TOCIP ONE: Tort and Contract

A. Conceptual distinction

Daniels v R White and Sons and Tarbard [1938] UK

Grant v Australian Knitting Mills Ltd [1936]

B. Practical implications

Remoteness of damage

Contributory Negligence

Harper v Ashton’s Circus Pty Ltd [1972] NSW

Daniels v R White and Sons and Tarbard [1938] UK

C. Concurrent liability in tort and contract

Matthews v Kuwait Bechtel Corp [1959] UK

Kelly v Metropolitan Railway Co [1895] UK

D. Choice of law considerations

John Pfeiffer Pty Ltd v Rogerson (2000) HCA

Bonython v Cth (1950) HCA

Garstand v Cendenco JV Australia [2002]

Dean v More Than A Morsel [2004]

Busst v Lotsirb Nominees [2003]

Insight Vacations v Young (2010) NSW

Sayers v International Drilling Co [1971]

TOPIC TWO: Interference with Goods

Overview

a) Trespass to goods

★ Hutchins v Maughan [1947] VLR 131

★ National Coal Board v J E Evans & Co (Cardiff) [1951] UK CA
### b) Title to sue

- *Penfolds Wines v Elliott* (1946) 74 CLR 204

### c) Measure of damages in trespass to goods

- *The Winkfield* [1902] P 42 [UK CA]

### d) Necessity as a defence to trespass to goods

- *Mouse’s Case* (1609) 77 ER 1341
- *Proudman v Allen* [1954] SASR 336
- *London Borough of Southwark v Williams* [1971] Ch 734 [UK]
- *Beckingham v Port Jackson and Manly Steamship Co* [1957] (NSW)

### e) Conversion

- *Day v Bank of New South Wales* (1978) 18 SASR 163

#### Wrongful taking

- *Foulides v Willoughby* (1841) 151 ER 1153
- *Bunnings Group Limited v CHEP Australia Limited* [2011] NSWCA 342

#### Wrongful detention

- *Baldwin v Cole* (1705) 87 ER 964
- *Craig v Marsh* (1935) 35 SR (NSW)

#### Wrongful delivery; destruction or consumption

- *Consolidated Company v Curtis & Son* [1892] 1 QB 495

#### Wrongful use

- *Model Dairy v White* (1935) 41 Argus LR 432
- *Aitken Agencies Ltd v Richardson* [1967] NZLR 65
- *Penfolds Wines v Elliott* (1946) 74 CLR 204

#### Defendant treating plaintiff’s goods as its own

#### Contributory negligence as a defence

- *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002]
- *Lloyds Bank v Chartered Bank of India, Australia and China* [1929] UK
- *Heap v Motorists Advisory Agency* [1923] 1 KB 577
### 3. Possession and finding

#### a) Finders keepers

- *Armory v Delamirie* (1722)

#### b) Law of finding as between employer and employee

- *Byrne v Hoare* [1965] Qd R 135 [UK]
- *Willey v Synan* (1937) 57 CLR 200 [QLD SC]
- *M’Dowell v Ulster Bank* (1899) Ir LT Jo 223 [IRELAND]

#### c) Law of finding as between occupier and finder

- *Elwes v Brigg Gas Co* (1886) 33 ChD 562
- *South Staffordshire Water Company v Sharman* [1896] [UK HC]
- *Hannah v Peel* [1945] KB 509 [UK]
- *Bridges v Hawkesworth* (1851) 21 LJQB 75 [UK]
- *Parker v British Airways Board* [1982] QB 1004 [UK CA]

### Past occupiers of private premises and superior title to unattached goods
★ Pierce v Bemis (The Lusitania) [1986] 1 QB 384 [UK HC] Page 25
Abandonment due to impracticality of retrieval

e) Contractual right to goods found Page 26
★ City of London Corporation v Appleyard [1963] 1 WLR 982 [UK HC]
*Competing ownership claims of City of London Corporation v Appleyard*

f) Larceny by finding

HOW TO APPROACH TOPIC TWO PROBLEM QUESTIONS Page 27

TOPIC THREE: PURE ECONOMIC LOSS IN TORT Page 33

A. Third party death or personal injury
*Baker v Bolton (1808) UK*

*Compensation to Relatives Act 1897 (NSW)*

*Commissioner for Railways (NSW) v Scott (1959)*

★ *Barclay v Penberthy* (2012)

*Swan v Williams* (1987)

B. Damage to third party property Page 34

★ *Caltex Oil v The Dredge ‘Willemstad’* (1976)

★ *Canadian National Railway v Norsk Pacific Steamship Co* (1992)

