**COMMON LAW AND THE COMMUNITY – GREENS LIST PRESENTATION**

**20 OCTOBER 2022[[1]](#footnote-1)**

If you ask 10 or 20 final year law students what area of law they’d like to practise in, in an ideal world, perhaps nine of them would say “human rights law”.

I could almost guarantee that none of them would say tort law!

And, sadly, perhaps not one of them would join the dots between human rights law and tort law.

What we are doing today is seeking to join those dots. Because what better system, in this imperfect world with imperfect systems, could one hope to find than tort law that can and does:

1. Shine a light on wrongs, including historical wrongs;

2. Seek to set a standard of human decency through judging what is reasonable care for one’s neighbours;

3. Give aggrieved persons an ability to access the courts to air their grievances in a public forum before an independent judiciary and frequently members of the community comprising a jury;

4. Have a court award damages, including aggravated and exemplary damages, in appropriate cases, as a way of repairing damage from wrongs, as best one can; and

5. Seeking to minimise vengeance - people taking the law into their own hands to seek retribution if there is no state system that assists them.

Instead of viewing it in this light, some view tort law more as “ambulance chasing” law - an offensive and unfair characterisation of tort law. Any system will have a minority who seek to exploit the vulnerable, but they lie on the fringes. A system should not be judged by its odd rotten egg.

When we speak of tort law we also often speak of common law. I still remember the first time someone from the Bar told me, then a green solicitor, that they practised in common law. I had no idea by that, that the person meant principally tort law, which has developed through the common law, highlighted best by *Donoghue v Stevenson*. Today, so much of our work is statute-based and great change can be made through parliamentary reform as well as common law development, but the essence of tort law lies in its common law tradition, inching forward as it does.

And the common law remains a rich instrument for practitioners to practise, and its magnificence, and the ability of lawyers to mould its development, is sometimes overlooked.

In a wonderful article by Dr Kyriakakis, senior lecturer at Monash University, titled Torts and Human Rights ([https://castancentre.com/2021/06/24/torts-and-human-rights-australian-federal-court-paves-the-way-for-negligence-based-climate-litigation/](https://aus01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fcastancentre.com%2F2021%2F06%2F24%2Ftorts-and-human-rights-australian-federal-court-paves-the-way-for-negligence-based-climate-litigation%2F&data=05%7C01%7Cphamilton%40vicbar.com.au%7Cdf6f66278d7b4c14cf7808daabbd6d17%7Cd0b98b7df96f4b9e84d70603f32ff79f%7C1%7C0%7C638011127309728770%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=UuoeJ4qjnqtbRx%2BMa7UFXHm%2FQBu8X65S4nyIVI3SEpE%3D&reserved=0)), she says this:

*The capacity for tort law to operate as a human rights mechanism is aided by its application to both public and private actors (the Crown is not immune from civil liability in Australia); the potential for class actions; and ways in which many human rights abuses can be translated into civil wrongs, albeit imprecisely. The ability to seek pre-emptive injunctions that prevent the commission of a tort is also a valuable tool for human rights lawyers. We have seen a rise in the creative use of tort law to achieve rights outcomes in Australia in recent years, such as efforts to secure refugee rights and women’s rights…*

There are endless areas we could address in this afternoon’s presentation. I want to pick two main ones, the first relating to the Aboriginal and Torres Strait Islander communities followed by the LGBTQIA+ community.

**Indigenous rights and tort law**

The statistics make it clear that incarceration rates for Aboriginal and Torres Strait Islander communities far exceed non-indigenous Australian rates. This is just one of many areas of discrimination for indigenous communities.

There is an inquest on foot concerning a death in custody of a young Indigenous man involving Constable Zachary Rolfe and text messages put into evidence – racist text messages directed towards the Aboriginal community

What can tort lawyers do to try to assist with incarceration rates?

Well, there is an indirect path we can take.

We can learn something from a stolen generations case of *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331; [2010] SASC 56

The Plaintiff was stolen from his family in the 1950s, in the sense that mother was never informed before Trevorrow, and placed in foster care.

Claims brought for false imprisonment and breach of fiduciary duty were rejected

But the Court accepted the claim brought in negligence

The Defendant’s case was that there were statutory provisions in place to protect children at the time, and a statutory right to have the child removed, and that one had to look at the standards of reasonableness from the 1950s.

The Court did that at found – it was reasonably foreseeable that stealing the Plaintiff from his parents would give rise to the risk of injury

The State did not adequately satisfy itself that the risk of harm from leaving him with his mother exceeded the risk of harm from removing him from her

The Plaintiff was awarded damages

Decision had a greater effect than that, I submit – the effect being a recognition of wrongdoing from 1950s standards

But how do we go further and identify and pursue rights in this area

Each of us needs to confront, I think, the challenges faced in this area, which include:

* Remoteness in many cases – remote communities;
* Language barriers;
* A potential reluctance to engage in Western systems of law;
* A potential lack of awareness of rights.

