) 447; 24 ALR 185 (the evidence did not establish a justification of exercise of royal prerogative as to war); *Evans v Finn* (1904) 4 SR (NSW) 297; 21 WN (NSW) 118; *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344; [1943] ALR 264; (1940) 16 ALJ 219 (no duty exists if injury is inflicted during course of military operations in time of war). See, however, *Groves v Commonwealth* (1982) 150 CLR 113; 40 ALR 193; 56 ALJR 570; *Commonwealth v Connell* (1986) 5 NSWLR 218; *Parker v Commonwealth* (1965) 112 CLR 295; [1965] ALR 1094; (1965) 38 ALJR 444 (immunity does not apply with regard to the performance of routine peacetime duties). As to peacetime duties see *Commonwealth v Jenner* (1989) 9 MVR 387; BC8901978, CA(NSW) (it is only with regard to actual war-like activities that the Commonwealth is not liable). The High Court of Australia left open the question of such a duty arising in war-like operations or military training exercises simulating active service in *Groves v Commonwealth* (1982) 150 CLR 113 at 125, at 136; 40 ALR 193 at 201, at 210; 56 ALJR 570 per Gibbs CJ, Stephen, Mason, Aickin and Wilson JJ, and per Murphy J, respectively. See also *Venoyan v Commonwealth (No 2)* [1989] VR

- 712 at 723-4; (1988) Aust Torts Reports ¶80-222 per Kay and Marks JJ, SC(VIC), Full Court (affirmed *Commonwealth v Verwayen* (1990) 170 CLR 394; 95 ALR 321; 64 ALJR 540). Military tribunals are exempt from liability: (CTH) Defence Force Discipline Act 1982 s 193(1).
5. *Downs v Williams* (1971) 126 CLR 61; [1972] ALR 97; (1971) 45 ALJR 576; *Sasin v Commonwealth* (1984) 52 ALR 299; 68 FLR 404, SC(NSW); *Howard v Queensland* [2001] 2 Qd R 154 at 157-59; [2000] QCA 223; BC200003088 per Thomas JA; *Bell v Western Australia* (2004) 28 WAR 555 at 563-4; (2004) Aust Torts Reports ¶81-777; [2004] WASCA 205; BC200406299 per McLure J.

**[415-115] Officers of the Crown** The Crown is not vicariously liable for the acts of its servants<sup>1</sup> in whom there is vested an 'independent discretion'.<sup>2</sup> This principle has particular relevance to the acts of police officers,<sup>3</sup> and has been abolished with regard to police officers in most jurisdictions.<sup>4</sup>

#### Notes

1. For example:
  - (1) magistrates — *Thompson v Williams* (1914) 32 WN (NSW) 27;
  - (2) legal aid officers — *Field v Nott* (1939) 62 CLR 660; 13 ALJ 419;
  - (3) collectors of customs — *Baume v Commonwealth* (1906) 4 CLR 97; 13 ALR 22 (distinguished *Oriental Foods (Wholesalers) Co Pty Ltd v Commonwealth* (1983) 50 ALR 452, SC(NSW)); and
  - (4) pilot of a ship — *Actieselskabet Bannockburn v Williams* (1912) 12 SR (NSW) 665; 29 WN (NSW) 177, SC(NSW), Full Court; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; 66 ALR 29; 60 ALJR 480.
2. *Baume v Commonwealth* (1906) 4 CLR 97; 13 ALR 22; *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 352-3; [1943] ALR 264; (1940) 16 ALJ 219 per Starke J; *Musgrave v Commonwealth* (1937) 57 CLR 514 at 548; [1937] ALR 614; (1937) 11 ALJ 153 per Dixon J; *Field v Nott* (1939) 62 CLR 660; 13 ALJ 419; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; 66 ALR 29; 60 ALJR 480; *Grimwade v Victoria* (1997) 90 A Crim R 526 at 567-70; (1997) Aust Torts Reports ¶81-422; BC9700017 per Harper J, SC(VIC); *Bell v Western Australia* (2004) 28 WAR 555; (2004) Aust Torts Reports ¶81-777; [2004] WASCA 205; BC200406299. See also *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 249; [1952] ALR 125; (1952) 25 ALJ 762 per Dixon J (affirmed *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113; [1955] AC 457; [1955] ALR 469; [1955] 1 All ER 846); *Commonwealth v Connell* (1986) 5 NSWLR 218 at 220 per Glass JA, CA(NSW); *Cubillo v Commonwealth* (2001) 112 FCR 455 at 529-31; 183 ALR 249; [2001] FCA 1213; BC200105126. This principle applies to any public officer with discretion in the exercise of an independent legal duty; *Little v Commonwealth* (1947) 75 CLR 94 at 114; [1947] ALR 483; (1947) 21 ALJ 292 per Dixon J.  
The principle has been abolished in New South Wales: (NSW) Law Reform (Vicarious Liability) Act 1983 s 8.
3. *Encver v R* (1906) 3 CLR 969; 12 ALR 592 (wrongful arrest); *Irvin v Whitrod (No 2)* [1978] Qd R 271 (stakeout); *Griffiths v Haines* [1984] 3 NSWLR 653; *Skuse v Commonwealth* (1985) 62 ALR 108, Fed C of A, Full Court; *Middleton v Western Australia* (1992) 8 WAR 256.
4. (CTH) Australian Federal Police Act 1979 s 64B  
(NT) Police Administration Act 1978 Pt VIIA; see *Lackersteen v Jones* (1988) 92 FLR 6, SC(NT) (the Crown is not liable where the officer is operating outside the course or scope of employment)  
(NSW) Law Reform (Vicarious Liability) Act 1983 ss 6, 8

[415-115]

*Halsbury's Laws of Australia*

(QLD) Police Service Administration Act 1990 s 10.5(1); see *Peat v Lin* [2005] 1 Qd R 40 at 43-50; [2004] QSC 219; BC200404807 per Atkinson J

(SA) Police Act 1998 s 65

(TAS) Police Service Act 2003 s 84

(VIC) Police Regulation Act 1958 s 123; see *Victoria v Horvath* (2002) 6 VR 326 at 342-6; [2002] VSCA 177; BC200206569

(WA) Police Act 1892 s 157.

There are no equivalent provisions in the other jurisdictions. See generally *New South Wales v Ibbett* [2006] HCA 57; BC200610288 at [4]-[5].

See also POLICE AND EMERGENCY SERVICES [320-175]-[320-225], [320-340], [320-345].