★ *Christopher v MV “Fiji Gas”* (1993)

★ *Fortuna Seafoods v The Ship ‘Eternal Wind’ [2008]*

C. Conduct causing pure economic loss in tort Page 35

★ *Perre v Apand* (1999) HCA

*McHugh J’s six factors for existence of duty of care for pure economic loss due to negligence*

D. Defective goods and structures

★ *Minchillo v Ford* [1995]

★ *Bryan v Maloney* (1995) HCA

★ *Woolcock Street Investments v CDG* (2004)

E. US Perspective Page 36

★ *Robins Dry Dock* (1927) US Supreme Court
F. Misrepresentation and pure economic loss

- **Derry v Peek** (1889) UK Court of Appeal
- **Hedley Byrne & Co Ltd v Heller & Partners Ltd** (1964) UK HOL
- **L Shaddock & Associates v Parramatta City Council** (1981) HCA
- **Esanda Finance Corp v Peat Marwick Hungerfords** (1997)
- **Esso Petroleum Co v Mardon** [1976]

G. Legal Professional Negligence

- **Ross v Caunters** [1980] UK
- **Hill v Van Erp** (1997) HCA
- **Hill v Van Erp** (1997) HCA

**FLOWCHART:** Misrepresentation in tort/legal professional negligence

H. Economic torts

a) Conspiracy

- **Hamlyn v More (Case of Gloucester School)** (1410) UK
- **Mogul Steamship Co v Macgregor, Gow & Co** [1925] UK House of Lords
- **British Airways Board v Laker Airways** [1984] UK

b) Inducing breach of contract

- **Lumley v Gye** (1853) UK
- **Lumley v Wagner** (1852) UK
- **Greig v Insole; World Series Cricket v Insole** [1978] UK

c) Intimidation

- **Rookes v Barnard** [1964] UK
- **CFMEU v Boral Resources (Vic) Pty Ltd** [2014] VSCA
- **Tarleton v M’Gawley** (1794) UK

d) Injurious falsehood

e) Passing off
TOPIC FOUR: CONCURRENT TORTFEASORS

A. Joint and several concurrent tortfeasors compared

Thompson v London County Council (1899) UK

Barclay v Penberthy (2012)

The Koursk [1924]

B. The rule in Brinsmead v Harrison and its abolition

Brinsmead v Harrison (1872) UK

s 5(1)(a) of Law Reform (Misc Provisions) Act 1946 (NSW)

XL Petroleum (NSW) v Caltex Oil (Australia) (1985) HCA

C. Contribution between concurrent tortfeasors

a) Common law and statute

Merryweather v Nixan (1799) UK

s 5 Proceedings and contribution between joint and several tortfeasors

Adamson v Jarvis (1827) UK

S 26 Limitation Act 1969 (NSW)

b) “Just and equitable” contribution

s 5(2) of the Law Reform (Misc Provisions) Act 1946 (NSW)

Chapman v Hearse (1961) HCA

Voli v Inglewood Shire Council (1963) HCA

D. Contribution/indemnification between employer/employee

a) Common law principles

Lister v Romford Ice & Cold Storage Co [1957] UK

b) Statutory modification of the common law

Employees Liability Act 1991 (NSW) ss 2A, 3-6

New South Wales v Eade [2006] NSWSC

E. Proportionate liability

ss 34-39 of the Civil Liability Act 2002 (NSW)

Competition and Consumer Act 2010 (Cth)

Reinhold v NSW Lotteries Corporation (No 2) (2008) NSWSC
TOPIC FIVE: VICARIOUS LIABILITY

A. Some general considerations

- *Hollas v Vabu* (2001) HCA
- *Jean-Baptiste Caire Claim* (1929)
- *Broome v Morgan* [1953] UK

Civil Liability Act 2002 (NSW) s 3C – Act operates to exclude or limit vicarious liability

- *Echin v Southern Tablelands Gliding Club* (2013) NSWSC
- *Sharrod v London and North Western Railway Company* (1849) UK
- *Day v The Ocean Beach Hotel Shellharbour* (2013) HCA

B. Relationship of employer and employee

- *Mersey Docks and Harbour Board v Coggins & Griffith* [1947] UK HOL
- *Quarman v Burnett* (1840) UK
- *Zuijis v Wirth Brothers* (1955) HCA
- *Hollis v Vabu* (2001) HCA
- *Sweeney v Boylan Nominees* (2006) HCA

C. Police tort claims

Law Reform (Vicarious Liability) Act 1983 (NSW) ss 9(B)(1-2), 8(1)

