

CHAPTER 6

Law of Torts

[6.10] A “tort” may be described as a “civil wrong”. It may also be said to be a liability arising from a breach of a legally recognised duty owed to people generally. There is no definable body of principles which apply to all torts as there is with the law of contract. It is therefore more convenient to consider the different torts and the rules which apply under separate categories.

This chapter is concerned with the specific torts particularly relevant to the building and construction industry generally, including negligence, negligent misstatement and nuisance. The tortious liability of architects, engineers and other professionals specifically is referred to briefly in this chapter and addressed in more detail in Chapter 11.

OVERVIEW

[6.20] The law of torts is generally found in the common law. There are, however, statutes which impose liability, for example, workplace health and safety legislation, and others, such as the *Defamation Acts*, which regulate entitlements. In all States and Territories legislation regulates the entitlements of persons injured in motor vehicle accidents and the rights to compensation for people injured at work. Legislation has created rights where common law rights were limited; for example, in compensation to relatives of people who are killed or suffer bodily injury.

All States and Territories now have legislation that to varying degrees limits the circumstances in which a person may be liable in negligence and that person’s liability to pay damages.¹ An important further reform of the law relating to liability for economic loss was the introduction of proportionate liability from 2004 in all States, Territories and the Commonwealth.² The impact of proportionate liability on the drafting of construction contracts and the conduct of construction claims involving a claim based on, or arising from, a failure to take care is significant, although the complications have taken some time to emerge in court decisions.

The same act may be both a tort and a crime, in which case the “tortfeasor” is liable to be prosecuted criminally by the police and to be sued separately in

1. See, eg, the *Civil Liability Act 2002* (NSW) and similar legislation in other all States (in Victoria, called the *Wrongs Act 1958* (Vic)).

2. See [6.310]-[6.320].

a tort action for damages. The most common of such cases are those arising from motor accidents. In the construction context accidents on building sites often lead to a prosecution of the contractor for a breach of workplace health and safety laws and separate proceedings in tort by the employee injured as a result of the employer's negligence which caused the accident.

Similarly, an act that is a breach of contract may also be a tort. In other words, the same act or omission may give rise to liability not only to a party to the contract which has been breached but also to third persons injured as a consequence of the breach. The example in construction is where an engineer or architect negligently designed a structure which collapsed, the owner could sue on the contract of engagement and any third persons injured by the collapse could sue in tort for negligence, see *Voli v Inglewood Shire Council*³ and see *Dymocks Book Arcade Pty Ltd v Capral Ltd*.⁴

In the case of professionals and others engaged in what were formerly "common callings", and in special circumstances of reliance, there may be concurrent liability or duty of care in tort with a duty owed under contract, see *Astley v Austrust Limited*.⁵ Parties to a building contract will generally have their rights and liabilities determined by reference to its provisions: see *Frederick W Neilsen (Canberra) Pty Ltd v PDC Constructions (ACT) Pty Ltd*⁶ and *Apache Energy Ltd v Alcoa of Australia*.⁷ The existence, or otherwise, of concurrent liabilities is primarily relevant to the application of limitation periods and defences to the various actions.⁸

Not all damage or injury which can occur to a person by the acts of another gives rise to a right to sue in tort. There are some exceptions from liability that apply generally. Where damage occurs as the necessary consequence of something done in performance of a statutory authority, there will be no redress in nuisance, or at least the redress will be limited to any provision for compensation in the statute, see *Benning v Wong*.⁹ As to an action based on nonfeasance by statutory authorities, see *Graham Barclay Oysters Pty Ltd v Ryan*.¹⁰ The tortious duty of care owed by statutory authorities has also been circumscribed by legislation in all States and Territories.¹¹

There may also be no remedy where the person injured has voluntarily consented to the risk of injury. This principle previously operated as a defence

3. *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

4. *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2013] NSWSC 343.

5. *Astley v Austrust Limited* (1999) 197 CLR 1.

6. *Frederick W Neilsen (Canberra) Pty Ltd v PDC Constructions (ACT) Pty Ltd* (1987) 71 ACTR 1.

7. *Apache Energy Ltd v Alcoa of Australia* (2013) 45 WAR 379; 307 ALR 376.

8. See, respectively, [6.330] and [6.90].

9. *Benning v Wong* (1969) 122 CLR 249.

10. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 21 NSWLR 502.

11. See, eg, *Civil Liability Act 2002* (NSW) Pt 5 and *Wrongs Act 1958* (Vic) Pt XII.

for an employer to a claim by an employee for injuries resulting from the employee's negligence. The principle still has application, although it is often difficult to establish. One example of its application generally is where a passenger travels in a car driven by a drunk driver, and thereby voluntarily accepts lesser skill, and a higher risk, than if the driver were sober. Some States and Territories have introduced legislation to exclude liability for certain "obvious risks" (a risk that is patent or a matter of common knowledge) or "inherent risks" (a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill).¹² Where a risk is "obvious", the injured person is presumed to have been aware of the risk. There is also no liability for the materialisation of an "inherent" risk.

The scope of tortious liability, particularly in the tort of negligence, continues to extend to areas where previously no duty was thought to exist. The decision of the High Court in *Bryan v Maloney*, in which the builder of a dwelling house was found to be liable in negligence to a subsequent purchaser, represents a high watermark in the expansion of the categories of tortious liability. The decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*¹³ placed substantial limitations upon such a cause of action.¹⁴ The most recent decision of the High Court in *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288*¹⁵ in effect precludes recovery by subsequent purchasers of non-residential property.

NEGLIGENCE

Elements generally

[6.30] Negligence is the tort which has the greatest impact upon construction activities. From being generally regarded as merely an element in fixing liability, it has become the main independent basis of liability in the law of torts. Moreover, negligence remains an element for liability in other torts such as nuisance. The term may also form part of an element in a cause of action in breach of contract, to describe a breach of an implied duty or implied level of competence in the execution of the contractual duties. It is in this area that the duty of an architect or engineer to the client will generally lie.

Negligence in its tortious context means a breach of duty to take reasonable care to prevent damage occurring to others when engaged on anything

12. See, eg, *Civil Liability Act 2002* (NSW) Pt 1A Div 4 and *Perisher Blue Pty Ltd v Nair-Smith* (2015).

13. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

14. Connor S, "Protection of the Rights of Purchasers of Commercial Properties where Latent Defects Arise: Assignment of Ongoing Rights under Building Contracts" (2005) 21(4) BCL 248.

15. *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185, and see Shipway, L, "Negligence in Design and Construction: The Impact of the Contractual Matrix, (2016) 32 BCL 289.

which a reasonable person would realise requires careful performance. A common action in negligence in the construction context is that between a client and a building professional engaged to carry out work or services for the client.

