A tort is a cake. Cakes are easy to eat. Ergo, this exam will be easy. And then afterwards we can eat cake. How could you not be excited?
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Introduction: Torts and Tort Law

What is a tort?

♥ Tort = ‘wrong’
♥ No succinct definition … it is discussed by lawyers, legislatures and judges, and involves a variety of things such as negligence, defamation, etc.

The relationship between tort law and other legal categories

Tort law and criminal law:

♥ Two main differences
  o The procedure for criminal trials is different from that for non-criminal (or ‘civil’) trials. The enforcement of the criminal law is usually left to state prosecuting authorities, whereas tort claims are normally made by the victim of the tort.
  o The sanctions most commonly imposed by the criminal law are different from those usually imposed by tort law: imprisonment and non-custodial sentences, and fines paid to the state, as opposed to monetary compensation paid to the victim of the tort, and injunctions.
♥ Some crimes are also torts

Tort law and contract law:

♥ One of the functions of a contract is to enable parties to undertake binding obligations (or ‘duties’) to one another; and many torts consist of breaches of duty.
♥ Contractual obligations can be distinguished from tortious obligations in various ways
  1. Many contractual obligations are ‘productive’ in the sense that they are obligations to produce advantageous outcomes, whereas tort law is predominantly ‘protective’ in the sense that the obligations that it imposes are usually obligations to prevent or not to cause disadvantageous outcomes.
  2. A person will normally be under a contractual obligation to do X only if they have received some form of payment in return for doing it (‘consideration’). By contrast, a person may be under a tortious obligation not to do Y (or sometimes an obligation to do X) even if they have received no payment.
  3. Most contractual obligations are owed to identified and specified individuals who have had dealings with the person subject to the obligation before the obligation arises; whereas tortious obligations may arise between ‘strangers’ (people who have not had dealings with each other before the tort occurs).
  4. The content of contractual obligations is often defined quite specifically and in some detail so that it is possible to know, in advance of performance, what will count as compliance with the contract, and when and how breaches of it might occur. By contrast, many tortious obligations are abstract and general in the sense that it is difficult to specify in advance the conduct that they proscribe and the circumstances in which proscribed conduct may occur.
  5. The typical justification for imposing a contractual obligation is the fact that the person subject to the obligation has done some ‘voluntary’ act such as making a
promise, etc. By contrast, although a few tortious obligations result from such conduct, the typical justification for tortious obligations is not that the person obliged has voluntarily engaged in some course of conduct, but that in so doing they have acted in a way that the law considers unacceptable and have damaged, or interfered with, or failed to protect some protected interest of another.

- The contract fallacy
- Concurrent liability – may arise where the same conduct amounts to more than one legal wrong.

**Tort law and the law of restitution:**

- The law of restitution deals with obligations resting on one person (A) to pay over benefits received ‘at the expense of’ another person (B).

**Tort law and the law of trusts:**

- A trust is an arrangement under which on person (the ‘trustee’) has an obligation to hold, manage or use property for the benefit of another (the ‘beneficiary’). Certain varieties of breach of trust bear great similarity to certain heads of tort liability
- The relationship between these two bodies is complex

**Tort law and property law:**

- Tort law plays a central role in protecting property rights and interests through common law causes of action such as trespass to land and conversion, and statutory intellectual property torts such as infringement of copyright.

**Standards of liability in tort law**

- Every tort involves conduct of one person that interferes with some interest of another person. Conduct will amount to a tort only if it contravenes the standard of conduct relevant to that tort. There is involuntary conduct and absolute conduct.
- The plaintiff will usually have to prove that the defendant was at fault. Strict liability comes into play here.

**Sources of Australian tort law**

- The foundational concepts of tort law are found in judge-made or ‘common law’ rules and principles.
- As legislation on tort law grows, common law tort liability will not be imposed if this would conflict or be inconsistent with relevant statutory provisions.
Tort theory

Economic analysis:

♥ The basic idea in the economic analysis of tort law is that legal rules can be used to give people incentives to behave in economically efficient ways that maximise social wealth and minimise wastage of social resources.

Corrective justice theory:

♥ Central idea in this theory is ‘correlativity’.
♥ States that tort law is as much concerned with the impact of risky behaviour on the rights and interests of others.

Critical theory:

♥ Deals primarily with the social implications of tort law.
♥ Critical theorists are interested not only in the distributional assumptions and the implications of tort doctrine, but also in the distributional effects of the institutions and social practices by which tort doctrine is implemented.

Alternatives to the tort system

Shortcomings of the tort system:

♥ Concept of fault (negligence) – quite abstract and fact-sensitive, and often very difficult to establish that conduct was negligent.
♥ Even in theory, the tort system only compensates for injuries that were caused in particular ways
♥ The tort system is extremely expensive to operate

Insurance:

Reinsurance: this is where insurance providers, to insure themselves, insure with another company of which each lacks in insurance risk.