- *NSW v Bryant* [2005] NSWCA

D. Course of employment

- *Joel v Morison* (1834) UK
- *Bugge v Brown* (1919) HCA
- *Fontin v Katapodis* (1962) HCA
- *General Engineering Services v Kingston & St Andrew Corp* [1989] UK

Poland v John Parr [1927] UK

Canterbury Bankstown Rugby League Football Club v Rogers (1993)

Nationwide News v Naidu (2007) NSWSC
[T&CII NOTES – LAWS5006 / LAWS1017]

Contents

★ Deatons v Flew (1949) HCA
★ Starks v RSM Security (2004) NSWSC
★ Blake v JR Perry Nominees [2012] VSCA
★ Canadian Pacific Railway Co v Lockhart [1942] UK
★ NSV v Lepore; Samin v Queensland; Rich v Queensland (2003)
★ ADC v Prince Alfred College Inc [2016] HCA

E. Agency

Motor Accidents Compensation Act 1999 (NSW) s 112 Presumption of agency
★ Thelma (Owners) v University College School [1953] UK
★ Scott v Davis (2000) HCA
★ Gutman v McFall (2004) NSW

F. Independent contractors and non-delegable duties

i) Independent contractors: the general rule
★ Stoneman v Lyons (1975) HCA

ii) Workplace safety of employees
★ Kondis v State Transport Authority (1984) HCA

iii) Supervision of school pupils
Commonwealth of Australia v Introvine (1982) HCA
Woodland v Essex County Council [2014]

iv) Road authorities
★ Leichhardt Municipal Council v Montgomery (2007) HCA

v) Dangerous substances and dangerous activities
Rylands v Fletcher (1866) UK
★ Burnie Port Authority v General Jones (1994) HCA
★ Bootle v Barclay [2013] NSWCA

vi) Occupier of premises let out for public purposes
★ Voli v Inglewood Shire Council (1963) HCA
TOPIC SIX: DAMAGES FOR BREACH OF CONTRACT

A. General considerations and causation

Reg Glass v Rivers Locking System (1968) HCA

B. Remoteness of damage

★ Hadley v Baxendale (1854) UK

i) First part of the rule (general damages)

★ Hobbs v London and South Western Railway Co (1875) UK

★ Koufos v C Czarnikow (The Heron II) [1969] UK

★ Transfield Shipping v Mercator Shipping (The Achilleas) [2009] UK

ii) Second part of the rule (special damages)

★ British Columbia Saw-Mill Co v Nettleship (1868) UK

★ Simpson v London and North Western Railway (1876) UK

★ Victoria Laundry (Windsor) v Newman Industries [1949] UK

iii) Remoteness of damage in tort compared to contract

Heron II

★ The Wagon Mound (No 1) [1961] UK

★ The Wagon Mound (No 2) [1967] UK

iv) Choice of law considerations

★ J D Almeida Araujo v Sir Frederick Becker & Co [1953] UK

C. Measure of damage

i) Expectation damages

Sale of Goods Act 1923 (NSW) ss 52, 53

ii) Reliance damages

★ McRae v Commonwealth Disposals Commission (1951) HCA

iii) Damages for disappointment and distress

Jarvis v Swan Tours [1973] UK

★ Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1991) NSW

Civil Liability Act 2002 (NSW) ss 3, 11, 16(1), 27, 31
<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>★ Insight Vacations v Young (2010) HCA</td>
<td>60</td>
</tr>
<tr>
<td>★ Flight Centre v Louw [2011] NSWSC</td>
<td>61</td>
</tr>
<tr>
<td>iv) Effect of contributory negligence</td>
<td></td>
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<tr>
<td>Law Reforms (Misc Provisions) Act 1965 (NSW) ss 9(1)(a-b)</td>
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<td>v) Mitigation of loss</td>
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</table>

**TOPIC SEVEN: VITIATING FACTORS IN CONTRACT**

**A. Overview**

**B. Misrepresentation**

*Paterson, Robertson and Duke, Principles, chs 32, 33, 39*

i) Establishing misrepresentation

**Change of circumstances**

*With v O’Flanagan [1936] UK*

**Statement induces the contract**

*Holmes v Jones (1907) HCA*

★ *Redgrave v Hurd (1881) UK*

ii) Restitutio in integrum (rescission)