My own very limited experience with the Yuin nation of Wreck Bay – near Nowra – makes this clear

In a recent Federal Court case, the Court actually went to the local community to take evidence – that was an environmental law – and see many native title claims – so we can think outside the box

So we need not only a great knowledge of all that tort law has to offer, and its many causes of action, but also cultural awareness and a way to try to overcome barriers

If tort claims are brought, it seems to me that that might assist in holding those in power to account – whether they be police officers, or state officials or whoever may be in the community with roles and responsibilities who are interacting with the indigenous communities

We might also need to think outside the box in terms of what may be a compensable claim

Just this weekend I was reading an article where some local community members made a referral to the Human Rights Commission about not being protected by Police in their local community – involving a man killed by a cross bow in the street after years of violence on the streets – could that be a tort law claim?

Traditionally, claims against Police having to be proactive have been rejected, but there are exceptions – and the so-called police immunity from suit from the 1980s of the House of Lords has been reduced significantly over time both in the UK and Australia (decision of *Hill v Chief Constable of West Yorkshire*)

**LBGTQIA+ or queer rights**

Another area where I want to join the dots of tort law, human rights and community relates to LBGTQIA+ or queer rights.

One of the many reasons for addressing this topic now is the recent attack on our community seemingly by one or more members of the Victorian Bar, as has been reported in the media. Tort lawyers are used to personal attacks, as I’ve mentioned above, but far more so are the LGBTQIA+ community. It is hard to think of any similar such bold workplace attacks on other groups than on this community in recent times. But I wish not to dwell on these wrongs, and instead on exploring avenues of redress.

Some of what follows expands upon a paper I wrote earlier this year

Wrongful conviction

There is no tort for wrongful conviction. Torts lie in false imprisonment, but once imprisonment is sanctioned by law, it cannot be said to be “false”. Malicious prosecution claims rarely, if ever, succeed in Australia.

But for certain wrongfully convicted prisoners, this leaves a legal lacuna. No better example of this lacuna is with gay man who were wrongfully convicted in the sense that we now recognise that the crimes committed by them were for loving or lovemaking with the same sex.

Such convictions can now be expunged, so that criminal checks will not reveal time spent behind bars. But the legislation specifically prohibits such persons an entitlement to any compensation.

I would like to see that changed

There may also be a way around it – by looking at the manner in which the arrests occurred

Then one may face limitation period issues also – if over the age of 18

Gay hate crimes

Another area to consider is gay hate crimes

In my paper from earlier this year looking at these issues, the statistics show that gay hate crimes were rife – perhaps at their peak in the 1980s with the AIDS pandemic

Many gay men were murdered

Cases were frequently concluded as suicides and are now being re-visited by coroners and police

If new findings are made, perhaps that gives rise to causes of action – with extensions for dates of discoverability

But there are also instances of more recent violent attacks on this community – and I cite in my paper a recent example of a bashing of a gay man in Sydney

One of the problems in this area is that there may be a lack of ability to achieve real compensation – does the perpetrator have any money?

Again, this might involve thinking outside the box – was the conduct in the workplace – is there vicarious liability – are parents liable if someone under age committed the acts – what role, if any does the State have?

Tort of harassment

Another developing tort is the tort of harassment

This was discussed in the case of *Australian Broadcasting Corp v Lenah Game Meats* (a case where trespassers filmed an abattoir and it was broadcast)

This was a 2001 case and it was said by the Court then that this may be a recognised cause of action

But it hasn’t had much of a look in since then

In the Queensland District Court case of *Grosse v Purvis* (2003) QDC 151 – the Plaintiff and Defendant had a friendly relationship – both professionals

Terribly, the Defendant started stalking the Plaintiff over many years

The Court considered the tort of harassment

The elements were said to be:

“The courts will require evidence of unwanted harassing and annoying conduct which the defendant knows or ought to know will cause fear or distress to the victim and which is of such degree of seriousness that an ordinary person should not reasonably be expected to endure it.”

But in that case, the Court concluded that the Defendant’s conduct was best seen as part of an invasion of privacy cause of action – and that was how it was dealt with

Confidentiality and privacy

There have been many high-profile examples of people being “outed”, having their sexual diversity revealed by others, including the press, without their consent.