There are a number of matters which a plaintiff must establish in an action for negligence:

- First, that the defendant owed them a duty of care recognised by the law.
- Secondly, that there has been a breach of that duty; that is, a failure to conform to the required standard of care.
- Thirdly, that the plaintiff has suffered material damage which was caused by the defendant's breach of duty.
- Fourthly, that there is a reasonably proximate connection between the action of the defendant and the damage done to the plaintiff; that is, the damage must not be too remote.
- Fifthly, the plaintiff may be required to counter any defences raised by the defendant to reduce or refute the defendant's liability.

Duty of care

[6.40] As to the duty of care, it should be noted that not all actions which cause injury will occur in situations where a duty of care is owed. Since the famous decision of *Donoghue v Stevenson*,¹⁶ the scope of duties which are recognised at law has greatly increased. The principle enunciated in that case by Lord Atkin was:

"You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely or directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

There was a tendency to apply a test of "reasonable foreseeability of injury or damage" as the principal test for determining the existence of a duty of care, absent policy considerations which preclude the imposition of such a duty. This approach has been rejected in Australia and the United Kingdom, although a modified form of the test, involving reasonable foreseeability, the existence of a sufficient relationship of proximity and policy considerations continues to enjoy support in Canada and New Zealand: see, respectively, *Childs v Desormeaux*¹⁷ and *South Pacific Manufacturing Co Ltd v New Zealand Security*.¹⁸

16. *Donoghue v Stevenson* [1932] AC 562.

17. *Childs v Desormeaux* [2006] 1 SCR 643.

18. *South Pacific Manufacturing Co Ltd v New Zealand Security* [1992] 2 NZLR 282.

In Australia, the tests of reasonable foreseeability and proximity are not, of themselves, sufficient to establish a duty of care, *Sullivan v Moody*.¹⁹ Rather, in cases which do not relate to an established category of duty, the modern approach is to look to a range of “salient features”.²⁰ These might include the vulnerability of the plaintiff to harm from the defendant’s conduct, whether the defendant is in a position of control over the plaintiff, assumption of responsibility by the defendant and reliance by the plaintiff and the foreseeability of harm to the plaintiff from the defendant’s conduct; see *Perre v Apand Pty Ltd*²¹ and the many cases which have subsequently applied the principles discussed within it.

In cases of pure economic loss involving negligent misstatement or advice,²² the defendant’s assumption of responsibility, the plaintiff’s reliance and the defendant’s assumption of control are important elements in establishing a duty of care: see *Esanda Finance Corp Ltd v Peat Marwick Hungerfords*,²³ *Hill v Van Erp*.²⁴ In cases of pure economic loss involving negligent acts or omissions, the plaintiff’s vulnerability to the risk and the plaintiff’s membership of an ascertainable or determinate class affected by the defendant’s conduct are important elements in establishing a duty of care: see *Perre v Apand Pty Ltd*²⁵ and the many cases which have subsequently applied the principles discussed within it, in particular, *Brookfield Multiplex v Owners Corporation SP 61288*.²⁶

The number of situations and relationships where a duty of care is owed is extremely large. Courts are not restricted to imposing a duty of care based on established categories. The categories of negligence are expanded on an incremental basis by applying analogous cases and general principles such as the “neighbour” principle. In determining novel cases, the courts consider the particular situation and may impose a duty where previously none was thought to exist.

Before considering some specific examples which apply to the construction industry, some of the established categories of relationships where a duty of care is owed should be noted. These include the relationships between one road user and all others, employers and employees, occupiers of land and entrants, manufacturers of goods and the ultimate consumer, and professionals and their clients. In these cases, foreseeability as to both plaintiffs and

19. *Sullivan v Moody* (2001) 207 CLR 562.

20. Witting C, “Tort Law, Policy and the High Court of Australia” (2007) 31 *Melbourne University Law Review* 569.

21. *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

22. See, generally, the case study at [2.40].

23. *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

24. *Hill v Van Erp* (1997) 188 CLR 159.

25. See n 21.

26. *Brookfield Multiplex v Owners Corporation SP 61288* (2014) 254 CLR 185.

the likely damage is quite clear, which may in itself be sufficient to satisfy the requirement of proximity.

Liability to future owners of buildings

[6.50] The legal basis for liability of a builder of a residence to future owners was considered in *Bryan v Maloney*.²⁷ The High Court held that a duty of care in negligence existed between a builder and a subsequent purchaser of a residence and that the economic loss suffered, being the diminished value due to inadequate footings constructed by the builder, was foreseeable and recoverable.

This decision should be contrasted with the position in England: see *D & F Estates Limited v Church Commissioners for England*²⁸ and *Murphy v Brentwood District Council*²⁹ which found that a builder was not liable in tort for economic loss, represented by the cost to rectify or the diminished value. Further, the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*³⁰ declined to apply *Bryan v Maloney* in the context of a commercial premises, holding that an engineering company that designed foundations of a commercial building did not owe a duty of care to a subsequent purchaser who suffered economic loss when the foundations were found to be inadequate. The High Court has further limited the scope of liability owed to future owners of non-residential buildings, *Brookfield*.³¹

The basis for differentiating between residential and commercial property purchasers is in part based on policy considerations and the fact that the latter are seen as being able to protect themselves and are thus not vulnerable to the actions of those who designed or constructed the building. Even where the property is residential, however, it may be that the plaintiff is unable to show the requisite degree of vulnerability. This occurred in *Roberts v Parletta Constructions Pty Ltd*,³² in which the Supreme Court of South Australia found that a subsequent purchaser of a residential property was not owed a duty of care in the circumstances. An important factor was that she had had the opportunity to conduct a site inspection and therefore discover the defect, but she had not done so.

The past presumed protection of purchasers of residential property under home warranty insurance in most States is regrettably either no longer available or is only available as an expensive last resort. Until the problem becomes a political issue the situation is unlikely to change. The foreshadowed

27. *Bryan v Maloney* (1995) 182 CLR 609.

28. *D & F Estates Limited v Church Commissioners for England* [1989] AC 177.

29. *Murphy v Brentwood District Council* [1991] 1 AC 398.

30. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

31. See n 26.

32. *Roberts v Parletta Constructions Pty Ltd* [2010] SASC 248.

consequences of the extent of non-compliant construction work in multistorey apartment buildings in New South Wales and other states might provide the impetus for belated reform.³³

A significant aspect of the decision in *Bryan v Maloney* was that there was a finding of actual reliance on the builder by the purchaser. Subsequent cases have confirmed that the absence of reliance by the subsequent purchaser on the builder, architect or engineer may negate the imposition of a duty of care: see *Woollahra Municipal Council v Sved*,³⁴ where there was specific reliance by the subsequent purchaser on the council.