**Recession and substantial justice**

★ *Alati v Kruger (1955) HCA*

**Affirmation**

★ *Coastal Estates v Melevende [1965] VSC*

**Lapse of time**

*Leaf v International Galleries [1950] UK*

iii) Rule in Seddon’s case

★ *Seddon v North Eastern Salt Co [1905] UK*

Sale of Goods Act 1923 (NSW) s 4(2A)(b)

iv) Statutory probation of misleading or deceptive conduct

Competition and Consumer Act 2010 (Cth) s 18(1)
# T&CII: QUICK REFERENCE ANSWER GUIDE

| 1. Tort and contract          | Page 66  |
| 2. Interference with goods   | Page 67  |
| 3. Pure economic loss in tort | Page 69  |
| 4. Concurrent tortfeasors    | Page 72  |
| 5. Vicarious liability       | Page 73  |
| 6. Damages for breach of contract | Page 75 |
| 7. Misrepresentation as a vitiating factor in contract | Page 77 |
1. TORT AND CONTRACT - NOTES

A. Conceptual distinction

<table>
<thead>
<tr>
<th>TORT</th>
<th>CONTRACT</th>
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<tr>
<td>Governs infringements of interests protected by the law independent of private agreement.</td>
<td>Governs expectations arising out of particular transactions between individual persons.</td>
</tr>
<tr>
<td>Concerned primarily with compensation for injury or damage.</td>
<td>Concerned primarily with the enforcement of agreements.</td>
</tr>
<tr>
<td>Liability in tort is imposed by law without the agreement of the parties. <strong>Exceptions:</strong> In particular situations, the agreement of the parties may be relevant to liability in tort (e.g. consent may negative what would otherwise be a trespassory interference with a person, land or goods. Also voluntary assumption of risk can be a defence to a tort claim founded on negligence).</td>
<td>Liability in contract is derived from the agreement of the parties. <strong>Exceptions:</strong> Consumer protection legislation (Part VIII of the Sale of Goods Act 1923) may imply, without the agreement of the parties, terms relating to quality and fitness in contracts for the supply of goods and services.</td>
</tr>
<tr>
<td>Liability in tort is (subject to limited exceptions such as strict liability for some breaches of statutory duty) based on fault comprising intentional wrongdoing or negligence.</td>
<td>Liability in contract in particular circumstances is strict: a contracting party who fails to perform the contract is liable for breach without regard to the fault (intentional wrongdoing or negligence) of that party. <strong>Exceptions:</strong> Professionals have a contractual obligation to exercise reasonable care: this is not a guarantee of the success of a particular treatment or the soundness of particular advice. Also, the contractual obligation of a carrier is to exercise reasonable care and is not a guarantee of the personal safety of the passengers.</td>
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**Daniels v R White and Sons and Tarbard [1938] UK**
Daniels goes to the pub owned by Tarbard and orders some lemonade manufactured by R White and Sons. Lemonade has carbolic acid and Daniels gets very sick. Plaintiff was unable to prove a relevant breach of duty to a common law duty of care in tort. However, his claim in contract was successful because lemonade was in breach of implied warranty that it would be of merchantable quality.

_for the plaintiff to be successful under a tort claim, he had to prove the defendants were at fault. However, for success in a contract claim, since liability was strict, the fault on the part of the defendants was immaterial._

**Grant v Australian Knitting Mills Ltd [1936]**
Grant brought a claim in tort against the manufacturer (Donoghue v Stevenson) and a claim in contract against the retailer for contracting acute dermatitis due to the presence in his underwear of a chemical irritant. Court found dual liability in tort and contract.

_for Lord Wright of the Privy Council held that ‘no question of negligence is relevant to the liability in contract’ because ‘the tort liability is independent of any question of contract’._

B. Practical implications

Measure of damages

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<tr>
<td>Damages are awarded with the object of placing the plaintiff in the position that they would have been had the tort not been committed. Torts are restorative (place in pre-tort position).</td>
<td>Damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed. Contract is both restorative (reliance damages) and expectation based (compensating for the loss of a good deal).</td>
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Remoteness of damage

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<th>CONTRACT</th>
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<tr>
<td>Recovery damages in tort embrace a wider range of losses than recovery of damages in contract.</td>
<td>In contract, the damage must have been of a kind which arises in ‘the usual course of things’ or which was in the contemplation of the parties as the ‘probable result’ of a breach (Hadley)</td>
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<tr>
<td>Remoteness of damage principle in tort is more generous to the plaintiff.</td>
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Contributory negligence

At common law, contributory negligence is a complete defence to a claim in tort for negligence (Butterfield), but is no defence in a claim founded on breach of contract (Astley)

*Harper v Ashton’s Circus Pty Ltd [1972] NSW*

Contributory negligence is no defence to an action founded on breach of contract and therefore no ground for reduction of plaintiff’s damages under apportionment legislation.

