

# LAWS1012 – Tort Law – NOTES

## Topic 1: Scope and Context of Tort Law

### Overview

- The common thread woven into all torts is the idea of unreasonable interference with the interests of others
- Tort law is the law of civil wrongs
- Tort law has been dominated in terms of caseload by claims for negligently inflicted personal injury and death arising out of motor and workplace, although statutory reforms introducing limitations and thresholds on damages and recoverable costs have reduced the number of claims in these fields
- However, the scope of tort law is much broader than just negligence actions for personal injury. It includes remedies for intentional interference with bodily integrity (e.g. battery, assault, false imprisonment) and remedies for interference with interests in land (e.g. trespass) and goods
- The tort of negligence provides a remedy for harm for property damage and loss of a non-physical kind e.g. psychiatric injury or pure economic loss
- It includes defamation and a range of economic torts such as deceit

### Some general considerations

- A **tort** is a civil wrong for which the law provides a remedy, usually in the form of an award for damages by way of compensation for the injury or loss or wrong that was suffered
- **Damages**: sum of money that the court has assessed is due from one person to another
- Many torts are only torts if you've suffered actual damage, however there are some exceptions e.g. assault
- **Actionable per se** → actionable because that was wrong, you get compensation for the wrong that was suffered rather than damages suffered
  - Can be sued upon without plaintiff demonstrating they have suffered damage
- Equity: would give a remedy that other courts couldn't give
- For torts, they could give an injunction: a court order that someone would stop doing something
- The nature of tort liability is **fault-based**, requiring intent or negligence on the part of the defendant, subject to limited exceptions e.g. the strict liability at common law of the creator of a private nuisance and the strict liability under statute of aircraft operators for damages to persons or property on the surface
- With torts, you must fit your case within a recognised tort

### Aims of Tort Law

- **Appeasement** → tort law was historically developed to prevent the disruption of society by disputes arising from the infliction of injury → to appease the victim's vengeance through awarding compensation (get money, and is pleased that the defendant has to pay them)
  - **Remedy** → **award of damages** to prevent people from taking the law into their own hands
- **Justice** → establishing moral principle → a person who has caused damage must, as a matter of justice, make compensation → the person must compensate for their moral wrongdoing
- **Deterrence** → tort law is somewhat a form of deterrence → to prevent future wrongdoings
- **Compensation** → the wrongdoer must compensate for their fault/damage caused → even if the damage was not morally wrong (e.g. intentional vs negligent)

### Sources of tort law

- Judgements (case law or common law) and statutes, however law of torts is mainly case based
- Up until the 21<sup>st</sup> century, statutes were designed to make it easier for plaintiff's to sue, designed to remedy the 'harshness' of tort law
  - **Civil Liability Act in 2002** has changed this → makes it harder to sue people
- **Compensations to relatives act** → before, it was cheaper to kill someone than to injure them (had to pay for their injuries- this act fixed this)

### Interests protected by tort law

- Bodily safety and wellbeing, including mental wellbeing (20<sup>th</sup> century development)
  - Protected by the torts of negligence, trespass, false imprisonment, assault, etc.
- Property → 'real' (land and premises) and personal (goods)
  - Protected by the intentional torts of trespass to land, and protected by the torts of negligence
- Economic interests
  - More of a 20<sup>th</sup> century development: before, law was much more concerned with contract law
  - Concern that tort law would impinge on competition
  - A few torts protecting intentional damage to economic interest, but negligence developed later
- 'Relational' interests- e.g. family, employment

present, so his statement expressly states that he did not intend and would not commit assault in that instance

- Therefore, this conditional threat was not an assault → since the condition could not be met (as the justices were in town) → there was no intention nor act of assault, nor imminent threat of assault
- However, there can be conditional threats that are assaults → depends on what is said, and the context it is said in
- E.g. 'your money or your life' – not an assault, because it is not a condition I can lawfully apply (cannot steal your money)

- CASE: **POLICE v GREAVES [1964] NZLR 295 – Conditional Threat**

▪ Fact:

- Police were called to Mrs Tolley's house due to a domestic violence situation.
- Greaves answered the door had knife 'get off my property or I'll stab you' → the police retreat
- Eventually, Greaves is caught → one of the charges he faces was assault
- Greaves appealed, arguing that this was a conditional threat → as per *Tuberville v Savage*, a conditional threat cannot be an assault