Another factor negating the duty of care is where the terms of the contract of sale militate against any reliance by the subsequent purchaser on the builder or building professional. Moreover, the High Court, in *Pyrenees Shire Council v Day*³⁵ rejected any concept of general reliance as the basis for determining whether a duty of care exists.

In practice, many purchasers of properties at the time of purchase will rely upon the advice of building professionals engaged to inspect, investigate and report on the condition of the building and will not rely, even in a general sense, on the original builder or building professional. Whilst this is prudent practice, it also may – in accordance with the principles discussed above – mean that it is less likely that a duty of care in tort will be imposed on the original builder or building professional.³⁶

Another significant aspect of *Bryan*, as noted in *Roberts*, was that the defects in the relevant dwelling were latent. It has, conversely, been found that no duty of care is owed to a subsequent purchaser in respect of defects that are not latent or that are not structural: see, for example, *Woollahra Municipal Council v Sved*;³⁷ *Zumpano v Montagnese*;³⁸ and now *Brookfield Multiplex v Owners Corporation SP 61288*.³⁹

Similar principles apply in respect of the liability of sub-contractors and consultants to third parties in tort for pure economic loss: see, respectively, [8.290] and [11.160].

33. Farrelly E, "Why I Would Never Buy a New Apartment in Sydney" (2017) SMH. <https://www.smh.com.au/opinion/why-i-will-never-buy-a-new-apartment-in-sydney-20170209-gu9i4n.html>.

34. *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 10.

35. *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

36. See Connor S, "Protection of the Rights of Purchasers of Commercial Properties Where Latent Defects Arise: Assignment of Ongoing Rights Under Building Contracts" (2005) 21 BCL 248.

37. See n 33.

38. *Zumpano v Montagnese* [1997] 2 VR 525.

39. See n 26.

Breach of the duty

Applicable standard of care

[6.60] The level or standard of care that must be applied to the duty is generally described as that which would be exercised by a "reasonable person". This is a legal abstraction which represents a person who, with no exceptional insight or knowledge in a particular situation, would react in a certain way, or be aware of certain possibilities. It is a purely objective question; the actual knowledge or considerations of the defendant are not relevant.

In the context of construction activities the standard or care in their performance is that which an ordinarily skilled builder would be expected to employ. It is not always a question of what the majority of people who owe the duty would do to show the required standard of care, although this is a good guide. The standard may be set by industry practice, such as the use of Standards or Codes. Such use is a normal practice in engineering design, so that if a design failed to comply with a Standard or Code, this may be indicative of negligence, unless it could be shown that the design conformed to otherwise accepted engineering practice: see *London Borough of Newham v Taylor Woodrow-Anglian*⁴⁰ and *Sydney Water Corporation v Turano*.⁴¹

Another means of assessing the standard of care used often in relation to building and construction cases is by analysis of the information and knowledge generally available on a specific material or problem area at the time of the alleged negligence, see *Vairy v Wyong Shire Council*⁴² and *Collins v Clarence Valley Council*.⁴³ By way of example, during the late 1970s and early 1980s, a considerable degree of information and knowledge was available concerning the behaviour of reactive soil foundations and ground movements and their impact upon footing design. In part, this development process resulted in Australian Standard AS 2870-1986 ("Residential slabs and footings – construction"). The introduction of AS 2870 would not preclude an engineer from being expected to have been familiar with the matters with which AS 2870 dealt prior to 1986. Similarly, the release in 1996 of the revised edition, Australian Standard AS 2870-1996, would not preclude an engineer from being expected to have been familiar with the matters with which AS 2870-1996 dealt prior to 1996. The same thing could be said in relation to the further revised edition published in 2011.

Builders and building professionals may also rely on evidence that they acted in accordance with the common practice of those engaged in the activity in question to support a claim that they exercised the appropriate standard of care. However, evidence of the practice followed or

40. *London Borough of Newham v Taylor Woodrow-Anglian* (1982) 19 BLR 99.

41. *Sydney Water Corporation v Turano* (2009) 239 CLR 51.

42. *Vairy v Wyong Shire Council* (2005) 223 CLR 422.

43. *Collins v Clarence Valley Council* (2015) 91 NSWLR 128.

supported by a responsible body of opinion in the relevant profession or trade is not conclusive and may be set aside in certain circumstances, see *Rogers v Whitaker*.⁴⁴ All States except Western Australia (but neither of the Territories) have now modified the common law position so that, in general, the standard for building professionals or those holding themselves as having a particular skill is measured against the standard that, at the time the conduct was engaged in, was widely accepted by peer professional opinion as competent professional practice.⁴⁵

Establishing the breach

[6.70] The proof of the breach is closely linked to the standard of care. It is often the central issue in a negligence action. It is a question of fact which will be decided by a jury, or by the judge where there is no jury. The question should not just be whether, after applying the standard of care to the facts, that the events would have been foreseen, but also whether there was a reasonable possibility of harm actually occurring. An example of this is *Bolton v Stone*⁴⁶ where a cricket ball hit from a nearby cricket field struck the plaintiff. It was held that, whilst it was foreseeable that a ball could be hit out of the ground, the club was not liable because of the infinitesimally small chance involved of the ball actually hitting someone. See also *Wyong Shire Council v Shirt*.⁴⁷

The duty of building professionals is to guard against probabilities, not possibilities. However, where there is a greater risk, the standard will be higher, and the duty may require that reasonable possibilities might also be considered, see *Burnie Port Authority v General Jones Pty Ltd*⁴⁸ and *Marsh v Baxter*.⁴⁹ Such a standard applies where children are concerned, or where dangerous materials are being used or dangerous activities undertaken. The combined effect of the magnitude of foreseeable risk of injury, loss or damage occurring and the gravity of the consequences of such risk are relevant in determining whether there has been a breach of duty.

In addition to considering the magnitude of the risk of harm and the degree of the probability of its occurrence, the courts also take into account the expense, difficulty and inconvenience to the defendant of taking alleviating action and any other conflicting responsibilities that the defendant may have when assessing whether there has been a breach of duty.⁵⁰ Although rare,

44. *Rogers v Whitaker* (1992) 175 CLR 479.

45. *Civil Liability Act 2002* (NSW) Pt 1A Div 6; *Civil Liability Act 2003* (Qld) ss 20-22; *Civil Liability Act 1936* (SA) ss 40-41; *Civil Liability Act 2002* (Tas) ss 21-22; *Wrongs Act 1958* (Vic) ss 57-60. The *Civil Liability Act 2002* (WA) ss 5PA-5PB currently applies only to health professionals.