**[415-120] Corporations** A company incorporated by registration has the legal capacity of a natural person and can be liable in tort.<sup>1</sup> A company can be liable itself for the breach of a duty it owes<sup>2</sup> and it can also be vicariously liable for the torts of its employees and agents.<sup>3</sup>

*Notes*

1. (CTH) Corporations Act 2001 s 124. Where liability in tort depends upon proof of personal fault on the part of the corporation, this must be established on the part of 'the directing will and mind' of the corporation: *Lenard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; [1914-15] All ER Rep 280; [1915] WN 119; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172; [1956] 3 All ER 624 per Denning LJ, CA; *Tesco Supermarkets Ltd v Natmass* [1972] AC 153 at 170; [1971] 2 All ER 127; [1971] 2 WLR 1166 per Lord Reid. See also *Federal Commissioner of Taxation v Whitford's Beach Pty Ltd* (1982) 150 CLR 355; 39 ALR 521; 56 ALJR 240; 12 ATR 692; 82 ATC 4031; *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270; 2 ACLR 176, SC(SA), Full Court. As to the legal capacity of a corporation see CORPORATIONS [120-3001]-[120-3235].
2. *Lenard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; [1914-15] All ER Rep 280; [1915] WN 119; *Canberra Formwork Pty Ltd v Civil & Civic Ltd* (1982) 41 ACTR 1; 67 FLR 66.
3. *Donato v Legion Cabs (Trading) Co-op Society Ltd* [1966] 2 NSW 583; (1966) 85 WN (Pt 1) (NSW) 242, CA. See also CORPORATIONS [120-3150].

**[415-125] Unincorporated associations** An unincorporated association does not have a legal identity and cannot sue or be sued in its own name.<sup>1</sup> The committee of such an association, however, can be liable for torts committed in the course of the association's activities; the committee can be treated as an occupier of association property<sup>2</sup> and as the employer of any staff of the association,<sup>3</sup> and is therefore subject to the liabilities of occupiers and employers. Rules of court also allow for representative actions which can be used against a member or members of an unincorporated association as representatives of the whole group, provided it can be shown that the individual members have a common interest in the matter<sup>4</sup> and there is a 'community of interest in the defence'.<sup>5</sup>

*Notes*

1. *Hall v Leyshon; Ex parte Hall* (1895) 6 QLJ 232, SC(QLD), Full Court (unable to sue); *Cother v John Fairfax & Sons Pty Ltd* (1947) 64 WN (NSW) 154 (unable to sue); *London Assn for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15; [1916-17] All ER Rep 452 (unable to be sued).

In Tasmania, a member or members of a society may sue and be sued in the name of the association where the relevant claim arose in relation to the carrying out of the objects or affairs of the association: (TAS) Supreme Court Rules 2000 rr 317, 319, 321, 328, 329, 330, 331, 333. A 'society' is defined to include unincorporated societies, fellowships, clubs other than proprietary clubs and associations: (TAS) Supreme Court Rules 2000 r 5.

2. *Smith v Yarnold* [1969] 2 NSWLR 410; (1969) 90 WN (Pt 1) (NSW) 316, CA(NSW); *Green v Perry* (1955) 94 CLR 606; [1955] ALR 761; (1955) 29 ALJ 358; 49 QJPR 113; *Verrall v Hackney London Borough Council* [1983] 1 QB 445; [1983] 1 All ER 277, CA. Compare *Prole v Allen* [1950] 1 All ER 476 (liability was held to rest on one office bearer only); *Robertson v Ridley* [1989] 2 All ER 474; [1989] 1 WLR 872, CA (office bearers held not liable to fellow member); *Hrybnyuk v Mazur* (2004) Aust Torts Reports ¶81-774 at 66,238; [2004] NSWCA 374; BC200406987 per Beazley JA, CA(NSW).
3. *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378, CA; *Peckham v Moore* [1975] 1 NSWLR 353 at 362-3 per Hutley JA, at 367 per Glass JA, at 371 per Samuels JA, CA(NSW).
4. (ACT) Court Procedures Rules 2006 r 266  
(NT) Supreme Court Rules O 18  
(NSW) Uniform Civil Procedure Rules 2005 r 7.4  
(QLD) Uniform Civil Procedure Rules 1999 rr 75, 584  
(SA) Supreme Court Rules R.R. 34.01, 34.09  
(TAS) Supreme Court Rules 2000 rr 335, 336 (seven people)  
(VIC) Supreme Court Act 1986 ss 33C, 33D, 33L; (VIC) Supreme Court (General Civil Procedure) Rules 2005 O 18A  
(WA) Rules of the Supreme Court O 18 r 12.  
See further VOLUNTARY ASSOCIATIONS [435-230] (liability of unincorporated associations in tort), [435-245] (representative actions).
5. *Clark v University of Melbourne* [1978] VR 457 at 475 per Kaye J. A representative action is therefore not available where there is a variety of defences available to different members of the association: *Fearnley v Berry* [1924] St R Qd 280, SC(QLD), Full Court; *Serbian Orthodox Ecclesiastic School Community 'Saint Nikolas' Queensland v Vlaislavjevic* [1970] Qd R 386; *Healey v Ballarat East Bowling Club* [1961] VR 206. See also *Ex parte Goddard*; *Re Falvey* (1946) 46 SR (NSW) 289; 63 WN (NSW) 168; *Carlton Cricket & Football Social Club v Joseph* [1970] VR 487; *Wallace v Project Interiors Pty Ltd* [1965] NSWLR 1069; *Amey v Fifer* [1971] 1 NSWLR 685, CA(NSW); *Maritime Services Board of New South Wales v Australian Chamber of Shipping* [1977] 1 NSWLR 648, CA(NSW).

**[415-130] Highway authorities** Previously, a highway authority<sup>1</sup> was immune from an action in negligence for a failure to repair or maintain a highway.<sup>2</sup> The immunity did not extend to negligent acts which created dangers or increased existing dangers to users of the highway<sup>3</sup> and did not include negligent non-feasance<sup>4</sup> with respect to the repair or maintenance of 'artificial structures' on or near the highway.<sup>5</sup>

Now, the position at common law in Australia is that, to the extent that there ever existed an 'immunity' for highway authorities,<sup>6</sup> no such immunity is currently recognised. The liability of highway authorities is governed by the ordinary principles of negligence, whether the conduct complained of amounted to misfeasance or nonfeasance.<sup>7</sup>

In every jurisdiction, except the Northern Territory, protection for highway authorities from liability in respect of nonfeasance has been reinstated by statute in varying terms.<sup>8</sup>