However, due to amendments in 2000 to the Law Reform (Miscellaneous Provisions) Act 1965 (NSW), the apportionment principle (reduction of damages on account of contributory negligence) applies in cases of ‘breach of contractual duty of care that is concurrent and coextensive with a duty of care in tort’ (s9(1)).

Therefore, if a fare paying passenger is injured by the negligence of the carrier is guilty of contributory negligence, the apportionment principle will apply whether the passenger claims against the carrier in tort or contract.

*Daniels v R White and Sons and Tarbard [1938] UK*

Here, liability in contract is strict, so the contributory negligence of the plaintiff is no defence to an action founded on breach of contract and is no ground for reduction of the plaintiff’s damages under the apportionment principle.

Where the contractual duty is a duty to exercise reasonable care (lawyer and client, carrier and passenger, doctor and patient) contributory negligence CAN BE a defence on a claim founded in contract AND tort. But if the duty is strict, the same common law duty applies.

C. Concurrent liability in tort and contract

Concurrent liability arises when the liability in tort law is coterminous with the liability derived from the agreement with the parties in contract. Plaintiff can elect to bring the claim in tort and/or contract:

- The election between a tort or contract claim will be guided by considerations of forensic advantage with regard to matters such as the measure of damages or choice of law considerations.
- The court’s jurisdiction also may depend on whether plaintiff’s claim is framed in tort or contract.
- It is often dangerous not to run the claim as both if there is concurrent liability.

*Matthews v Kuwait Bechtel Corp [1959] UK*

Plaintiff was an English worker and suffered personal injury in the course of employment caused by the failure of his employer (the defendant – a Panama-based company) to take reasonable care in respect of safety at a construction site in Kuwait, where the plaintiff was employed. The contract of employment had an express term that said the contract was to be governed by English law. Court held there can be concurrent liability in tort and contract in an employment relationship. Also an important trans-border dimension to this case: lex loci delicti: the legal system that will govern the claim is the one which the tort was committed.

Court of Appeal held that the plaintiff could elect to frame his claim against defendant in contract rather than in tort. Practical significance was that the English court had jurisdiction over defendant under the rules of court because the employment was expressed to be governed by English law. However, English court would not have had jurisdiction over the claim had been framed in tort because the rules of the court required that the tort must have been committed in England. In this case, the tort had been committed in Kuwait.
Kelly v Metropolitan Railway Co [1895] UK
Plaintiff was a passenger on defendant’s steam train. Plaintiff suffered personal injury when the engine driver negligently failed to turn off steam in time to prevent the train running into a wall at the station. Court held there is concurrent liability in tort and contract on the part of the carrier in respect of the safety of the passenger.

The rationale of concurrent liability in tort and contract in a case such as Kelly is that the liability of the carrier for the safety of the passenger is an incident of the relationship of carrier and passenger and the carrier would be liable to the passenger even if he or she was being carried gratuitously: there would be liability in tort even in the absence of a contractual relationship between the parties.

In addition to the employer/employee and carrier/passenger relationships, concurrent liability in tort and contract exists between professional persons (medical, legal, architects etc) and their clients/patients

- Principle: there will be concurrent liability in tort and contract ‘whenever there would be liability for gratuitous performance without the contract’
- In a case where there is concurrent liability in tort and contract (carrier/passenger), the liability of D in tort is no affected by D’s lack of contractual capacity on account of his/her minority

D. Choice of law considerations

Choice of law considerations are particularly important in trans-border cases:

- Example: Postal acceptance rule is an Anglo-Australian rule. It wouldn’t apply in France
- Example: Consideration is not a factor in Italian Contract Law

- In Australian law, liability in tort is governed by the law of the place where the tort was committed: the lex loci delicti (John Pfeiffer v Rogerson)
- On the other hand, liability in contract is governed by the legal system which is identified as the proper law of the contract.
  - The legal system which is the express or inferred choice of the parties as the proper law of the contract, or, in the absence of an express or inferred choice, the legal system with which the contract has its closest and most real connection (Bonython v Cth)
- Therefore, in a case involving concurrent liability in tort and contract e.g. where an employee has been injured as the result of his or her employer’s negligent failure to provide a safe workplace, the existence or extent of the liability of the employer may be significantly different depending on whether the employee’s claim is framed in tort (lex loci delicti) or contract (governed by the proper law of the contract).

John Pfeiffer Pty Ltd v Rogerson (2000) HCA
Rogerson, was an ACT based employee. One day he crossed over to NSW for work and was injured due to the negligence of his employer. Court held liability in tort is governed by the law of the place where the tort was committed (ACT preferable as it has more generous WorkCover provisions than NSW). Also an issue of concurrent liability: Rogerson only brought the claim in tort and not in contract – he should have lodged a claim in both.