46. *Bolton v Stone* [1951] AC 850.

47. *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

48. *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

49. *Marsh v Baxter* [2015] WASCA 169.

50. *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

circumstances will arise where the cost and complications of alleviating the possibility of an accident occurring may militate against a finding of a breach of a duty to take care. Nevertheless, if the contractor is under a binding statutory obligation to prevent such events occurring, the contractor may be liable to the plaintiff for breach of its statutory duty, notwithstanding the absence of negligence.

Occasionally, a situation will occur in which the plaintiff may claim "*res ipsa loquitur*" (that is, the "thing speaks for itself"); in other words, the events causing the damage could not have occurred unless there had been negligence. Where the principle applies, the mere occurrence of the events causing the damage is *prima facie* evidence of the defendant's negligence, and it is unnecessary for the plaintiff to prove the actual breach of a duty of care, *Schellenberg v Tunnel Holdings Pty Ltd*.⁵¹ This maxim is not relied on very often, and it is in any case open to the defendant to give evidence refuting negligence, and even without such evidence, the plea may not be accepted.

Damage

[6.80] A principle applying generally in contract and tort (but in different ways in their detailed application) is that, for a plaintiff to recover substantive damages in contract or tort, the plaintiff must establish that actual, compensable injury, damage or loss has been sustained, that such injury, damage or loss was caused by the defendant's breach and that the injury, damage or loss was not too remote. As a general rule, therefore, there is only liability in tort for negligence where actual damage has occurred.

In order to understand the general rule, the basis for liability in tort and contract (see Chapter 5) must be contrasted. The cause of action in tort does not commence to run until actual damage has been sustained: damages in tort are not recoverable for mere theoretical harm or exposure to a risk of harm, even if there has been a breach of duty of care. On the other hand, the cause of action for breach of contract is complete on the breach and immediately gives rise to nominal damages. Thus, in *Voli v Inglewood Shire Council*,⁵² the architect could have been sued by the client (via the *contract* of engagement) for undertaking the design poorly as soon as the under-design of the stage was discovered, whilst the injured third person only had a right to sue (via the *tort* of negligence) from the time the injury was sustained.

In Australia, liability in tort for purely economic loss arising from negligence no longer depends upon there being physical damage to the property of the plaintiff: see *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"*,⁵³ and *Perre v Apand Pty Ltd*.⁵⁴ However, the circumstances in which a person

51. *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121.

52. *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

53. *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"*,⁵³

54. *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

54. *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

may be liable for pure economic loss are substantially more limited than for physical injury or damage to property: see *Perre v Apand Pty Ltd*,⁵⁵ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,⁵⁶ and *Brookfield Multiplex v Owners Corporation SP 61288*.⁵⁷

The plaintiff must prove on the balance of probabilities that the damage was in fact caused by the defendant's negligence. This apparently simple process involving the application of common sense to the various causative factors can lead to considerable complexity, particularly where there are intervening or other acts of negligence: see *March v E & M H Stramare Pty Limited*,⁵⁸ and *Chappel v Hart*.⁵⁹ An act or omission that materially contributes to the plaintiff's injury, damage or loss or that materially increases the risk of such injury, damage or loss may be a legal cause of the injury, damage or loss: see *Chappel v Hart*,⁶⁰ *Henville v Walker*.⁶¹ In addition, legal policy considerations can affect the selection of causative factors for the purposes of determining liability, *Allianz Australia Insurance Limited v GSF Australia Pty Ltd*.⁶²

The States and the Australian Capital Territory have codified the common law test for causation and require courts to consider at the causation stage whether it is appropriate for the scope of the negligent person's liability to extend to the injury, damage or loss so caused.⁶³

On the issue of remoteness, the plaintiff must show that the relevant kind of injury, damage or loss suffered was foreseeable at the time of the defendant's breach of duty, although it is not necessary to show that the precise manner in which the injury, damage or loss suffered was foreseeable: see *Mount Isa Mines Ltd v Pusey*,⁶⁴ *Chapman v Hearse*.⁶⁵

Defences

[6.90] Apart from establishing that there was no duty owed, or that a duty owed had not been breached, defendants to a negligence action may be able to refute or reduce their liability by a number of defences. Defendants may

55. *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

56. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

57. *Brookfield Multiplex v Owners Corporation SP 61288* (2014) 254 CLR 185.

58. *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506.

59. *Chappel v Hart* (1998) 195 CLR 232.

60. See n 58.

61. *Henville v Walker* (2001) 206 CLR 459.

62. *Allianz Australia Insurance Limited v GSF Australia Pty Ltd* (2005) 221 CLR 568.

63. See *Civil Liability Act 2002* (NSW) Pt 1A Div 3 and *Wrongs Act 1958* (Vic) s 51, but also *Travel Compensation Fund v Tambree* (2005) 224 CLR 627.

64. *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

65. *Chapman v Hearse* (1961) 106 CLR 112.

also be able to reduce their liability by establishing that the plaintiff failed to take all reasonable steps to mitigate its loss consequent upon the defendant's breach.

A plaintiff may, therefore, succeed in an action for negligence, but, because the loss was caused partly by the plaintiff's own actions, the court will reduce the damages which may be recovered to the extent that the plaintiff's failure to take reasonable care to protect his or her person or property was a cause of the damage, see generally, *Astley v Austrust Limited*.⁶⁶ This is known as "contributory negligence". Whilst not strictly a defence, it will reduce liability if established. The defence is governed by legislation in each State and Territory⁶⁷ and has been further codified as part of the 2002-03 reforms to the laws of negligence.⁶⁸ Since codification, the principles that apply to determine whether a person has been negligent are used to determine whether a person has been contributorily negligent.

The liability of "concurrent wrongdoers" (that is, two or more persons whose separate acts independently or jointly cause the economic loss or damage to property the subject of the plaintiff's claim) is further limited in all States and Territories by proportionate liability legislation.⁶⁹ Where the plaintiff's claim is in respect of economic loss or damage to property and involves a failure by a concurrent wrongdoer to take reasonable care, the liability of each defendant is limited to the degree of each defendant's responsibility for the plaintiff's loss. The apportionment regimes do not apply to claims in respect of personal injury or death.

NEGLIGENT MISSTATEMENT

[6.100] The traditional restriction upon recovery for purely economic loss unassociated with physical injury or damage prevented recovery of financial loss flowing from negligent misstatements in the absence of a contract, fraud or a fiduciary relationship.