## Notes

1. For the definition of 'highway' see *Buckle v Bayswater Road Board* (1936) 57 CLR 259; 10 ALJ 377; 13 LGR (NSW) 130 and HIGHWAYS, ROADS AND BRIDGES [225-1]-[225-20]. As to highway authorities see HIGHWAYS, ROADS AND BRIDGES [225-195]-[225-215].
2. *Buckle v Bayswater Road Board* (1936) 57 CLR 259; 10 ALJ 377; 13 LGR (NSW) 130; *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357; [1950] ALR 277; (1950) 24 ALJ 94. As to non-feasance see also *Bretherton v Hornsby Shire Council* [1963] SR (NSW) 334; (1963) 8 LGRA 354; 80 WN (NSW) 332. Provided the initial construction was in accordance with the prevailing standards, there was no liability to maintain the road in adequate condition: *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 284-5; 10 ALJ 377; 13 LGR (NSW) 130 per Dixon J; *Hellyer v Commonwealth* [1964] ALR 1026; (1964) 5 FLR 459, SC(ACT). Compare *Donaldson v Municipal Council of Sydney* (1924) 24 SR (NSW) 408; 41 WN (NSW) 98; 7 LGR (NSW) 28, SC(NSW), Full Court. However, this may not have applied where the design or execution of the road increased or created foreseeable dangers to users: *Municipality of Wollahra v Moody* (1913) 16 CLR 353; 14 SR (NSW) 16; 19 ALR 196; 1 LGR (NSW) 188. See further HIGHWAYS, ROADS AND BRIDGES [225-985].
3. See, for example, *Webb v South Australia* (1982) 43 ALR 465; 56 ALJR 912, HC of A; *McDonogh v Commonwealth* (1986) 3 MVR 289, Fed C of A; *Travis v Vanderloos* (1984) 54 LGRA 268, SC(QLD); *Municipality of Wollahra v Moody* (1913) 16 CLR 353; 14 SR (NSW) 16; 19 ALR 196; 1 LGR (NSW) 188. When undertaking repairs, the authority was only obliged to exercise reasonable care: *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357; [1950] ALR 277; (1950) 24 ALJ 94; *Kirk v Culcairn Shire Council* (1964) 64 SR (NSW) 281; 10 LGRA 153; 81 WN (Pt 2) (NSW) 409, SC(NSW), Full Court.
4. For the definition of 'non-feasance' see *Buckle v Bayswater Road Board* (1936) 57 CLR 259; 10 ALJ 377; 13 LGR (NSW) 130; *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357; [1950] ALR 277; (1950) 24 ALJ 94; *Bretherton v Hornsby Shire Council* [1963] SR (NSW) 334; (1963) 8 LGRA 354; 80 WN (NSW) 332.
5. See HIGHWAYS, ROADS AND BRIDGES [225-985]. For the definition of 'artificial structures' see *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 286; 10 ALJ 377; 13 LGR (NSW) 130 per McTiernan J (accepted in *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357 at 379; [1950] ALR 277; (1950) 24 ALJ 94 per Fullagar J; *Grafton City Council v Riley Dodds (Aust) Ltd* (1956) SR (NSW) 53 at 57; (1955) 73 WN (NSW) 33, SC(NSW), Full Court.
6. *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 570, 573; 180 ALR 145; [2001] HCA 29; BC200102755 per Gaudron, McHugh and Gummow JJ.
7. *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 577; 180 ALR 145; [2001] HCA 29; BC200102755 per Gaudron, McHugh and Gummow JJ.
8. (ACT) Civil Law (Wrongs) Act 2002 s 113  
(NSW) Civil Liability Act 2002 s 45  
(QLD) Civil Liability Act 2003 s 37  
(SA) Civil Liability Act 1936 s 42  
(TAS) Civil Liability Act 2002 s 42  
(VIC) Wrongs Act 1958 s 83  
(WA) Civil Liability Act 2002 s 5Z.

[415-135] **Local authorities** Local authorities are bodies corporate and can thus sue and be sued in their own name.<sup>1</sup> A local authority is not liable in negligence if the damage results from the bona fide exercise of its discretionary powers<sup>2</sup> and it has no duty of care with regard to decisions of policy, unless there is proof that it was acting ultra vires.<sup>3</sup> Local authorities are exempt from liability for things done for the purpose of executing the relevant local government legislation.<sup>4</sup>

## Notes

1. (NT) Local Government Act 1993 s 7(1)(a)  
 (NSW) Local Government Act 1993 s 220; (NSW) Interpretation Act 1987 s 50(1)(c)  
 (QLD) Local Government Act 1993 s 35(c)  
 (SA) Local Government Act 1999 ss 35(1), 36(1), 36(1)(a)(ii)  
 (TAS) Local Government Act 1993 s 19(1), 20(4)(b)  
 (VIC) Local Government Act 1989 s 5(2)(c)  
 (WA) Local Government Act 1995 s 2.5(3).  
 There are no equivalent provisions in the Australian Capital Territory. See also LOCAL GOVERNMENT.
2. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; 56 LGRA 120; 60 ALR 1; 59 ALJR 564; (1985) Aust Torts Reports ¶80-322.
3. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; 56 LGRA 120; 60 ALR 1; 59 ALJR 564; (1985) Aust Torts Reports ¶80-322; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 555 per Gleeson CJ, at 574-6 per McHugh J; 194 ALR 337; [2002] HCA 54; BC200207277; *Amaca Pty Ltd v New South Wales* (2004) 132 LGRA 309; (2004) Aust Torts Reports ¶81-749 at 65,794; [2004] NSWCA 124; BC200402751 per Ipp JA, CA(NSW). A local authority may also be held liable in negligence for its failure to exercise its powers: *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147; [1998] HCA 3; BC9800020.
4. (NT) Local Government Act 1993 s 28  
 (NSW) Local Government Act 1993 s 731; see also *Hudson v Vendeheld* (1969) 118 CLR 171  
 (SA) Local Government Act 1999 s 39  
 (TAS) Local Government Act 1993 s 341  
 (VIC) Local Government Act 1989 s 228  
 (WA) Local Government Act 1995 s 9.56.  
 There are no equivalent provisions in the other jurisdictions.

[415-140] **Public bodies and public officials** Public bodies and public officials are subject to the same ordinary principles of negligence for their negligent acts as apply to the activities of private citizens,<sup>1</sup> with certain modifications.<sup>2</sup> A duty is imposed on public officers to know the limits of their power and avoid causing foreseeable harm which may result from exceeding those limits.<sup>3</sup> Public bodies may be liable for negligent misstatements which occasion economic loss where there is a proximate relationship between the maker of the statement and the recipient.<sup>4</sup> Liability for negligent misstatements is not limited to those professing to have special skill or competence, but extends to public bodies who are non-experts.<sup>5</sup>

## Notes

1. *Northern Territory v Mengel* (1995) 185 CLR 307; 129 ALR 1 at 23; BC9506418 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147; [1998] HCA 3; BC9800020 per Gummow J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 18; 167 ALR 1; [1999] HCA 59; BC9907273 per Gaudron J.
2. These modifications include limiting the liability of a public body to circumstances where the authority had a duty to act, but has breached that duty: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 432-47; 56 LGRA 120; 60 ALR 1 at 7-18; 59 ALJR 564; (1985) Aust Torts Reports ¶80-322 at 68,278-86 per Gibbs CJ (to establish liability, the plaintiff must place actual reliance on the public body carrying out its functions).