▪ Principle:

- Conditional threats do not negate an assault if other elements of assault are satisfied
- Conditional threat is an assault if the alternative offered is obedience to an unacceptable command

▪ Judgement:

- Court of Appeal held that Greaves' actions amounted to assault
- The court distinguished *Tuberville v Savage* → Tuberville had made it clear that he didn't intend/was not able to carry out the threat
- In this case, Greaves did have the present intention and present ability to carry out his threat → a reasonable person would have objectively believed that if they did not get off the property, they would be stabbed.
- Also, the police were lawfully on his property → he had no right to make such condition with them → this conditional threat is an assault since the alternative offered is obedience to an unacceptable command → Police were told to either stop doing their job (unacceptable) or be stabbed

• Can words alone constitute an assault?

- CASE: **BARTON v ARMSTRONG [1969] 2 NSW 451 – Telephone Calls**

▪ Fact:

- Plaintiff was coerced into signing a deed (contract) by both threats of violence and death to him and his family made over the phone, during early hours of the morning
- Plaintiff was also allegedly kept under constant surveillance by men hired by the defendant → and that imminent harm could come at anytime
- Issue: Whether it could be said if there was a threat of immediate unlawful contact if the threats were being made remotely from the plaintiff → and whether threatening phone calls could amount to assault

▪ Principle:

- Words spoken over the telephone may constitute assault where those words, said in that particular circumstance or context, cause the listener to apprehend the immediate application of unlawful force

▪ Judgement:

- Taylor J: Held that telephone calls can be an assault, and that assault can be created by mere words alone – the words spoken must have created in the mind in the plaintiff the apprehension of imminent unlawful contact
  - Historically, mere words would not amount to assault → however, in the modern age, the development of technology enables threats to be made and communicated remotely → hence, mere words alone may constitute assault if those words make the plaintiff apprehend imminent unlawful contact
- Taylor J notes that in this case, there are more than just mere words → in the context of this case, where the plaintiff was repeatedly telephoned in early hours of morning, and threatened with violence and death in an atmosphere of drama and suspense → the words were sufficient enough to constitute a threat

- The **principle of necessity** may justify medical or surgical treatment, which otherwise would constitute trespass to the person, when the patient is incapable of giving his or her consent by reason of lack of consciousness in an emergency situation or mental disability.
- However, application of the principle of necessity is accompanied by stringent safeguards requiring that the proposed treatment be in the best interests of the patient in order to preserve his/her life, health or well-being.

#### Judgement:

- A declaration was granted at first instance and upheld by the Court of Appeal due to necessity → declaration made it lawful for the doctors to operate without her consent.
- **Lord Goff** confirmed that the performance of a medical operation upon a person without his or her consent would amount to the crime of battery and tort of trespass to the person
  - He held that the court had no power to give consent on F's behalf, or to dispense the need for such consent
  - For the treatment performed without consent to be lawful, it has to be justified on some other principle → the **principle of necessity** → which recognises that in limited circumstances, it is in the best interests of the patient, that treatment should be given to him in circumstances where he is (temporarily or permanently) unable to consent to it.
  - This principle is not one of emergency, but is a principle of necessity → emergency is only one circumstance where necessity arises → the medical treatment must be necessary to preserve the life and safety of the patient in the circumstances for it to be lawful

#### **c) Negligence in creating or contributing to the circumstance of necessity**

- The defence of necessity will fail where the act that the defendant relies on to avert the threatened harm is itself negligent.
  - i.e. The defendant cannot rely on the defence of necessity when it was their negligence that created the situation of necessity
- Even if necessity is a defence to trespass, necessity may not be a complete answer to a negligence action → it will be one of the relevant factors when deciding whether a duty has been breached. (**Beckingham; Rigby**)
- But it may disentitle the negligent party from relying on necessity where his/her negligence caused the emergency (**Simon v Condran**)

#### **Beckingham v The Port Jackson and Many Steamship Co [1957] SR (NSW) 403**

##### Facts

- Plaintiffs owned a submarine which, with the agreement of the defendant, was moored alongside the defendant's wharf in Manly Cove
- Storm arose, defendant thus arranged for the submarine to be towed to a more protected location
- During the towing operations the submarine broke loose and was wrecked
- In respect of this loss, the plaintiff's claimed damages in trespass and negligence

##### Rule

- Although necessity may constitute a defence to a claim founded on trespass, necessity is no defence to a claim founded on negligence.