In 1964, however, the House of Lords in *Hedley Byrne & Company Limited v Heller & Partners*⁷⁰ held that, in certain circumstances, the law implied a duty of care in the making of statements and that a negligent though honest statement could give rise to liability. It was held that a bank could be liable for a negligent misstatement to a person who, though not a customer of the bank, relied on the statement and suffered a loss as a consequence. The bank in this case was in fact protected because the information was given "without

66. *Astley v Austrust Limited* (1999) 197 CLR 1.

67. See, eg, *Wrongs Act 1958* (Vic) Pt V.

68. See, eg, *Civil Liability Act 2002* (NSW) Pt 1A Div 8.

69. See, eg, *Civil Liability Act 2002* (NSW) Pt IV; *Wrongs Act 1958* (Vic) Pt IVAA and, generally [6.300]-[6.310].

70. *Hedley Byrne & Company Limited v Heller & Partners* [1964] AC 465.

responsibility". The High Court in *Mutual Life & Citizens Assurance Company Limited v Evatt*⁷¹ accepted (but, on appeal in 1970, the Privy Council did not)⁷² that, where there was a special relationship between a person giving information or advice and the recipient of that information or advice, a duty of care arose where the latter reasonably relied on it in circumstances where the former knew or ought to have known of this reliance.

Liability in tort for negligent misstatement causing pure economic loss has to a large extent been absorbed into the general principles of liability in negligence for pure economic loss described earlier in this chapter: see *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979*;⁷³ see also *L Shaddock & Associates Pty Limited v Parramatta City Council*,⁷⁴ and see *Addenbrooke Pty Ltd v Duncan No 2*⁷⁵ and *Brookfield Multiplex v Owners Corporation SP 61288*. However, the reasonableness of the plaintiff's reliance on the defendant's statement or advice is a critical factor in establishing liability: *Esanda Finance Corp Ltd v Peat Marwick Hungerfords*;⁷⁶ *Hill v Van Erp*.⁷⁷ More significantly, where circumstances exist which may justify a claim on the basis of this cause of action, a claim might more readily be made that the statement or advice provided was "misleading or deceptive" and hence in breach of s 18 of the *Australian Consumer Law* (see [3.140]).

Reliance on a statement may not be reasonable in circumstances where the person providing the information or statement does not provide the information or statement to the plaintiff directly, does not realise that the plaintiff intends to act upon the information or statement in connection with some matter of business or serious consequence and the plaintiff has access to expert advice from other sources. In *Tepko Pty Ltd v Water Board*,⁷⁸ for example, the High Court held that the Water Board did not owe a duty of care to the plaintiff property developers in connection with an incorrect estimate of the costs, prepared for a government body, of connecting water to a property that the plaintiff company sought to subdivide. See also *Kuringai Council v Chan*⁷⁹ and *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No7)*.⁸⁰

71. *Mutual Life & Citizens Assurance Company Limited v Evatt* (1968) 122 CLR 556.

72. *Mutual Life & Citizens Assurance Company Limited v Evatt* (1970) 122 CLR 628.

73. *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.

74. *L Shaddock & Associates Pty Limited v Parramatta City Council* (1981) 150 CLR 225.

75. *Addenbrooke Pty Ltd v Duncan No 2* (2017) 348 ALR 1.

76. *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

77. *Hill v Van Erp* (1997) 188 CLR 159.

78. *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1.

79. *Kuringai Council v Chan* [2017] NSWCA 226.

80. *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No7)* [2012] NSWCA 417.

LIABILITY FOR DANGEROUS ACTIVITIES

[6.110] A person who takes advantage of his or her control of premises to introduce a dangerous substance or to carry on a dangerous activity owes a duty of care to avoid a reasonably foreseeable risk of injury or damage to the property of another person. In overturning the rule in *Rylands v Fletcher*⁸¹ regarding strict liability for negligence relating to dangerous substances or activities on property, the High Court, in *Burnie Port Authority v General Jones Pty Ltd*⁸² held that the liability of such a person is governed by the ordinary principles of negligence. In *Burnie Port Authority* property of the plaintiff was destroyed when a fire spread from a part of a building occupied by the Authority, in which building work was being undertaken, to another part of the building occupied by the plaintiff. The fire was caused by the negligence of an independent contractor who was carrying out welding in the Authority's building. At first instance, the defendant was found liable on the basis of the rule in *Rylands v Fletcher*. The High Court, whilst finding in favour of the plaintiff, overturned the rule and determined that the defendant was in breach of a non-delegable duty of care which it owed to the plaintiff. This duty was owed personally and could not be discharged merely by the employment of an independent contractor, given the level of danger of the activity involved and the vulnerability of the plaintiff to the risk of harm.

A non-delegable duty of care arises in special circumstances where one party is responsible for the care or safety of another. The duty is characterised by concepts of control and vulnerability and involves the duty not only to take care but also to ensure that care is taken, see *Kondis v State Transport Authority*.⁸³

The category of cases in which such a non-delegable duty arises includes those in which the former rule in *Rylands v Fletcher* applied, and those where the activity being undertaken involves some aspect of dangerousness. Since *Burnie Port Authority*, property owners may owe a non-delegable duty to neighbours to ensure that care is taken in the course of construction work. In the construction context generally, principals owe a non-delegable duty to employees of independent contractors, see *Le Cornu Furniture & Carpet Centre Pty Ltd v Hammill*.⁸⁴

The liability of proprietors to their neighbours may also arise as a result of statutory provisions which impose a duty upon those "causing" excavation to be undertaken, which thereby interferes with rights of support. There may also be a separate liability in nuisance.

NUISANCE

[6.120] Apart from issues of negligence in the execution of building works, liability may also arise based on the actual effect which building operations have on adjoining properties or on "public rights" generally.

Nuisance is similar to trespass in that both involve some interference with the plaintiff's interest in land but arise in different circumstances. Trespass occurs where, by a positive voluntary act of a defendant (which may be intentional or negligent), there is *direct* interference to or with the plaintiff's land. The trespass may be to the air space over the land, for example, by scaffolding (see *LJP Investments Pty Limited v Howard Chia Investments Pty Limited*;⁸⁵ *Bendal Pty Limited v Mirvac Projects Pty Limited*)⁸⁶ or a crane jib (see *Graham v K D Morris & Sons Pty Limited*).⁸⁷ For historical reasons, an action in trespass is available even without proof of actual damage to the land, and regardless of the intention of the defendant, be they unaware, deliberately harmful, or acting with neighbourly care.