3. *Northern Territory v Mengel* (1995) 185 CLR 307; 129 ALR 1; BC9506418. As to the tort of misfeasance in a public office see further [415-1885]-[415-1905].
4. A relationship of proximity exists where there is a special relationship, that is, the defendant knows or ought to have known that his or her words are such as to induce another to place reasonable reliance on them: *San Sebastian Pty Ltd v Minister administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 at 355; 68 ALR 161 at 169 per Gibbs CJ, Mason, Wilson and Dawson JJ.
5. *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225; 36 ALR 385; 55 ALJR 713; 1 Austr Const LR 1; *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; 178 ALR 634; [2001] HCA 19; BC200101436; *Commonwealth v Cornwell* [2006] ACTCA 7; BC200603166.

[415-145] **Trade unions** A trade union registered under Commonwealth legislation has corporate status and may sue or be sued in its corporate name.<sup>1</sup> The status of unions registered under State legislation varies. In New South Wales, Queensland, South Australia and Western Australia, corporate status is explicitly conferred,<sup>2</sup> but in Tasmania, it appears that unions have the same status as unincorporated associations.<sup>3</sup> Except in South Australia,<sup>4</sup> unions generally are not immune from liability with regard to any tort, although immunity is conferred on unions taking 'protected action' under Commonwealth legislation.<sup>5</sup>

#### Notes

1. (CTH) *Workplace Relations Act 1996 s 8, Sch 1 cl 27(e)*. See *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Builders Labourers' Federation* (1988) 83 ALR 385 at 393; (1988) ATPR ¶49-680 per Morling JC.  
The federal industrial system also operates in the Australian Capital Territory, the Northern Territory and Victoria: see INDUSTRIAL LAW [230-20].
2. (NSW) *Industrial Relations Act 1996 s 222*  
(QLD) *Industrial Relations Act 1999 s 423*  
(SA) *Fair Work Act 1994 s 123*  
(WA) *Industrial Relations Act 1979 s 60*.
3. The legislation in Tasmania does not confer corporate status: (TAS) *Industrial Relations Act 1984 Pt V* (provides for 'registration' of 'associations'). As to the capacity of unincorporated associations to sue and be sued see [415-125].  
At common law a trade union can sue and be sued in its own name and judgment can be executed against union funds: *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426; (1901) 85 LT 147; *Bonsor v Musicians' Union* [1956] AC 104; [1955] 3 All ER 518; *Brisbane Shipwrights' Provident Union v Heggie* (1906) 3 CLR 686; 12 ALR 107. See also *Egan v Shop Distributive and Allied Employees Federation of Australia and New South Wales* (1979) 143 CLR 325 at 347; 25 ALR 257 at 274 per Gibbs J (uncertainty of status of some unions).
4. In South Australia, unions are immune from liability in respect of acts or omissions done or made in the contemplation or furtherance of an industrial dispute, unless:
  - (1) the action is for
    - (a) recovery of damages for death or personal injury;
    - (b) recovery of damages for damage to property (not being economic damage);
    - (c) conversion or detinue, or
    - (d) defamation;
  - (2) a full bench of the State industrial commission determines that a dispute which has been resolved by conciliation or arbitration arose or was prolonged by

unreasonable conduct on the part of a particular person, in which case an action in tort may be brought against that person: or

- (3) a full bench of the State industrial commission determines that all attempts to resolve an industrial dispute have failed and, having regard to the nature of the dispute, it is in the public interest to allow the action: (SA) Fair Work Act 1994 s 138.
5. (CTH) Workplace Relations Act 1996 s 447 (immunity provisions). 'Protected action' is defined in *ibid* s 435 and is restricted to industrial action taken during the negotiation of certified agreements under the Act. For analogous provisions in New South Wales see (NSW) Industrial Relations Act 1996 ss 140-142.

**[415-150] Foreign sovereigns and states** Foreign sovereigns and states are liable in tort in respect of the death of or personal injury to a person, the loss of or damage to tangible property or the obligations of the state arising out of its possession or use of immovable property, provided that the tort was committed in Australia.<sup>1</sup> In other respects, foreign states are immune from liability unless they submit to the jurisdiction of an Australian court.<sup>2</sup>

*Notes*

1. (CTH) Foreign States Immunities Act 1985 ss 13, 14. See also *ibid* ss 3(1), 30 (definition of 'foreign state'). At common law foreign sovereigns and states can sue but cannot be sued: *The Parlement Belge* (1880) 5 PD 197; 3 BILC 322.
2. (CTH) Foreign States Immunities Act 1985 s 9.

**[415-155] Diplomats** Members of the diplomatic staff of a mission (including a mission of an international organisation) and consular officers and employees are immune from the jurisdiction of local courts.<sup>1</sup> The state which these officers represent may waive this immunity.<sup>2</sup> There is no bar to their suing in tort.

*Notes*

1. (CTH) Consular Privileges and Immunities Act 1972; (CTH) Diplomatic Privileges and Immunities Act 1967.
2. (CTH) Consular Privileges and Immunities Act 1972; (CTH) Diplomatic Privileges and Immunities Act 1967.

**[415-160] Partners** Partners are jointly and severally liable to any person who is not a partner<sup>1</sup> for torts committed by any co-partner while that co-partner is acting either in the ordinary course of the business of the firm, or with the authority of the co-partners.<sup>2</sup> Each partner may also incur personal liability.<sup>3</sup>

*Notes*

1. *Mair v Wood* 1948 SC 83 (firm not vicariously liable for the negligence of one partner to a fellow partner). See also *Huston v Burns* [1955] Tas SR 3.
2. (ACT) Partnership Act 1963 ss 14, 14A, 16  
(NT) Partnership Act 1997 ss 14, 16  
(NSW) Partnership Act 1892 ss 10, 12

- (QLD) Partnership Act 1891 ss 13, 15  
 (SA) Partnership Act 1891 ss 10, 12  
 (TAS) Partnership Act 1891 ss 15, 17  
 (VIC) Partnership Act 1958 ss 14, 16  
 (WA) Partnership Act 1895 ss 17, 19.

It is a question of fact whether a particular act is within the ordinary course of business: *Walker v European Electronics Pty Ltd (in liq)* (1990) 23 NSWLR 1. See also *Polkinghorne v Holland* (1934) 51 CLR 143; [1934] SASR 475; [1934] ALR 353; (1934) 8 ALJ 140; *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251; 65 ALR 385; 60 ALJR 379 (discussion of 'ordinary course of business'). See further PARTNERSHIPS AND JOINT VENTURES [305-455].

3. *Mackinnon v Henson* [1964] 1 QB 472; [1962] 1 All ER 899 (distinction between vicarious liability and primary personal liability, holding on the facts that only one member of a firm liable for defamation). See also *Hamlyn v John Houston & Co* [1903] 1 KB 81, CA; *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103. See also *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at 375-81; [2003] 1 All ER 97; [2002] 3 WLR 1913 per Lord Nicholls of Birkenhead. See further PARTNERSHIPS AND JOINT VENTURES.