##### Judgement

- Court observed that with regard to the trespass claim, the danger to the wharf and the submarine provide a justification for what would otherwise be a trespass (towing the submarine away from its moorings)
- However, the court further observes that the circumstances of danger and necessity provided no defence to the negligence claim
- If it be taken, as is conceded in this case, that in the given circumstances the defendant was justified in moving the submarine in order to avert the danger, he was bound, in effecting the removal, to exercise such a degree of care as was reasonably to be expected of him in the circumstances.

#### **Rigby v Chief Constable of Northamptonshire [1985] 2 All ER 985**

##### Facts

- In this case, the police were held responsible for firing a CS gas canister into the plaintiff's gunsmith's shop to flush out a dangerous psychopath without ensuring the availability of adequate fire fighting equipment
- Police were aware that the gas canisters inside were likely to become hot and ignite the inflammable power that the psychopath had spread on the floor → indeed this happened, and the shop was burned out

##### Principle

- If the defendant's act was necessary, but negligent, then it will render the measures taken by the defendant unreasonable and on this basis the defence must fail

##### Judgement

- j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
  - k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
  - l) any potential indeterminacy of liability;
  - m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
  - n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
  - o) the existence of conflicting duties arising from other principles of law or statute;
  - p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
  - q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.
- **NOTE:**
    - This is a non-exhaustive list – can include more factors
    - This only applies to a novel case, not established case → Mrs Stavar's case was new and never argued before
    - If your case fits within an established duty of care, you do not need to establish it, just point to the relevant salient factors
    - If you are dealing with a novel case, where you have to consider whether or not a duty can be established, you should look at analogues non-binding decisions: take an incremental approach and see whether existing cases can be extended to the present case
    - If this is not possible, then we have the salient features approach: starting with reasonable foreseeability of harm to the plaintiff and then other considerations
    - Proximity is generally going to be important
    - What is considered another salient feature is considered on the facts of the case

### Australian Approach to Establishing a Novel Duty of Care

- Lord Atkin's neighbour principle (*Donoghue v Stevenson*)
  - Reasonable foreseeability still important
- The incremental approach (*Home Office v Dorset Yacht*)
  - Where you argue that an existing duty of care should be extended by analogy to a case in front of you
- The salient features approach (*Caltex Refineries v Stavar*)
  - Involves a close factual analysis of the relationship between the parties with reference to the salient features in the case
  - Gave a list of the salient features in this case but stressed that this wasn't an exhaustive list/not a checklist
  - Reasonable foreseeability is always going to be a central consideration when establishing a DOC
  - Proximity also remains an important consideration
  - Whether or not we need to consider the other salient features will depend on the facts of the case considered
- If you are dealing with an established duty of care, you don't need to go to principles- go to a case that establishes the duty of care and leave it at that
- If you are arguing that a new Duty of Care needs to be established, you start with reasonable foreseeability of harm to the plaintiff, then you consider an incremental approach → where you must consider the salient features approach
- Although there is no positive test to establish duty of care, there is a negative test that negates a duty of care → contradictory to public policy

### PUBLIC POLICY CONSIDERATIONS → that may negative the existence of a duty of care

- In particular situations or relationships, public policy considerations (the good of the general community) may negative the existence of a duty of care even though damage was reasonably foreseeable and there was a close and direct connection between plaintiff and the defendant
- As *McHugh J* explained in *Graham Barclay Oysters v Ryan* → the general **statutory context** in which a public authority acts is **particularly important** in determining whether it owes a duty of care to an individual
- Further the court will not impose a duty of care which might conflict with statutory or other duties, or which would lead to incoherence and inconsistency with other settled legal principles.