Private nuisance is concerned with indirect or consequential interference to the land as a result of an act or omission of the defendant occurring outside the plaintiff's land. It is wider than trespass in the sense that it is not restricted to physical intrusions, be they persons or things. Noises, smells, vibrations and even high frequency waves have been held to be nuisances. However, these interferences must be unreasonable, and the plaintiff must show actual damage to the use or enjoyment of land to which it has some legally recognised interest. Public nuisance consists of interference by the defendant with any rights shared by the public, which rights need not necessarily relate to land or the ownership or occupation of land.

Private nuisance

[6.130] The tort of private nuisance protects the right of a person to the use or enjoyment of land and property which that person owns or occupies or in which that person has an interest. There are two types of private nuisance.

The first type occurs when a person allows the escape of materials or things such as water, trees or even pieces of masonry, onto the land of another, which causes material damage to that land or property on that land. A plaintiff's cause of action is made out on proof of material damage to property that the plaintiff owns or occupies or in which the plaintiff has an interest, and proof that the damage was reasonably foreseeable.

The second type occurs where there is a substantial or unreasonable interference with the enjoyment by another of their land or other property on

85. *LJP Investments Pty Limited v Howard Chia Investments Pty Limited* (1989) 24 NSWLR 490.
 86. *Bendal Pty Limited v Mirvac Projects Pty Limited* (1991) 23 NSWLR 464.
 87. *Graham v K D Morris & Sons Pty Limited* [1974] Qd R 1.

that land through excessive noise, vibrations, dust or smells. Whether the interference is unreasonable is a question of degree: a continuing interference with the enjoyment may be unreasonable, even if that interference is slight; likewise, an isolated deliberate act or an irregular unintended occurrence may give rise to an action for private nuisance, if that interference is considerable: see *Halsey v Esso Petroleum Co Ltd*,⁸⁸ and *Owners of Strata Plan 4085 v Mallone*.⁸⁹

The interference must be with a recognised property right of the plaintiff in or over the affected land. The success of an action will depend on how unusual or unreasonable the interference is in all the circumstances of the case, having regard to the neighbourhood and use of surrounding properties, the duration, time of day, frequency and extent of the interference and all other relevant considerations, see *Baxter v Camden London BC [No 2]*.⁹⁰ Where a defendant undertakes building works on its land for example, interference with a neighbour's use or enjoyment of their property might not be considered unreasonable where the interference is temporary and confined to business hours.

It is no defence to say that the defendant's nuisance existed before the plaintiff's interest in the land and that the plaintiff "came to the nuisance", see *Proprietors of Strata Plan No 14198 v Cowell*.⁹¹ A defendant continues or "adopts" a nuisance if, after the defendant knew or ought to have known of its existence, the defendant takes no reasonable steps to end it. In *Ikic v Evans*,⁹² for example, the plaintiffs' house was damaged by a concentration of groundwater that resulted from excavations for a swimming pool undertaken on the defendant's property by the defendant's predecessor in title. Although the defendants had "adopted" the nuisance, the plaintiffs' action failed because they were unable to establish that there was any reasonable step which the defendants could have taken to prevent the continuing damage.

Only the owner or occupier of, or the person with the interest in, the affected land or property on that land is able to sue for private nuisance, though others affected by the nuisance may sue in negligence on the same facts. The creator of the nuisance is liable for the nuisance (and may also be liable in negligence to third parties), as may the person who occupies or owns the premises from which the nuisance emanates. A building contractor is responsible for private nuisance caused by its construction operations, and the owner of the land on which the building work is being undertaken may also be liable in negligence to third parties, either as a result of a non-delegable duty at law

or under statute: see *Burnie Port Authority v General Jones Pty Ltd*⁹³ and *Marsh v Baxter*.⁹⁴

As between the building contractor and the property owner, liability to third parties for nuisances created by the construction work is usually regulated under the building contract: the building contractor is typically required to indemnify the owner (as principal under the building contract) against such liability to third parties (see [12.20]).

Public nuisance

[6.140] Public nuisance occurs when there is an obstruction to the exercise by members of the public of a right that is common to all members of the public, *Kent v Johnson*.⁹⁵ Any interference that endangers the health, safety or comfort of the public is actionable as a public nuisance, and the interference need not relate to rights over land. A commonly occurring interference is obstruction of a public highway. The erection of a building which interferes with reception from a television transmitter is neither a public nor private nuisance, see *Hunter v Canary Wharf Limited & London Docklands Development Corporation*.⁹⁶ The action in public nuisance is usually taken by the Crown; however, an individual who can prove he or she suffered damage over and above that suffered generally by the public may take action.

Nuisance from construction

[6.150] Construction operations often cause disruption to, and interference with, the rights of adjoining owners or occupiers. Disputes may arise not only because of nuisance arising from the construction work itself but also from the effect of the project on rights of owners or occupiers of neighbouring properties to light or air. During construction, problems may arise where noise, dust and vibrations emanate from the construction site.

Such situations may constitute a private nuisance. If so, there may be grounds for obtaining an injunction to prohibit its continuance, see *Wherry v K B Hutcherson Pty Limited*,⁹⁷ or an action for damages may also lie, or both remedies may be available. In *Wherry*, partly by agreement, the hours of operation of demolition and excavation work were restrained. In *Aldridge v J O Clough & Son Pty Limited*,⁹⁸ an injunction was granted in general terms and damages awarded for interference with the enjoyment of the plaintiff's land from the activities of a quarrying operation.

93. *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

94. *Marsh v Baxter* [2015] WASCA 169.

95. *Kent v Johnson* (1973) 2 ACTR 1.

96. *Hunter v Canary Wharf Limited & London Docklands Development Corporation* [1997] 2 WLR 684.

97. *Wherry v K B Hutcherson Pty Limited* [1987] Aust Torts Reports 68,741.

98. *Aldridge v J O Clough & Son Pty Limited* (1979) 2 ACLR 167.

Unlike negligence, liability for nuisance does not generally depend on the standard of conduct of the defendant. Thus, it is not necessarily a defence to a nuisance action that the defendant took reasonable precautions to avoid the nuisance, although it may be a defence to an action for private nuisance by interference with use and enjoyment of property, particularly where the duration of the nuisance is temporary. Where the nuisance occasions material damage to the plaintiff's property, the reasonableness of the use of defendant's property and the actual consequences of the defendant's actions are the important considerations, *Cambridge Water Co Ltd v Eastern Counties Leather plc*.⁹⁹

The courts, however, have adopted a pragmatic approach to demolition and building works. The contractor will be under a duty to take proper precautions to avoid undue inconvenience to neighbours. Where no steps are taken to limit the interference with a neighbour's property, the contractor will be liable for the nuisance, though not necessarily for the total consequences of the nuisance caused by the building work. Liability would extend only to that part attributable to the failure to take proper precautions, see *Andreae v Selfridge & Company Limited*.¹⁰⁰

The actual invasion of neighbouring property by crane jibs and scaffolding occurs often, particularly on inner city construction sites. Such an interference with a neighbour's rights has been held to be a trespass and not a mere nuisance. In *Graham v K D Morris & Sons Pty Limited*,¹⁰¹ for example, an injunction was granted to prevent a crane jib passing over the plaintiff's property.