[415-165] **Employers and employees** An employer is vicariously liable for the torts of an employee which are committed in the course of employment.<sup>1</sup> In such circumstances, the employer and the employee are joint tortfeasors<sup>2</sup> and the personal liability of the employee is not displaced.<sup>3</sup> An employer may be held vicariously liable even though the employee is immune from action.<sup>4</sup> The rule that an employer is not vicariously liable for the torts of persons exercising public functions with independent discretion<sup>5</sup> applies to private employers.<sup>6</sup> An employer cannot be liable for breaches of statutory duty imposed only on employees.<sup>7</sup> In certain circumstances an employer may also incur personal liability with regard to torts committed by his or her employee.<sup>8</sup>

#### Notes

1. See, for example, *Broom v Morgan* [1953] 1 QB 597; [1953] 1 All ER 849, CA. All the elements of the tort must be committed within the course of employment: *Credit Lyonnais Bank Nederland v Export Credits Guarantee Dept* [2000] 1 AC 486 at 495; [1999] 1 All ER 929; [1999] 2 WLR 540 per Lord Woolf MR. Where the employer personally directs or authorises the commission of the tort, liability is direct rather than vicarious: *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia Ltd* (1986) 44 NTR 14 at 36; 85 FLR 285; (1986) 4 ANZ Ins Cas ¶60-780 per Asche J, CA(NT). Compare *Ross v Harrick Howard (Aust) Pty Ltd* (1986) 4 SIR (WA) 1 at 4 per Keall J, DC(WA). See further EMPLOYMENT [165-1045], [165-1050], [165-1052].
2. As to joint tortfeasors see [415-180]-[415-210].
3. *Rowell v Alexander Mackie College of Advanced Education* (1988) 25 IR 87 at 90; (1988) Aust Torts Reports ¶80-183 per Samuels JA, CA(NSW). A term that an employer will indemnify the employee against liability will be implied in respect of innocent conduct (see *Adamson v Jarvis* (1827) 4 Bing 66; 130 ER 693), but generally, not in relation to negligent conduct: *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555; [1957] 1 All ER 125; [1957] 2 WLR 158 (there is no implied term in the contract of employment that an employee is entitled to the benefit of any insurance policy held by the employer, nor is an employee entitled to be indemnified by the employer against any liability for negligent conduct). See further EMPLOYMENT [165-460]. This common law result has been altered by statute in the Northern Territory, New South Wales and South Australia. Where an employee commits a tort for which his

or her employer is vicariously liable, the employee will not be liable to indemnify the employer and, unless the employee is otherwise entitled to indemnity, the employer shall be liable to indemnify the employee in respect of the tortious liability incurred. These provisions do not apply however, when a person commits serious and wilful misconduct constituting a tort in the course of his or her employment:

(NT) Law Reform (Miscellaneous Provisions) Act 1956 s 22A(1)

(NSW) Employees Liability Act 1991 s 3

(SA) Civil Liability Act 1936 s 27C(1)(b).

See further EMPLOYMENT [165-465]. See also *New South Wales v Eade* [2006] NSWSC 84 at [38]-[49]; BC200600852 per Hoeben J.

This situation also depends on whether the employer is insured and the nature of the employee's conduct. Where misconduct is not serious or wilful and the employer is insured, the insurer is not subrogated to the rights of the employer: (CTH) Insurance Contracts Act 1984 s 66.

4. For example, when at common law it was not possible for spouses to sue each other in tort, this did not prevent one spouse from suing the employer of the other on the basis of vicarious liability: *Broom v Morgan* [1953] 1 QB 597; [1953] 1 All ER 849, CA; *Waugh v Waugh* (1950) 50 SR (NSW) 210.
5. As to officers of the Crown see [415-115].
6. *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 637-8 per Gibbs CJ, at 650 per Wilson J, at 681-2 per Dawson J; 66 ALR 29; 60 ALJR 480.
7. *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36; [1957] ALR 505; (1957) 31 ALJ 208.
8. For example, where the employer personally authorises or ratifies tortious conduct (see *Holmes v Mather* (1875) LR 10 Ex 261 at 269; [1874-80] All ER Rep 345; (1875) 33 LT 361 per Cleasby B; *Thompson v Cabot* (1907) 24 WN (NSW) 40; *Dawson v Council of the Shire of Bulli* (1927) 27 SR (NSW) 509; 44 WN (NSW) 166) or when the employer unreasonably fails to control the conduct of an employee where harm to a third party or parties is reasonably foreseeable: compare *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348; *Smith v Crossley Bros* (1951) 95 Sol Jo 655, CA. See further EMPLOYMENT [165-1040].

**[415-170] Principal and agent** A principal is liable for the torts of his or her agent when they are committed whilst the agent is acting within the scope of the agent's authority.<sup>1</sup> A principal is jointly and severally liable with the agent.<sup>2</sup> The principal will be liable if he or she expressly authorised the commission of the tort or ratified the agent's acts subsequently.<sup>3</sup> In most circumstances an agent will be personally liable for the tort even if it was done with the principal's authority and for the principal's benefit.<sup>4</sup> If the wrong is done for the agent's own private ends, the principal is not liable.<sup>5</sup> A principal may be liable even though the agent is immune from action in respect of the tort.<sup>6</sup> The common law principles regarding agency with respect to drivers of motor vehicles are still relevant where an accident victim wishes to sue for damage to property.<sup>7</sup>

#### Notes

1. *Smith v Keal* (1882) 9 QBD 340, CA. See also *Koonagang Investments Pty Ltd v Richardson & Wrench Ltd* [1981] 2 NSWLR 1; (1981) 36 ALR 142 (valuer acted outside scope of his employment with defendants therefore defendants not liable). This includes the tort of deceit where it is committed while the agent is acting within the scope of his or her actual or ostensible authority (see *Poseidon Ltd v Adelaide*

*Petroleum NL* (1991) 105 ALR 25 at 37; 68 ALJR 313 per Burchett J (citing *Lloyd v Grace, Smith & Co* [1912] AC 716; [1911-13] All ER Rep 51) and defamation (*Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-op Assurance Co of Australia Ltd* (1931) 46 CLR 41; [1932] ALR 73; (1931) 5 ALJ 355). As to the tort of deceit see [415-1620]-[415-1630]. As to defamation generally see DEFAMATION.