Bonython v Cth (1950) HCA
Issue was whether a loan raised in 1895 in Queensland for £2 million ought to be payable in 1945 in Australian or English pounds. Court held that the contract had its most real connection with the Queensland legal system because the loan had been raised on the authority of an Act of the Queensland parliament and was secured on the public revenues of Queensland. If parties have not selected a proper law of the contract, the court will objectively choose the most reasonable jurisdiction in the circumstances.

Garstand v Cendenco JV Australia [2002]
Both the plaintiff and defendant resided in NSW and their contract was formed in NSW. In the course of employment, while harvesting tomatoes in Victoria, the plaintiff suffered personal injury in an accident caused by the defendant’s breach of duties of care under the employment contract. Court held that the proper law governing the contract was that of NSW.
Master Harrison: ‘The principal factors to be considered when determining which system of law the contract has its closest and most real connection are the place of contracting, the place of performance, the place of residence or business of the parties and the nature and subject matter of the contract’

Harrison: ‘At the time the contract was entered into the system of law with which it had a connection was the NSW system of law. Victoria was not even within the contemplation of the parties. The only link with Victoria is that the accident occurred there. Accordingly, the proper law to be applied to the contract is NSW law.

**Dean v More Than A Morsel [2004]**
Despite an accident occurring WA, court held that the proper law of employment contract was NSW.

**Busst v Lotsirb Nominees [2003]**
Plaintiff was from QLD and was employed by defendant, a Victorian company which supplied paint in QLD and NSW. QLD law was the proper law of the contract. In the course of employment, whilst working in NSW (lex loci delicti), plaintiff suffered personal injury allegedly caused by defendant’s negligent failure to provide a safe place of work. Court held that in an action by an employee against his or her employer for personal injury caused by the employer’s negligent failure to provide a safe system or place of work, the substantive governing law in tort is the lex loci delicti but the substantive governing law in contract is the proper law of the contract.

**Insight Vacations v Young (2010) NSW**
Contract between tour operator and client made in NSW. She then gets injured in Slovakia on the tour. Claim in tort was the law of Slovakia, while the claim in contract was the law of NSW.

**Sayers v International Drilling Co [1971]**
An employment contract governed by Dutch law contained an exclusion clause, valid under Dutch law but void under English law, in respect of the employer’s liability in negligence for injury suffered by the employee in the course of employment. Court held that in cases involving concurrent liability in tort and contract, a contractual term, valid under the proper law of the contract, may constitute a defence to a claim founded on tort.
2. INTERFERENCE WITH GOODS – NOTES

Four specific torts to consider:

<table>
<thead>
<tr>
<th>A. Trespass</th>
<th>B. Conversion</th>
<th>C. Detinue</th>
<th>D. Action on the case</th>
</tr>
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<tbody>
<tr>
<td>Direct physical/forcible interference (requires actual possession)</td>
<td>Wrongful exercise of dominion</td>
<td>Wrongful failure to return goods</td>
<td>Goods destroyed or damaged through negligence</td>
</tr>
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</table>

**Definition of goods**: Includes inanimate objects such as ships, aircraft, motor vehicles and railway rolling stock, as well as animals.

**Specific torts providing a remedy for interference with goods**:

1. **General tort of negligence** (action on the case: goods destroyed or damaged through negligence)
2. **Trespass** (direct physical/forcible interference)
3. **Conversion** (wrongful exercise of dominion/control)
4. **Detinue** (wrongful failure to return goods)
5. **Equitable remedy of specific restitution of goods** where an award of damages would not be an adequate remedy (e.g. unique goods, such as a family heirlooms, wrongfully detained)

**Bailment**: The specific torts which provide a remedy for interference with goods require an awareness of the legal relationship of bailment:

Bailment: the delivery of possession of goods by one person (the bailor) to another person (the bailee) for a certain purpose (e.g. gratuitous loan, lease or repair) on the condition that the bailee return the goods to the bailor when the purpose has been fulfilled.

During the bailment, the bailee is in actual possession of the goods. However, the bailor may have a right to immediate possession depending on the bailment terms.

**Types of possession**

- **Actual** possession
  - **Definition**: When a party exercises the requisite level of physical control over goods to bring them into possession. Requires control and intention to control.
  - **Right of action**: Trespass, conversion, detinue.

- **Constructive** possession
  - **Definition**: Type of actual possession, constructive possession is when a party has knowledge of goods, as well the ability to control the goods, even if the party has no physical contact with the goods. Also, if a servant or agent has the goods at the time when they are interfered with, the master or principal can also sue in trespass, even though not in actual possession.
  - **Right of action**: Trespass, conversion, detinue.