The test for determining whether an activity or an incursion above the surface of land constitutes a trespass to land is whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake: see *Bendal Pty Limited v Mirvac Projects Pty Limited*,¹⁰² *LJP Investments Pty Limited v Howard Chia Investments Pty Limited*¹⁰³ and *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd*.¹⁰⁴ Despite case law to the contrary, it is respectfully suggested that a temporary and limited invasion of air space is a nuisance rather than a trespass and should require actual damage to the plaintiff's property or unreasonable interference with the plaintiff's enjoyment of its property to entitle the plaintiff to a remedy, certainly a remedy by way of injunction.

When considering whether to grant an injunction, the court will seek to balance the rights of the parties; delay in commencing action and the availability

99. *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264.

100. *Andreae v Selfridge & Company Limited* [1938] Ch 1.

101. *Graham v K D Morris & Sons Pty Limited* [1974] Qd R 1.

102. *Bendal Pty Limited v Mirvac Projects Pty Limited* (1991) 22 NSWLR 100.

104. *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (1991) 22 NSWLR 100.

of damages are also relevant considerations (see, generally, [5.560] and [6.290]). Cantilevered staging represents a more continuing trespass and is more likely to be restrained by way of injunction. Accordingly, the written permission of neighbouring properties' owners is usually sought for such activities and compensation considered. In New South Wales the *Access to Neighbouring Land Act 2000* (NSW) provides the opportunity for contractor to obtain access under an application to the Local Court, see [7.40] and [7.90].

Apart from interference with the enjoyment and use of land, interference with other rights over land owned or occupied by the plaintiff may constitute private nuisance, the most important being the right of support. Whilst there is a natural right of support for land by land, and a nuisance is committed if subsidence is caused by either the removal of natural support by excavation or undermining, there is no equivalent natural right for support of the building, see *Dalton v Angus*;¹⁰⁵ *Kebewar Pty Ltd v Harkin*;¹⁰⁶ and see *SJ Weir Ltd v Bijok*.¹⁰⁷ This old and unsatisfactory rule is partly overcome by the concurrent liability in negligence of a builder or property owner for damage caused to neighbouring properties during excavation and underpinning: see *Pantalone v Alaouie*;¹⁰⁸ *Anderson v MacKellar County Council*;¹⁰⁹ and *Hicks v Lake Macquarie City Council (No 2)*.¹¹⁰

Apart from the present inclination of courts to impose liability based on a duty of care to neighbouring owners of property during construction excavation, there are statutory regulations which require certain procedures and notification of work, particularly where underpinning is involved. These statutory provisions may impose a non-delegable duty upon the owner of the land to ensure that excavation and underpinning works are carried out without causing damage to neighbouring properties.¹¹¹

DEFAMATION

[6.160] Defamation is concerned with damage to a person's reputation, and not merely with hurt feelings, invasion of privacy or distress. Reputation is injured if a communication concerning the plaintiff is made to a person other than the plaintiff, which communication (known as "publication") contains a defamatory imputation, that is, it is likely, in the minds of ordinary, reasonable people, to cause others to think less of the plaintiff or to shun or avoid the plaintiff. A defamatory imputation may be conveyed by the natural and

105. *Dalton v Angus* (1881) 6 App Cas 740.

106. *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738.

107. *SJ Weir Ltd v Bijok* [2011] SASCF 165.

108. *Pantalone v Alaouie* (1989) 18 NSWLR 119.

109. *Anderson v MacKellar County Council* (1968) 69 SR (NSW) 444.

110. *Hicks v Lake Macquarie City Council (No 2)* (1992) 77 LGRA 269.

111. See, eg, *Conveyancing Act 1919* (NSW) s 177.

ordinary meaning of a publication or by innuendo. Publications may be defamatory even if the publisher has no intention to defame.

The defamatory imputation must have been published by the defendant, in the sense of conveyed in print or some other material form, by word of mouth or by broadcast to a person other than the plaintiff. A defamatory statement conveyed only to the subject of the statement is not actionable. All persons involved in the publication or republication of a defamatory imputation may be liable for the defamation, subject to a defence of innocent dissemination. Other specific defences are available to a defendant to excuse or justify an otherwise defamatory publication.

Since 2006, following the enactment by all States and Territories of model defamation laws, essentially uniform defamation legislation operates in Australia.¹¹² The *Defamation Acts* retain, with some modification, the common law of defamation, including the common law principles with respect to "publication", conveyance of a meaning and defamatory character and common law defences. Significantly, the *Defamation Acts* abolish the distinction at common law between slander and libel, establish a defence of "contextual truth", set a statutory cap on awards of damages for non-economic loss, abolish exemplary and punitive damages and impose a one year limitation period on defamation actions, subject to extension for up to three years following publication.

The situations in the construction industry where defamatory statements may be made are relatively rare, though the consequences in some cases could be quite serious. Subject to the limitations in the *Defamation Acts* upon the ability of corporations to bring actions for defamation, the architect or engineer reporting to a third party on the capacity and ability of a particular contractor may be liable if an unreasonably subjective assessment were to injure the contractor's reputation in the way of its business and cause the contractor to lose a major contract: see *Sydney Water Corp Limited v Aqua Clear Technology Pty Limited*.¹¹³ Similarly, the comments of architects reporting on the work of other architects should be confined to objective and professional analysis. An architect will have the right to sue where unobjective and emotive criticisms of his or her work are published resulting in injury to reputation: see *Andrews v John Fairfax & Sons Ltd*¹¹⁴ where an architect, at first instance, was awarded substantial damages for a newspaper commentary on one of his buildings.

At common law the most important defence to an action for defamation, other than justification, is privilege. Available to the original publisher only,

absolute privilege protects the publication regardless of the intention of the publisher. There is absolute privilege for proceedings in Parliament, a court or a quasi-judicial tribunal, and possibly for communications between husbands and wives and between solicitors and clients. Qualified privilege applies to fair reporting of parliamentary, judicial and other official proceedings. To qualify, the report must be fair, accurate and made without improper motive or malice. Under the *Defamation Acts* a defendant can prevent further proceedings by making an offer of amends, which may include publishing a correction or apology, or offering to pay compensation.