2. See AGENCY [15-255]-[15-355].
3. *Barker v Braham* (1773) 3 Wils 368; 95 ER 1104 (authorised); *Wilson v Tunman* (1843) 6 Man & G 236 at 242-3; 134 ER 879 at 882 per Tindal CJ (ratification of wrong); *Hilbery v Hatton* (1864) 2 H & C 822; 159 ER 341; *Hewitt v Bonvin* [1940] 1 KB 188; (1939) 161 LT 360, CA. Where a person holds out another as having authority, that person is liable as principal for torts committed as part of ostensible authority; *Armstrong v Strain* [1952] 1 KB 232; [1952] 1 All ER 139, CA; *Trade Practices Commission v Queensland Aggregates Pty Ltd* (1982) 44 ALR 391; 61 FLR 52; (1982) ATPR ¶40-297, Fed C of A.
4. *Stephens v Elwall* (1815) 4 M & S 259; 105 ER 830.
5. *Malcolm, Brunner & Co Ltd v Waterhouse & Sons* (1908) 24 TLR 854. See also *Beach Petroleum NL v Johnson* (1993) 43 FCR 1; 115 ALR 411; 11 ACSR 103 (where a director is acting totally in fraud of the company, that is, all the director's activities are directed against the interests of the company, the knowledge of the director will not be attributed to the company in civil proceedings).
6. See AGENCY [15-255].
7. *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, CA (if a vehicle is driven by the owner's agent and the use is as the owner's agent, the owner is liable)). This principle may be applied to persons other than owners of cars, for example, the principal may be a bailee (see *Sobhushy v Egan* (1960) 103 CLR 215 at 231; [1960] Qd R 204; [1960] ALR 310; (1960) 35 ALJR 463 per Dixon CJ, Kitto and Windeyer JJ; compare *Fetke v Bogovic* [1964] SASR 119) or a thief (*Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 at 320; 59 WN (NSW) 10, SC(NSW)). The fact of ownership, however, imposes a presumption that the driver at the time of the accident is, if not the servant, then the agent of the owner; *Barnard v Silly* (1931) 47 TLR 557, KB; *Manawatu County v Rowe* [1956] NZLR 78, CA(NZ); *Jennings v Hannan (No 2)* (1969) 71 SR (NSW) 226, CA(NSW); *Parry v Flesser* [1953] QWN 13, SC(QLD), Full Court; *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317; 59 WN (NSW) 10. The presumption of agency is limited 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. As to the further limits of this principle see *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron* (2005) 91 SASR 570 at 597; 54 ACSR 505; [2005] SASC 204; BC200503824 per Besanko J. Where personal injuries are sustained in a car accident, the situation is governed by legislation in all Australian jurisdictions:
  - (CTH) Commonwealth Motor Vehicles (Liability) Act 1959
  - (ACT) Road Transport (General) Act 1999 s 196
  - (NT) Motor Accidents (Compensation) Act 1979
  - (NSW) Motor Accidents Act 1988; (NSW) Motor Accidents Compensation Act 1999
  - (QLD) Motor Accident Insurance Act 1994
  - (SA) Motor Vehicles Act 1959
  - (TAS) Motor Accidents (Liabilities and Compensation) Act 1973
  - (VIC) Transport Accident Act 1986
  - (WA) Motor Vehicle (Third Party Insurance) Act 1943.

**[415-175] Husband and wife** Spouses are entitled to sue one another<sup>1</sup> and a woman who is married does not suffer any disabilities with regard to her rights or liabilities in tort.<sup>2</sup>

## Notes

1. (CTH) Family Law Act 1975 s 119.  
See also:  
(NT) Married Persons (Equality of Status) Act 1989 s 4  
(NSW) Married Persons (Equality of Status) Act 1996 s 5. See further *Magill v Magill* [2006] HCA 51; BC200608953 at [27] per Gleeson CJ, at [95] per Gummow, Kirby and Crennan JJ.
2. (ACT) Married Persons Property Act 1986 s 3(1)  
(NT) Married Persons (Equality of Status) Act 1989 s 3(1)  
(NSW) Married Persons (Equality of Status) Act 1996 s 4(1)  
(QLD) Law Reform Act 1995 s 18  
(SA) Law of Property Act 1936 s 92  
(TAS) Married Women's Property Act 1935 s 3(2)  
(VIC) Marriage Act 1958 s 156  
(WA) Law Reform (Miscellaneous Provisions) Act 1941 s 3(1).

## (e) JOINT AND SEVERAL TORTFEASORS

## (i) Categories

**[415-180] Joint tortfeasors** Joint tortfeasors are two or more persons who together are jointly and severally liable for the same tort. The joint liability arises because their acts have combined to produce the one damage and those acts were intended, or in law were taken as intended, to be one act or design.<sup>1</sup> The joint liability may arise through:

- (1) vicarious liability;<sup>2</sup>
- (2) the liability of a principal for the tort of the agent;<sup>3</sup>
- (3) the joint breach of an obligation;<sup>4</sup> and
- (4) a tort being committed by persons taking 'concerted action to a common end'.<sup>5</sup>

Each of the joint tortfeasors is liable for the entire loss<sup>6</sup> and satisfaction of the loss by one joint tortfeasor discharges the liability of the others.<sup>7</sup>

## Notes

1. *The Koursk* [1924] P 140 at 156; [1924] All ER Rep 168 per Scrutton LJ, CA; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; 141 ALR 1; 71 ALJR 131; (1997) Aust Torts Reports ¶81-412, HC of A. The acts do not have to be simultaneous or contemporaneous to be characterised as a joint tort: *Rouse v Squires* [1973] QB 889, CA.
2. *Jones v Manchester Corporation* [1952] 2 QB 852 at 869; [1952] 2 All ER 125 per Denning LJ, CA. The relationship may be that of employer and employee (see [415-165]) or, less commonly, that of employer and independent contractor: *Jones v Manchester Corporation* [1952] 2 QB 852 at 870; [1952] 2 All ER 125 per Denning J. As to vicarious liability see further [415-80].
3. *JF & BE Palmer Pty Ltd v Blowers and Lowe Pty Ltd* (1987) 75 ALR 509, Fed C of A. As to the liability of a principal for the tort of an agent see [415-170].