### Active wartime operations

(\*note: Referencing may be different under AGCLA to course outline)

- Reconsidered the UK rules above: weren't clear at the time in Australia
- A conjoined appeal → heard together, determined together
- Court considers the control mechanisms/limitations again

Facts: Tame

- Mrs Tame was involved in a traffic accident, the fault of another driver who was intoxicated.
- The other driver was not insured → Tame claimed medical expenses + physiotherapy expenses for the accident from her insurance company → insurance company accepted this liability
- Mrs Tame later found out that the police officer who prepared the report mistakenly reported Tame as having an above 0 BAC. Police later realised the mistake, corrected it, and apologised
- Tame became completely obsessed with it; concerned with her reputation, concerned that this mistake was the reason why her insurance company wouldn't pay for her physiotherapy (not true) → this resulted in a psychiatric injury
- Sued the state for the negligent infliction of psychiatric injury on the basis that it was vicariously liable for the basis of the police officer
- ISSUE (*Tame*): not suffered sudden shock, claim initially denied that it was not reasonably foreseeable that a person of normal fortitude would develop a psychiatric injury in the context of her case

Facts: Annetts

- Plaintiffs were a couple whose 16yo son went to work for Australian Stations. Before he left, the plaintiffs rang the wife of the station's manager and asked her about how their son would be taken care of. She assured them they he would be well cared for/supervised at all times
- Sent to work alone on a remote station, not given sufficient training and his vehicle was not properly working → in December he went missing (escaped with a fellow worker) and died after the car he was in got stuck in a sand dune in the desert
- Annetts received a phone call that their son was missing, went to creek a number of times to find out more info
- In April, told that their sons' remains had been found- as a result, developed psychiatric illnesses over a period of time (5 months of wishing their son was alive)
- ISSUE (*Annetts*): whether they could recover given they did not witness their son dying + psychiatric illnesses developed over a period of time (not the result of a sudden shock)
- Cases gave HC opportunity to consider those control mechanisms again – requirement of:
  - 1) Normal fortitude – is it subjective, or objective test
  - 2) Sudden shock
  - 3) Direct perception

Principle:

- Ordinary principles of the tort of negligence determine the existence of a duty of care in respect of negligently inflicted psychiatric injury (nervous shock) → NOT the control mechanisms
- Accordingly, a duty of care in respect of psychiatric injury requires:
  - reasonable foreseeability on the part of person in position of defendant of injury of that kind to a person in the position of the plaintiff; and
  - a relation between the parties (i.e. plaintiff and defendant) such that defendant should have had plaintiff in contemplation as a person closely and directly affected by the defendant's conduct

Judgement:

- Majority held that these control mechanisms should no longer be used to determine liability for negligently inflicted psychiatric injury, rather, liability should be determined according to the ordinary principles of negligence
- What is important in every single case is that there is a reasonably foreseeable risk of psychiatric injury to the plaintiff and a close and direct relationship between the plaintiff and the defendant
- Old control mechanisms will be relevant to the question of reasonable foreseeability, but they do not determine liability

**Per Gummow; Kirby JJ:**

- Psychiatric injury foreseeable in plaintiff of 'normal fortitude'?
  - Not a pre-condition that a person be of normal fortitude to recover
  - The central question is whether they sustained a recognised psychiatric injury that was reasonably foreseeable
- Requirement of sudden shock?
  - Had never been and should not be part of Australian law