- **Immediate** possession
  - **Definition**: When a party has been in actual possession, but then consents to another party temporarily holding possession. When that period of temporary possession has come to an end, the original party gains the right to immediately regain possession.
  - **Right of action**: Conversion, detinue.

- **Future** or **reversionary right** to possession
  - **Definition**: A reversionary right to future possession exists during the term of a bailment. The bailor cannot get the goods back, but instead holds a right to future possession at the conclusion of the bailment.
  - **Right of action**: Insufficient possession to ground an action in conversion or detinue, but trespass might be available if the bailment does not have a fixed term and the defendant acts in contradiction to the bailment (e.g. permanent damage has occurred).
2. Trespass to goods, conversion and detinue

a) Trespass to goods

Trespass to goods: Direct physical/forcible interference with goods e.g. taking (trespass de bonis asportatis), destroying, damaging, using or consuming goods.

It is actionable per se – fault is an essential element of the tort (not necessarily involving the defendant’s moral culpability).

★Hutchins v Maughan [1947] VLR 131

Facts: Defendant laid baits in his unfenced paddock and plaintiff’s dogs (goods) ate the poison. Court found this was a consequence of the defendant’s actions, not a direct act.

Principles:
- Liability for trespass to goods must involve a direct action, not consequential.

Reasoning: Herring CJ (quoting Professors Goodhart and Winfield): “An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act; if it is consequential on the other hand, when, by reason of some obvious and visible intervening cause, it is regarded, not as part of the defendant’s act, but merely as a consequence of it. The distinction between an act and its consequences – between doing a mischief and causing one – seems to be nothing more than an indeterminable difference in degree.”

★National Coal Board v J E Evans & Co (Cardiff) [1951] 2 KB 861 [UK CA]

Facts: National Coal Board placed an electric cable under land occupied by the county council, without their knowledge or consent. Defendant (J E Evans & Co) was engaged by the council to excavate a trench and damaged the electrical cable during this activity. Defendant was given a plan of the land by the council, which did not show the electric cable.

Principles:
- No liability in trespass to goods without fault (wilful or negligent act by defendant).
- It is not sufficient that the defendant’s deliberate action brought them into contact with goods, the presence of which were not known to the defendant.

Reasoning: The accident in the present case had occurred “utterly without fault” on the part of the defendant. This fact negatived the defendant’s liability. The reasoning in the trespass to the person cases (Homes v Mather (1875) 10 LR Exch 261 (highway accident) and Stanley v Powell [1891] 1 QB 86 (shooting accident)) should be following in the context of trespass to goods.

b) Title to sue

Trespass to goods is generally an interference with the plaintiff’s actual possession of goods.

- A right to immediate possession is sufficient title to sue for trespass of goods only in specific circumstances.
**Penfolds Wines v Elliott (1946) 74 CLR 204**

**Facts:** Court considered whether the defendant (publican) committed a tortious interference with two of the plaintiff’s empty wine bottles, supplied to the defendant by his brother, when the defendant refilled the bottles with wine other than the plaintiff’s wine and delivered the bottles (but did not purport to sell them) to a third party in exchange for the payment of eight shillings, being the cost of the wine in the refilled bottles (not for the bottles themselves).

Plaintiff sought an injunction (not damages) to stop this practice. It was established the company never sold the bottles, only the contents of the bottles. The bottles were branded “This bottle is the property of Penfolds Wines Limited” or “This bottle always remains the property of Penfolds Wines Limited”. Invoice also stated:

“The bottles remain the sole property of Penfolds Wines Limited from which they have been loaned… solely for purposes of enabling the contents to be used once only for retailing, consuming or using Australian Wine or Brandy… when the contents are once used, the bottles must be forthwith on demand given over or returned to the Company or its agents. The bottles must not be destroyed, damaged or parted with, nor used for any of the foregoing purposes.”

**Principles:**

- **Title to sue for trespass to goods requires** the plaintiff to be in *possession of the goods at the time* of the trespassory interference.

- **Direct interference with goods cannot occur** if the person in possession of the goods at each step *authorises the action*.

- An act repugnant to a bailment converts it to a bailment at will. 

- **An act repugnant to terms of bailment, so the plaintiff was legally entitled to immediate possession of the bottles**.

- **Reasoning:** Majority dismissed claim for trespass to goods, but found grounds for conversion. Latham CJ only one to find grounds for trespass (minority) as well as conversion.