Insurable interest: The insured must have an insurable interest in the source of the insured.

Moral hazard: idea that insurance makes people incautious: the tendency of people who are insured against a specific hazard to cease to exercise caution to avoid the hazard. People acting immorally because they think there is no trouble with what they’re doing, or they think something better will happen which will lift the troubles.
Interference with the Person

Historical background and relationship with negligence

♥ ‘Trespass to the person’ torts: battery, assault and false imprisonment.
♥ The tort of battery provides protection from unwanted physical contact
♥ Tort of assault provides protection from threats of physical contact
♥ Tort of false imprisonment provides protection from total restraints of liberty

Trespass to the person

♥ The intentional tort of trespass, as said, consists of three nominate torts: battery, assault and false imprisonment.

Damage:

♥ The trespass to the person torts are actionable per se; that is, it is not necessary to prove any actual damage (personal injury, damage to property and the like).
♥ The interests protected are considered of sufficient importance to receive protection irrespective of whether D happens to cause damage while committing them. But if the defendant has actually suffered damage, the plaintiff is also able to sue for that damage.
♥ Even if the conduct is criminal, in Australia a plaintiff can still bring a civil action in tort to the courts.

Battery:

♥ A battery is a voluntary and positive act, done with the intention of causing contact with another, that directly causes that contact.

1. Direct contact: first requirement of the tort of battery is that the contact must be a direct result of D’s conduct. The notion of directness requires there to be a close connection between the act of the defendant and the interference (the contact with P). In some cases an act that sets in motion an unbroken series of continuing consequences, the last of which ultimately causes contact with the plaintiff, will be sufficiently ‘direct’ for the purposes of trespass. Positive act does not include an omission, can include things such as spitting, taking blood with the person’s consent. All actionable per se, regardless of whether they are injured or not.

2. Intentional contact: if a tort is said to be intentional, some element of the tort must be intended. This can occur in the following ways: the conduct of the defendant is intentional, and/or that in any ‘intentional’ tort, D must not have simply acted voluntarily, but also must have intended particular consequences of the conduct, which the law regards as tortious. Just needed to intend to make physical contact, not that they intended to harm. Automatism is where a person didn’t have intent because they didn’t have control over their decision, e.g. sleep walking and serious mental disability.
3. **Contact with the body of the plaintiff:** contact can take a wide variety of forms, including spitting on a person, forcibly taking blood or fingerprints, and firing a gun so close to a person’s face as to burn it. It is suggested that there can only be battery if the result of D’s conduct is sufficient to produce a physical reaction. An action in battery normally involves contact with some part of the plaintiff’s body but this is not always required. Contact with some object the plaintiff is holding could also constitute a battery. For a battery, the conduct must be active and not passive: a battery must be founded on a positive act rather than an omission.

4. **Knowledge of the contact:** knowledge of the contact by the plaintiff (at least at the time of contact) is not a necessary requirement for the tort of battery. The plaintiff will need not know of the contact at the time of the contact but it will be necessary to show evidence of contact or provide evidence from those who have seen the contact take place.

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**Assault**

- An assault is any direct and intentional threat by D that places P in reasonable apprehension of an imminent contact with P’s person, either by the D or by some person or thing within D’s control. Assault is the threat of force to the person of another, while battery is the actual application of that force.

- **Conduct constituting a threat:** threats that constitute assaults are usually acts accompanied by words; but words are not necessary for an assault if the act clearly places the plaintiff in reasonable apprehension of receiving a battery. In *Barton v Armstrong* it was held that threats made over the telephone were capable in law of constituting an assault. There must be a positive threat of imminent bodily contact, whether by deed or by word, to constitute an assault. No preparation for a bodily contact will constitute an assault unless the defendant follows it up by a threat of imminent bodily contact.

- **Directness:** there is a requirement of directness in the tort of assault. The requirement that the apprehension be of an imminent battery may well satisfy this requirement, however alternatively, it may be that a directness requirement can only be met where the threat is of harm directly resulting from conduct of the person making the threat.

- **Apprehension of an imminent battery:** assault is the creation of a reasonable apprehension of an imminent battery. In most cases, whether there has been an assault or not will depend on the length of time between the threat and the anticipated battery.

- **Conditional threats:** sometimes words have the effect of neutralising a threat made by a positive act. In other words, the condition associated with the threat is such as to render it harmless.

- **Intention:** what must be intended in assault is the consequence that the plaintiff should reasonably apprehend an imminent battery.

- **Reasonable apprehension:** in the tort of assault the word ‘apprehension’ simply means to expect the imminent battery. It is not necessary (though it is usually the case) that the plaintiff must anticipate with fear or be frightened by the possible contact; it is sufficient if the plaintiff just knows and expects that it is about to take place. The apprehension of imminent contact must be reasonable.