- McFarlan J was also a judge in McKenna → whom required “a practice”
- Simpson J did not agree there needed to be “a practice” but found herself bound by McKenna → she said it was incorrect statutory interpretation to require “a practice”
- **Basten JA**: rejected the requirement that there be “a practice” (described as a “regular course of conduct adopted in particular circumstances”), on the basis that the Court of Appeal’s decision in McKenna was overturned by the High Court on appeal, and so its reasoning was no longer binding.
  - “... there is a risk in reformulating the statutory language. To speak of “a practice” adopted by a group of professional persons suggests a regular course of conduct adopted in particular circumstances. By contrast, the phrase “competent professional practice” is apt to cover the whole gamut of professional services provided by the practitioner, whether or not the particular circumstances have arisen sufficiently often to result in an established practice.”
- However, His Honour agreed with Justice McFarlan (but on different grounds) that Dr Grey’s evidence was insufficient to establish s 50.
- The majority’s judgment in **Sparks v Hobson** narrows the scope of the operation of s 50, meaning that it will not be available in circumstances where the defendant cannot show that he or she followed a discrete, established “practice”. This includes in unusual factual situations or potentially, in situations involving new medical techniques or procedures. The High Court recently denied an application for leave to appeal from the Court of Appeal’s decision.
  - This implies that s 50 cannot be invoked if there is no “practice” → but even if s 50 is not invoked, it does not mean that it is negligent act → move onto s 5B to determine standard of care
- “Once s 50 is invoked, arguably the general exercise required by s 5B 5 becomes otiose. There can only be one standard against which to judge the conduct of a professional defendant, although that standard may depend upon the resolution of conflicting evidence called by the plaintiff and the defendant. It is only if one takes the plaintiff’s evidence in isolation that a two-stage process, involving the assessment of the plaintiff’s claim followed by assessment of an affirmative defence, will arise. However, in a practical sense, that is not how the dispute should be determined. Rather, a judgment will be given based on all of the evidence. Nor is the exercise helpfully clarified by speaking of shifting burdens of proof. The question for the trial judge is ultimately whether the plaintiff has established that the conduct of the defendant failed to comply with the relevant standard of care.”

### Summary (s 50 – Professional Standard of Care):

- If it is a professional defendant, start with s 5P first to see whether s 50 applies → if s 50 applies, see if s 50 can be established; if it is established then that is conclusive of breach; if it is not established, move onto s 5B and s 5C of CLA → if s 50 does not apply (pre-operative information), then move to s 5B as per **Rogers v Whitiker**
- If it is not a professional defendant, move to s 5B and s 5C of CLA

### Temporal considerations

- At what point in time do we assess the defendant’s conduct/knowledge?
  - We assess the defendant’s conduct and knowledge at the time the defendant was acting (**Roe v Minister of Health**)
  - Essentially, we judge the defendant by what is known at the time
- ‘So often it is easy, years after an event in the light of subsequent knowledge, to judge earlier events in the light of subsequent received wisdom. This is a human reaction but impermissible for courts in determining duties of care and their breach which must be judged by the events at the earlier relevant times.’ - **E v Australian Red Cross Society (1991)**

### **Roe v Minister of Health [1954] 2 QB 66 – Standard of Care/Knowledge “AT THE TIME” of Accident**

#### Facts:

- Two patients operated on in hospital on the same day
- Both operations were minor, and in each case spinal anaesthetic injected
- Anaesthetic contained in sealed glass ampoules stored in a solution of phenol
- Phenol had percolated into the ampoules through invisible cracks
- Resulted in permanent paralysis in both patients
- Accident in 1947: did not know of the risk of undetectable cracks
- 1954: knew of risk and actions were taken to prevent it

#### Principle:

- Standard of care required of defendants judged by applying an objective test, considering what “reasonable man” would(n’t) have done in the same situation

it will **cut the chain of causation** and Kruschich, will liable for the 40%, will not be liable for the 20%, therefore, these will be two independent torts- only Dr Mahony liable for 20%, and no contribution in relation to that

- Contribution action would fail if Kruschich not also liable for the doctor's negligence
- Two possible results:
  - (1) Minor negligence- Kruschich liable for 40% and gets contribution for the other 20% as both liable
  - (2) Separately liable- Kruschich for 40%, Dr Mahony for 20%
    - Dr Mahony then becomes like the thief/robber in Baker v Willoughby- injured someone who is already injured, so only has to pay for the 20%
    - If you are a second tortfeasor who independently injures someone who is already injured/damaged property that is already damage, you don't pay for the original damage- only pay for the extra damage you have caused

WHAT HAPPENS IF DETERMINED THAT THIRD PARTY **CRIMINAL ACTION** ACTUALLY IS A NAI

- If it is an unrelated, intentional criminal act by third party which increases the plaintiffs damage, the question is whether the defendant is still responsible for the second event which has actually made everything worse?
- If it's unrelated- defendant not responsible for what the third party did
- Different question then arises: does 3<sup>rd</sup> parties act take over now and excuse the defendant altogether?
- (**Bakers v Willoughby**)- injured at work in one leg, then in an unrelated incident he gets shot in the same leg in a bank robbery and his leg has to be amputated (i.e. now has far worse injuries)
- Is defendant now excused i.e. is being shot in leg by criminal a vicissitude of life- held that it is not
- Held that defendant remains responsible for loss he causes i.e. if he caused a 40% loss of earning to plaintiff, and after criminal came along, he suffers 80% loss i.e. extra 40%
- D continues to be responsible for that 40% loss and C (criminal) is only liable for the extra 40% that he has caused