4. For example, the joint liability of occupiers to take reasonable care for the safety of persons on their land or buildings: see NEGLIGENCE [300-30].
5. *The Koursk* [1924] P 140 at 152; [1924] All ER Rep 168 at 172 per Bankes LJ, CA. See also, for example, *Schumann v Abbott* [1961] SASR 149 at 154-5 per Reed J; *Schemmell v Pomeroy* (1989) 50 SASR 450; *Brooke v Bool* [1928] 2 KB 578; *Dougherty v Chandler* (1946) 46 SR (NSW) 370; 63 WN (NSW) 183; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; 141 ALR 1; 71 ALJR 131; (1997) Aust Torts Reports ¶81-412, HC of A (concerted action by Channel Seven and Channel Nine to transmit a television program).
6. A plaintiff may choose to sue only one, but the person sued may join the other tortfeasors as parties to the action. The plaintiff is entitled to judgment against each and every defendant for the full amount of damages awarded: *Bell v Thompson* (1934) 34 SR (NSW) 431 at 435; 51 WN (NSW) 138 per Jordan CJ; *Clark v Neusam* (1847) 1 Exch 131 at 140; 154 ER 55 per Alderson B; *Damiens v Modern Society Ltd* (1910) 27 TLR 164. The judgment may be executed in full against any one of the defendants: *Rich v Pilkington* (1691) Carth 171; 90 ER 704; *Mitchell v Tarbut* (1794) 5 Term Rep 649; 101 ER 362; *Wah Tat Bank Ltd v Chan Cheng Kinn* [1975] AC 507; [1975] 2 All ER 257 at 263; [1975] 2 WLR 475; [1975] 2 Lloyd's Rep 62. PC; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063; [1972] 1 All ER 801; [1972] 2 WLR 645 per Lord Hailsham (citing *Greenlands Ltd v Wilmshurst* [1913] 3 KB 507 per Salmon LJ) ('it is well settled that where there are several defendants who have all committed a joint tort, there can be only one award of one sum of damages against all of them'). It is possible to award exemplary damages against one joint tortfeasor but not the others, if they are sued separately: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448; 57 ALR 639; BC8501117 (rejecting *Cassell & Co Ltd v Broome* [1972] AC 1027; [1972] 1 All ER 801; [1972] 2 WLR 645).
7. See [415-185] note 4.

[415-185] **Several tortfeasors** Several concurrent tortfeasors may be distinguished from several tortfeasors causing different damage. Persons whose separate and independent torts combine to cause the same, indivisible damage on another are characterised as several concurrent tortfeasors.<sup>1</sup> Each concurrent tortfeasor is liable individually for the whole damage.<sup>2</sup> Concurrent tortfeasors may be joined in the one action<sup>3</sup> and satisfaction of a claim by one concurrent tortfeasor discharges the liability of the other tortfeasors.<sup>4</sup>

Several tortfeasors are persons whose separate and independent torts cause damage to the same person where the damage can be quantified separately. Each will be liable only for the separate and distinct damage caused by his or her tort.<sup>5</sup> Satisfaction by one such tortfeasor will not discharge the liability of the other several tortfeasors.<sup>6</sup> The first of two successive tortfeasors may be liable for the separate damage caused by the second tortfeasor if some or all of the damage caused by the second is held to be a foreseeable consequence of the first tort.<sup>7</sup> Where the evidence is insufficient to determine the apportionment of damages, the damages will be apportioned equally between the tortfeasors.<sup>8</sup>

#### Notes

1. Although the acts lead to the same injury, they are separate and unconnected in intention: *The Koursk* [1924] P 140 at 159-60; [1924] All ER Rep 168 per Sargant LJ, CA. See also *Nilou v Bezzina* [1988] 2 Qd R 420 at 424 per McPherson J; *Rahman v Aearose Ltd* [2001] QB 351 at 362-63; [2000] 3 WLR 1184 per Laws LJ.
2. *Paton v Parker* (1941) 65 CLR 187; 42 SR (NSW) 17; [1942] ALR 15; 15 ALJ 285; 59 WN (NSW) 27; *Voli v Inglewood Shire Council* (1963) 110 CLR 74; [1963] Qd

- R 256; [1963] ALR 657; (1963) 37 ALJR 25; *Chapman v Hearse* (1961) 106 CLR 112; [1962] ALR 379; BC6100100; *Barisic v Devenport* [1978] 2 NSWLR 111 at 116-17 per Moffitt P, CA(NSW).
3. At common law, several tortfeasors could not be joined. Procedural reforms permit the joinder of concurrent tortfeasors as co-defendants: see PRACTICE AND PROCEDURE [325-1310]-[325-1335].
  4. *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR (NSW) 159 at 180-2 per Asprey JA, CA(NSW); *Ruffino v Grace Bros Pty Ltd* [1980] 1 NSWLR 732; *Sadler v Cresco Fertilizers Pty Ltd* [1939] VLR 438; *Kohnke v Karger* [1951] 2 KB 670.
  5. This might mean that the second tortfeasor will not be liable as his or her tort caused no further damage: *Performance Cars Ltd v Abraham* [1962] 1 QB 33. Compare *Baker v Willoughby* [1970] AC 467; [1969] 3 All ER 1528; *Nilon v Bezzina* [1988] 2 Qd R 420. See also *Weait v Jayanabee Joinery Ltd* [1963] 1 QB 239; [1962] 2 All ER 568; *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323; 6 ALR 171; BC7500032.
  6. *Eyre v New Zealand Press Assn Ltd* [1968] NZLR 736 at 745 per McGregor J.
  7. *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323; 6 ALR 171; BC7500032; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522; 59 ALR 722.
  8. *Bank View Mills Ltd v Nelson Corp* [1942] 2 All ER 477 at 483 per Stable J (reversed on other grounds *Bank View Mills Ltd v Nelson Corp* [1943] KB 337).

## (ii) Judgment and Contribution

**[415-190] Effect of judgment against joint tortfeasor** The common law position that judgment against one tortfeasor barred any subsequent action against any other<sup>1</sup> has been abolished by statute.<sup>2</sup> Consequently, the release of one joint tortfeasor does not release the other joint tortfeasors in respect of the same tort.<sup>3</sup>

### Notes

1. This was true even if judgment was unsatisfied: *Brinsmead v Harrison* (1871) LR 6 CP 584 (affirmed *Brinsmead v Harrison* (1872) LR 7 CP 547) and was in contrast to the law relating to 'several' tortfeasors: *Sadler v Cresco Fertilizers Pty Ltd* [1939] VLR 438; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; [1940] 4 All ER 20. See also [415-185].  
It does not matter whether the tortfeasors were sued in the one action or separately: *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507; [1975] 2 All ER 257; [1975] 2 WLR 475; [1975] 2 Lloyd's Rep 62, PC; *Bryanston Finance Ltd v De Vries* [1975] QB 703, CA.
2. (ACT) Civil Law (Wrongs) Act 2002 ss 20, 21; see also *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; 141 ALR 1; 71 ALJR 131; (1997) Aust Torts Reports ¶81-412, HC of A  
(NT) Law Reform (Miscellaneous Provisions) Act 1956 s 12  
(NSW) Law Reform (Miscellaneous Provisions) Act 1946 s 5  
(QLD) Law Reform Act 1995 s 6  
(SA) Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 s 12  
(TAS) Wrongs Act 1954 s 3  
(VIC) Wrongs Act 1958 s 24AA  
(WA) Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 s 7.



3. The rule that the release of one joint tortfeasor releases the other has been taken to have been impliedly abolished: *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; 141 ALR 1; 71 ALJR 131; (1997) Aust Torts Reports ¶81-412, HC of A.