Two recent examples are Dani Laidley & Rebel Wilson

I’m going to go slightly off topic here – but in addition to tort claims – there is the breach of confidence cause of action available for some victims

This is a creature of equity – entitling one to claim equitable compensation

It’s sometimes forgotten by tort lawyers

The elements are these:

* The information must have the necessary quality of confidence – e.g. it can’t be matters of common knowledge
* It has to have been imparted in circumstances that are confidential – e.g. if you tell a large audience something it may well not be confidentially imparted
* There must be unauthorised use of that information – i.e. it’s expressed or implied to be confidential

There is also a related claim in tort – for breach of privacy

This arguably gets around some limitations in breach of confidence claims – e.g. where a celebrity might be filmed in a public place and then that is broadcast – it might not fit neatly into the above categories – although there are some examples of successful claims in that respect

*Lenah Game Meats* considered this cause of action too

The Court recognised this cause of action as developing in the common law world

Gleeson CJ said this about it:

*Certain kinds of information about a person, such as information relating to*

*health, personal relationships, or finances, may be easy to identify as private;*

*as may certain kinds of activity, which a reasonable person, applying*

*contemporary standards of morals and behaviour, would understand to*

*be meant to be unobserved. The requirement that disclosure or*

*observation of information or conduct would be highly offensive to a*

*reasonable person of ordinary sensibilities is in many circumstances a*

*useful practical test of what is private.*

*Grosse v Purvis* said the elements are these:

*(a) a willed act by the defendant,*

*(b) which intrudes upon the privacy or seclusion of the plaintiff,*

*(c) in a manner which would be considered highly offensive to a reasonable*

*person of ordinary sensibilities,*

*(d) and which causes the plaintiff detriment in the form of mental*

*psychological or emotional harm or distress or which prevents or hinders*

*the plaintiff from doing an act which she is lawfully entitled to do.*

**Old law and new facts**

What’s great for lawyers is trying to fit different scenarios into already established categories

Like trying to fit a triangle shaped object into a square box

But not only helping the community, but also expanding your own knowledge and enjoyment

**A Defendant’s perspective**

A lot of you here today are great defendant lawyers – who will be the ones charged with responding to these new causes of action – exciting times for you too

Doesn’t matter which side one is on, it’s important to be as aware of the strengths and weaknesses and have the cultural awareness too to be able to respond appropriately to claims and to do so in a respectful manner – even when tasked with shooting down someone’s claim and having to be the so-called “bad guy”

**Access to justice for the disenfranchised**

I want to say something briefly about “no win no fee” work. While pro bono work is a great thing, of course, and widely recognised as such, acting on a no win no fee basis still seems to be a dirty phrase in some circles, perhaps tantamount to lawyers taking on hopeless cases. This is regrettable.

At its core, the “no win no fee” system is a wonderful system for access to justice. It should be celebrated. And those of us who run, and occasionally lose, no win no fee trials after weeks of hard, often thankless, unpaid work, can at least know we have in our own small way contributed to access to justice.

This access to justice gives us a great opportunity to explore new areas of law and cases for the marginalised in our society.

Sometimes our cases are difficult and one struggles to take them on knowing the risks involved.

Gideon Haigh in his wonderful book, The Brilliant Boy, looks at lawyers taking on nervous shock claims in the first half of last century, which then the courts routinely knocked out as offensive to their sensibilities.

The book is based around a case of a young boy stumbling upon a worksite and drowning in a pit. This understandably ruined the brilliant boy’s mother. Her nervous shock case went all the way to the High Court and was rejected by majority. It was a sort of “harden up” approach taken by the majority to those suffering from the negligent loss of a loved one.

A young justice Doc Evatt issued a compelling dissenting judgment in *Chester*. Eventually the law developed, Doc Evatt’s dissent won the day, and nervous shock claims became mainstream through the persistence of a handful of solicitors, barristers and judges. The resistance today seems absurd. And we should hope that standards have improved such that there are fewer deaths from negligence, particularly in the workplace.

What this case alone shows is that it is within our capabilities to drive social change, bit by bit.

Another way of driving social change is by having the judiciary more reflective of the community. We are privileged indeed to have his Honour Judge Pillay chair this seminar. Judges and lawyers like his Honour are promoting diversity and access to justice for the marginalised in our community. And today we also celebrate that and thank his Honour for Charing this seminar.

**Challenges ahead**

Final thoughts now.

This seminar deals with challenging topics. Topics that force us to look inside ourselves and our society. Are we doing enough to promote access to justice? Are we doing enough to engage with wrongs? Are we doing enough to promote the rights of marginalised members of our community and of the fragile environment?

These questions necessarily force us to look at ourselves and the make up of our own profession.

Is the profession doing enough to promote real diversity, rather than token efforts? Are great lawyers and champions of rights being silenced by a culture of tradition, by which I mean an exclusive club of like people? Is the phrase “adversarial system” being confused with plain old bullying or toxic masculinity? Do we want the loudest in the room instead of the wisest? How do we get a profession to look like and truly be part of the community we all serve? And how would that open further doors to access to justice and championing the rights of the disenfranchised? How do we deal with internal attacks, let alone external ones?

These are the challenges that lie ahead for each of us.  Now is the time to embrace that challenge.

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1. I am most grateful to Greens List, his Honour Judge Pillay and Yusur Al-Azzawi of counsel for their arranging, chairing and co-speaking at the seminar, respectively, and for their insights into this area of law. [↑](#footnote-ref-1)