**Coca Cola Amatil (NSW) Pty Ltd v Pareezer [2006] NSWCA 45 (Supplementary Materials)**

Facts:

- Contractor employed by defendant to refill vending machines & collect coins
- While attending to vending machines during daylight and in presence of witnesses, attacked and shot 5 times by robber ("had no regard for human life and was prepared to take extreme risks for negligible financial gain")
- Alleged employer had failed to take reasonable care for his safety

Principle:

- **Tort law requires the plaintiff to establish the defendant's conduct was a cause of the plaintiff's damage.**

Judgement:

- On facts: assuming breach of duty by defendant in respect of plaintiff's safety (e.g. extra training about risk minimisation or different cash collection system), breach was not a cause of damage
  - Not proved, on balance of probabilities, that extra steps would have saved plaintiff from being shot.
  - In the particular circumstances of the present case, extra training about risk minimisation or a different cash collection system would not have averted the plaintiff's damage.
  - Conduct of robber in present case had been "particularly opportunistic and random in its viciousness"

**State Rail Authority of NSW v Chu [2008] NSWCA 14 – sexual assault**

Facts:

- Respondent fractured ankle walking down stairs at appellant's railway station
- Sexual assault committed against her 5-6 weeks after when still in plaster
- Man assisting Respondent invited her to home; trapped her in bedroom; took phone and purse; forced her to have intercourse and beat her → psychological injury
- Chu tried to argue that the defendant, who broke her ankle, was liable for both her ankle and her assault as she could not run away

Principle:

- **The "free, deliberate and informed" criminal act of a third party may constitute novus which breaks causal connection between negligence and plaintiff's damage**
  - **Bennett v Minister of Community Welfare**: causal connection between negligence and damage negated by the subsequent conduct of another only when that conduct is the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by the defendant
  - On facts: broke chain between fall and injury suffered as result of sexual assault
- **Modbury Triangle**: in absence of a special relationship, person has no duty to prevent harm to another from criminal conduct of a third party even if risk is foreseeable.

- No implication in by-law of intention to protect Trust from liability: does not relieve tramways trust of consequences of own negligent act
  - Does not provide a duty upon which trust can found right of action or any defence for breach of any duty owed to deceased.

### Gala v Preston (1991) 172 CLR 243

#### Facts:

- Preston, 19, injured in motor vehicle collision (passenger; driven by Gala)
- At time of accident, appellant and respondent unlawfully using motor vehicle

#### Principle:

- Public policy considerations may negate the existence of a duty of care.
- Plaintiff's participation in the defendant's commission of a criminal offence prevents a duty of care from arising, when that act (i.e. the joint illegal enterprise) is the act relied upon to found a cause of action.
  - Duty not precluded in cases involving no more than breach of regulation, or turning on negligent act/omission merely incidental to commission of offence
- Joint criminal enterprise may negate a duty of care (but does not always → salient features), rather than act as a defence

#### Judgement:

- On facts: one illegal user of motor vehicle cannot recover damages for injuries sustained as result of negligent driving of another illegal user of the vehicle
  - Should not give validity to criminal enterprise by using it as foundation for erecting standard of care
  - Criminal nature of activity (concomitant lack of responsibility for safety of vehicle involved and desire to avoid detection → unrealistic to have regard to the standard of ordinary, prudent users of road)
  - Special element in relationship which, if standard were to be set, would require its modification by reference to criminal nature of activity

### Miller v Miller (2011) 242 CLR 446 (Cases, p. 187) – Serious Joint Illegal Enterprises

#### Facts:

- 16 year old plaintiff decided to steal a car.
- One of her cousins (27 years old) offered to drive her and her sister home in the car she'd stolen → he had no license, had been drinking too
- After a while he starts to speed and drive through red lights.
- Plaintiff asked him to slow down/stop and let her out, but he kept driving even after she again asked him to let her go.
- He then lost control of a car and crashed into a pole, injuring the plaintiff.
- The plaintiff sued Miller in negligence, however he argued that he did not owe a duty of care to her on the basis that they had both been engaged in a joint illegal enterprise by using a car without the owner's consent, which was a crime under the WA Criminal Code