**[415-195] Entitlement to contribution** An entitlement to contribution is an entitlement to recover part of the damages paid to a plaintiff. At common law, contribution was not allowed for joint<sup>1</sup> or several<sup>2</sup> tortfeasors. The common law position has been abolished by legislation which provides that a person is entitled to claim for contribution where he or she is a tortfeasor liable in respect of damage against a plaintiff.<sup>3</sup> The category of persons 'liable' includes not only a person sued to judgment,<sup>4</sup> but also a person who has submitted to a consent judgment or has settled the claim made by the plaintiff.<sup>5</sup> The claim may be made against anyone who 'is, or would if sued have been, liable' for the same damage.<sup>6</sup> Except in Victoria, the legislation allows for contribution only between persons liable in tort.<sup>7</sup> Further, the entitlements of some defendants, for example, employers and insurance companies, to contribution has been limited by statute.<sup>8</sup>

#### Notes

1. *Merryweather v Nixan* (1799) 8 Term Rep 186; 101 ER 1337.
2. *Hornell v London General Omnibus Co Ltd; Re London Tramways Co Ltd* (1877) 2 Ex D 365, CA.
3. (ACT) Civil Law (Wrongs) Act 2002 s 21  
(NT) Law Reform (Miscellaneous Provisions) Act 1956 s 12(4)  
(NSW) Law Reform (Miscellaneous Provisions) Act 1946 s 5(1)(c)  
(QLD) Law Reform Act 1995 s 6(c)  
(SA) Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 s 6  
(TAS) Wrongs Act 1954 s 3(1)  
(VIC) Wrongs Act 1958 s 23B(1)  
(WA) Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 s 7(1)(c).

The right to recover contribution includes costs recoverable by the plaintiff: *James Hardie & Co Pty Ltd v W'yang Shire Council* (2000) 48 NSWLR 679 at 685 per Handley JA. at 686, 689-90; [2000] NSWCA 107; BC200002083 per Giles JA.

4. *Bitumen and Oil Refineries (Aust) Ltd v Cnr for Government Transport* (1955) 92 CLR 200; [1955] ALR 325; BC5500620 (person from whom contribution claimed not able to dispute liability of, or amount of damages awarded against, adjudged person).
5. *Baylis v W'ugh* [1962] NZLR 44; *Bakker v Joppich* (1980) 25 SASR 468; *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651; [1971] 3 All ER 534, CA; *Re Securitybank Ltd* [1986] 2 NZLR 280 at 288 per Barker J. See also *Soblusky v Egan* (1960) 103 CLR 215; [1960] Qd R 204; [1960] ALR 310; (1960) 33 ALJR 463 (extends to a person vicariously liable).

Where the person claiming contribution has settled the plaintiff's claim, in all jurisdictions except Tasmania and Victoria, where the common law has been modified by statute, the person from whom the contribution is claimed may dispute whether, and the extent to which, the former is liable to the plaintiff: *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651; [1971] 3 All ER 534, CA.

In Tasmania and Victoria, a person who has settled the plaintiff's claim is entitled to recover contribution irrespective of whether or not he or she was in fact liable: (TAS) Wrongs Act 1954 s 3(1)(d)

(VIC) Wrongs Act 1958 s 23B(4).

6. *Leeds and Northrop Australia Pty Ltd v Electricity Commission of New South Wales* (unreported, CA(NSW), No 8574/68, 4 May 1973). In general therefore, except in Victoria, the defendants must be joint or several concurrent tortfeasors. For the Victorian position see note 7 below. As to joint tortfeasors see [415-180]. As to several concurrent tortfeasors see [415-185] notes 1-4. A defendant who has been sued and has had judgment entered in its favour cannot be subject to a claim for contribution: *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 68-9 per Gaudron and Gummow JJ, at 98-9 per Callinan J; 159 ALR 268; [1998] HCA 78; BC9806759.
7. (ACT) Civil Law (Wrongs) Act 2002 Pt 2,5  
 (NT) Law Reform (Miscellaneous Provisions) Act 1956 Pt IV  
 (NSW) Law Reform (Miscellaneous Provisions) Act 1946 s 5  
 (QLD) Law Reform Act 1995 Pt 3  
 (SA) Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 s 6  
 (TAS) Wrongs Act 1954 s 3  
 (WA) Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 s 7.

In Victoria, a claim for contribution may be made even where one wrongdoer is liable in tort and the other is liable on some other basis such as breach of contract or breach of trust: (VIC) Wrongs Act 1958 s 23A(1). The effect of the restrictive legislation in other jurisdictions may be modified where there are, for example, co-extensive duties in tort and contract. If co-extensive duties are owed, contribution may be claimed regardless of how the plaintiff has framed the action against the defendant: *Leeds and Northrop Australia Pty Ltd v Electricity Commission of New South Wales* (unreported, CA(NSW), No 8574/68, 4 May 1973); *Employers Corporate Investments Pty Ltd v Cameron* (1977) 3 ACLR 120 at 123-6; (1977-78) CLC ¶40-365 per Sheppard J, SC(NSW); *Rap Industries Ltd v Royal Insurance Australia Ltd* (1988) 5 ANZ Ins Cas ¶60-876 at 75,519 per Brownie J, SC(NSW). However, there is authority to support a more liberal interpretation of liability in tort for the purpose of contribution: *Jonstan Pty Ltd v Nicholson* (2003) 58 NSWLR 223 at 237-8; 184 FLR 247; [2003] NSWSC 500; BC200303036 per Hulme J (contravention of statutory provisions relating to misleading and deceptive conduct torts for the purposes of (NSW) Law Reform (Miscellaneous Provisions) Act 1946 s 5).

8. See, for example:
  - (CTH) Insurance Contracts Act 1984 s 66
  - (NT) Law Reform (Miscellaneous Provisions) Act 1956 s 22A
  - (NSW) Employees Liability Act 1991 s 3(1)(a)
  - (SA) Civil Liability Act 1936 s 27C.
 See further [415-165] note 3.

**[415-200] Apportionment** The aim of contribution proceedings is to apportion liability among the tortfeasors according to their relative responsibility for the tort. The legislation in all jurisdictions gives the court<sup>1</sup> a wide discretion<sup>2</sup> to award such contribution as it considers to be 'just and equitable'.<sup>3</sup> Such apportionment may range from exemption of a tortfeasor from liability<sup>4</sup> to one tortfeasor providing complete indemnity to another tortfeasor.<sup>5</sup>

#### Notes

1. This excludes the jury, except in Victoria where the legislation confers the discretion to apportion liability to the 'jury or court': (VIC) Wrongs Act 1958 s 24(2).
2. The findings of the trial judge in this matter of discretion should be disturbed on appeal only in exceptional circumstances: *AV Jennings Construction Pty Ltd v Maunill* (1956) 30 ALJR 100; *Sinclair v William Arnott Pty Ltd* [1963] SR (NSW) 88 at 95-6;