  - *Mere taking or asportation of goods may be trespass without the infliction of any damage. However, for taking to constitute a trespass it must not merely be an unlawful act, but unlawful as against the party from whom possession is taken.***

  - *The use by the defendant of the plaintiff’s bottle for keeping and disposing of wine in his trade (being an act done with the consent of the person who delivered the bottle to him, such person having the actual possession of the bottle) was not a trespass for which any person can sue.***

  - A **bailor of goods has sufficient possession to support an action for trespass against third persons, unless an exclusive possession of the goods for a period not yet expired has been granted by him to the bailee. In the present case the bailment had expired. Bottles returned to defendant in manner repugnant to terms of bailment, so the plaintiff was legally entitled to immediate possession of the bottles. Authorities support view that the plaintiff could sue in trespass, but logical argument tends against this view.***

  - If the defendant’s brother is regarded as being a sub-baillee holding the bottles upon the same terms as the original baillee, his delivery of the bottles to the defendant to be filled with wine other than the plaintiff’s wine and to be returned to him was an act which, to use the words of Baron Parke in Fenn v Bittleston (1851), was “doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel.” It was therefore a “determination of the lawful bailment, and caused the possessory title to revert to the bailor and entitled him to maintain an action of trover.

  - [218] The defendant used [the bottles] without any regard to the plaintiff’s rights. A **taking of the bottles without any intention to exercise permanent or temporary dominion over them, though it might be a trespass (NB: majority said not trespass), would not be a conversion; but the actual use of the bottles for the benefit of the defendant and his brother was a conversion.** In the present case there was not, in my opinion, a mere removal of the bottles received from the defendant’s brother independently of any claim over them in favour of the defendant or anyone else. There was a handling of the bottles, an actual user of them, for the purposes of the defendant’s trade….. [which is] inconsistent with the dominion of the owner of the bottles and was a conversion.

  - Remedy of common law is inadequate. To leave the plaintiff to its common law rights in the present case would be in effect to deprive the plaintiff of any remedy.

  - [Dissenting] DixonJ said there cannot be conversion with no act or intent inconsistent with the appellants’ right to possession and nothing to impair or destroy it, that it was a “temporary and harmless use”. But majority found using goods for commercial benefit constituted conversion, as above.
c) Measure of damages in trespass to goods

★ The Winkfield [1902] P 42 [UK CA]
Facts: Mail ship sunk after colliding with the Winkfield ship. Owners of the Winkfield admitted liability and repaid an amount calculated as per the statutory limit of their liability. The Postmaster-General (plaintiff) made two claims - one for the registered mail and one for the unregistered mail which were lost in the accident. Court considered whether the PMG could claim for unregistered mail. The delivery of the mail by the PMG and the Winkfield is a bailment:
- The people who sent the mail are the bailors. They are the true owners of the mail.
- The plaintiff is the bailee, since the goods were given to them to be delivered.

Court considered: (1) whether a bailee (or any person who is not the true owner of goods) can still recover money when that goods are interfered with whilst in the bailee's possession and (2) whether the bailee can recover even if they aren't liable to the bailor (true owner of the goods)?

Principles:

- “As against a wrongdoer, possession is title” – a bailee in possession of goods may recover the goods’ full value from a wrongdoer who has interfered with them.
- However the bailee is obliged to account damages above their own interest to the true owner and after having paid in full once, the wrongdoer has an answer to any action brought by the true owner.

Reasoning: Collins MR: The goods that have been converted or damaged are deemed to be the goods of the possessor and of no other, and therefore the loss or deterioration of the goods is the possessor’s loss, and to him, if he demands it, it must be recouped. The wrongdoer must treat the bailee as the owner of the goods for all purposes irrespective of the rights and obligation as between him and the bailor.

The defendant admitted liability and therefore is a wrongdoer. The possession of the plaintiff is therefore an absolute title against the defendant, so it doesn't matter that the plaintiff is not liable to the people sending the letters. However, Collins dismissed the potential of double liability.

Collins MR: It is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and…. the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer.

As between bailor and bailee the real interests of each must be inquired into and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor...

d) Necessity as a defence to trespass to goods

★ Mouse’s Case (1609) 77 ER 1341
Facts: Authority for the defence to trespass of necessity. Mouse was one of 47 passengers on a barge from Gravesend to London, when “a great tempest happened”. The barge was in danger, so the defendant threw Mouse’s casket containing £113 overboard.

Principles:

- Necessity is a defence to trespass: in case of great and imminent danger, in order to preserve life, the law permits an encroachment on private property.

Reasoning: “In case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it...the danger accrued only by the act of God, as by tempest…. Everyone ought to bear his loss for the safeguard and life of man.”