#### Principle:

- Generally, there is no duty of care is owed when there is an engagement in a joint illegal enterprise → as this would be inconsistent with criminal law
- However, the fact that the plaintiff was acting illegally when injured by the defendant's negligence is not determinative of whether a duty of care is owed → not necessarily a bar to recovery
- But, in some cases, policy reasons may preclude plaintiff recovering damages for negligence where parties jointly participating in illegal conduct
  - Some circumstances where the law denies a remedy e.g. when plaintiff and defendant are engaged in a serious joint illegal enterprise
- To determine whether it would be incongruous to establish duty where plaintiff sues defendant for negligent infliction of injury suffered in course of, or as result of, pursuit of joint illegal enterprise, refer to any statute(s) contravened in that enterprise, and identify the purpose of that statute
  - Where the purpose of a statute is both to proscribe as a criminal offence the taking and use of a car without the consent of the owner and to deter and punish such conduct because of its association with dangerous or reckless driving, the law would lack coherence or be inconsistent if it recognised that one participant owed a duty of care to another participant jointly engaged in the same illegal conduct.

#### Judgement:

- Held: that one of the purposes of the Criminal Code was to promote road safety, to promote safe driving and protect property rights.
  - It would be incongruous to say that the defendant owed the plaintiff a Duty of care to drive safely as they were both engaged.



## Part B: Engineering Professional

### Duty of Care:

- The duty of care of architects and builders to exercise 'due care, skill and diligence' in any work undertaken in the way of their profession → per *Voli v Inglewood Shire Council* → can be incrementally developed to expand to engineers undertaking renovations
- Hence, Diane would be held to the standard of care of an ordinary skilled person exercising the engineering profession when undertaking work in the way of her profession (including renovations on Cliff's house) → per *Bolam* and *Imbree v McNeily*
- Although the duty to warn of risk has only been applied in the medical profession, it may be incrementally developed to other professions, including the engineering profession

### Breach of Duty – s 50 of the CLA:

- The question is whether Diane breached her duty of care by not informing of risk of major structural damage
- **S 50 and 5P of the CLA** extends to other professions outside the medical profession
- **'A professional'**
  - For the purposes of s 50 and 5P, Diane, an engineer would be considered a professional
  - Engineering is a traditionally recognised profession
  - "It can be justified by education and public benefit" → per *Zhang v Hardas (No 2)*
  - Hence, as a professional, Diane is held to the standard of care of an ordinary skilled person exercising the engineering profession when undertaking work
- **S 5P of CLA:**
  - Again, since we had a professional defendant, we first consider s 5P to see whether s 50 of the CLA applies
  - The risk of damage to Cliff's house is not risk of death or injury to Cliff, thus s 5P would not operate to debar s 50 from applying
- **S 50 of CLA:**
  - **'A practice'**
    - To invoke s 50, Diane's evidence from other Australian engineers must firstly identify 'a practice' → per *McKenna* (Justice MacFarlan) → in order to satisfy the "competent professional practice" requirement under s 50
    - 'A practice' = 'a regular course of conduct adopted in particular circumstances' → per *Sparks v Hobson* (by Justice Basten – in dissent of the need for 'a practice')
    - On the facts, Diane's evidence suggests that other Australian engineers routinely follow 'a practice' of not warning their clients about risks of major structural damage to their house in circumstances where the risk was very unlikely to eventuate → hence, there is 'a practice' that is identifiable in the evidence
  - **'Widely Accepted' in Australia:**
    - To be 'widely accepted' is a question or matter of degree → implying that the group of Australian engineers that hold the supporting opinion for this practice must be sufficiently large, numerous or diverse
    - To be widely accepted, the practice does not need to be universally accepted (s 50(4)) → hence, the fact that there are differing opinions in New Zealand does not prevent Diane from relying on the opinion of the group of Australian engineers for the purposes of s 50
  - **'Irrational':**