LIABILITY OF OCCUPIERS

[6.170] The law concerning the liability of occupiers of premises to persons entering those premises preceded the law of negligence and thus developed as a separate basis of liability in tort, see *Indermaur v Dames*.¹¹⁵ Critical for determining liability was the classification of the defendant as the “occupier” of premises and the basis upon which the plaintiff entered the premises, whether as “invitee”, “licensee”, “entrant as of right” or “trespasser”.

In *Australian Safeway Stores Pty Ltd v Zaluzna*,¹¹⁶ the High Court accepted that occupiers’ liability forms a sub-set of the law of negligence and that the relationship of occupier and entrant falls within the categories of cases where the mere existence of the relationship gives rise to a duty of care. For this reason, the fact of the defendant’s occupation of the premises and the manner of the plaintiff’s entry upon them are still relevant evidentiary matters. The Court held that occupiers of premises owe entrants a duty to take reasonable care, although the content of the duty and the standard of care vary with the circumstances of the plaintiff’s entry on the premises.

Occupiers’ liability is liability in respect of premises. For this purpose, “premises” refers to both land and structures attached to it, including buildings, construction sites, lifts, ladders and scaffolding, as well as moveable things such as ships and trains. An “occupier” is a person who has a degree of control over premises such that he or she can prevent injury to entrants, for example, through a right to admit or exclude visitors. An occupier does not have to be the owner of the premises. On a construction site, the contractor is usually the occupier, though the principal may also be, or there may be joint occupiers: see *AMF International Limited v Magnet Bowling Limited*¹¹⁷ where the principal and the main contractor were both held to be occupiers in relation to an independent contractor entering a site. See also *Canberra Formwork Pty Ltd v Civil & Civic Ltd*.¹¹⁸ Accordingly, a sub-contractor may be an occupier, either jointly or separately, of the whole or part of the site.

115. *Indermaur v Dames* (1866) LR 1 CP 274.

116. *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

117. *AMF International Limited v Magnet Bowling Limited* [1968] 1 WLR 1028.

118. *Canberra Formwork Pty Ltd v Civil & Civic Ltd* (1982) 41 ACTR 1.

As the standard of care owed by an occupier to an entrant at common law varies according to the circumstances of entry and the purposes of entry, the following section sets out the various categories of entrants and the duties owed by occupiers to those entrants.

Entering the site under contract

[6.180] The nature of the duty and the standard of care owed by occupiers to contractual entrants is governed by the terms of the contract of entry. In the absence of any express term or generally accepted standard, the occupier's duty is to make the premises as safe for the purposes of the contract as reasonable skill and care can make them, see *Woods v Multi-Sport Holdings Pty Ltd*.¹¹⁹ The duty does not extend to things that are not discoverable through using reasonable care, *Jones v Bartlett*.¹²⁰ However, the occupier is liable for the negligence of third parties involved in the construction, alteration, maintenance or repair of the premises, whether before or after occupation by the occupier, see *Northern Sandblasting Pty Ltd v Harris*.¹²¹ As a result, it is no defence that the lack of care was that of the occupier, the occupier's employee or an independent contractor. Where the purpose of entry is subsidiary to the main purpose of the contract, the entrant would be regarded as an invitee.

Lawful entrants other than entrants under contract

[6.190] The occupier is under a duty to exercise reasonable care to prevent a risk of damage or injury occurring to lawful entrants, such as invitees and licensees, of which the occupier is, or ought to be, aware. An invitee is a person who enters the premises of an occupier for a purpose in which they and the occupier have a common financial or material interest, such as a person who enters a shopping centre or premises let for social functions: see, for example, *Australian Safeway Stores Pty Ltd v Zaluzna*¹²² and *Voli v Inglewood Shire Council*.¹²³ See also *Northern Sandblasting Pty Ltd v Harris*,¹²⁴ although this case was predominantly concerned with the liability of a landlord for injuries arising from defects in the premises. A licensee is a person who is permitted by the occupier to enter the occupier's premises, but for a purpose in which the occupier has no economic interest.

At common law, the scope and content of the occupier's duty to lawful entrants is based on the standard of care in negligence expressed in *Wyong Shire Council v Shirt*.¹²⁵ This test depends on factors such as the nature and

119. *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

120. *Jones v Bartlett* (2000) 205 CLR 166.

121. *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

122. *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

123. *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

124. *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

125. *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

extent of the land or premises entered, the magnitude and gravity of the perceived risk, the degree of probability of its occurrence, and the expense, difficulty and inconvenience of taking precautions to prevent injury to entrants.

Trespassers

[6.200] At common law, an occupier owes a duty of care to trespassers only if there is a reasonably foreseeable risk of injury to the class of persons of whom the plaintiff is a member; for example, if the occupier has knowledge of the actual or likely presence of a trespasser or is or ought to be aware of a real risk of such presence, *Hackshaw v Shaw*.¹²⁶ Actual knowledge by the occupier that members of the public regularly trespass on or use the occupier's land in unsafe circumstances is relevant to the reasonableness of the occupier's response and the question of whether the occupier has discharged his or her duty of care, *Consolidated Broken Hill Ltd v Edwards*.¹²⁷

Prior to *Zaluzna*, trespassing children were treated as "licensees" under the doctrine of "allurement" and were owed a higher duty of care than the duty owed by occupiers to adult trespassers. In *Southern Portland Cement Ltd v Cooper*,¹²⁸ the Privy Council held that, where an occupier has created a danger that is easy to remove, and knows that children may trespass, the occupier's duty to trespassing children is higher than the duty to trespassing adults, particularly where the danger constitutes an allurement to children: see also the various State-based *Civil Liability Acts*.¹²⁹

VICARIOUS LIABILITY

[6.210] Vicarious liability is the most important exception to the general rule that a person is not liable in the law of torts unless he or she intentionally or negligently caused some loss or damage to the plaintiff. Vicarious liability in this context means liability for the torts of others. In the construction industry vicarious liability may arise in two ways. The first is where the principal is liable for the torts of the contractor, or the contractor is liable for the torts of the sub-contractors. The second situation is where an employer is liable for the torts of an employee or agent committed in the course of their employment.

Independent contractors

[6.220] The general rule is that a person is not responsible for the torts committed by an independent contractor of that person, where the independent contractor is acting as a "principal" in their own right, not as a

126. *Hackshaw v Shaw* (1984) 155 CLR 614.

127. *Consolidated Broken Hill Ltd v Edwards* [2005] Aust Torts Reports 81-815.

128. *Southern Portland Cement Ltd v Cooper* (1973) 129 CLR 295.

129. See, eg, the *Civil Liability Act 2002* (NSW) and similar legislation in other all States (in Victoria, called the *Wrongs Act 1958* (Vic)).