

Court Actions in Tort

Tort can be defined as a wrongful act which causes harm to a person arising out of a ‘duty of care’ to that person.

A court action in tort is a civil matter and it aims to compensate for losses suffered by the plaintiff. A tort may take various forms, the prime example being negligence causing personal injury. Other actions in tort include trespass to land, nuisance, deceit and defamation.

A. Tort of Negligence

Certain elements must be established in order for a claim in negligence to be mounted. Firstly, it must be established that there is a breach of a reasonable duty of care owed to a class of persons, in which the plaintiff is a party to. The damage done to the plaintiff must be the result of the defendant's breach, in other words the damage sustained must not be too remote.

Remedies for personal injury caused by negligence

Personal injury caused by negligence is usually remedied by courts through compensation. The sum of money awarded as compensation for victims of tort are called *damages*. The underlying principle of an award of damages is that it is to be made once and for all in the form of a lump sum payment.

Damages for Personal Injury

There are three main headings under which a plaintiff may try to recover damages for personal injury caused by a tortious action of negligence. They are:

1. Compensation for loss of earning capacity
2. Compensation for needs created
3. Compensation for the injury and consequential hurt

Compensation for loss of earning capacity

The most common area for recovery of damages is the loss of earning capacity. A plaintiff will only be entitled to compensation for loss of earning capacity if it is shown that the plaintiff's earning capacity has indeed been diminished by reason of the negligence-caused injury. Factors that affect the provision of damages for earning capacity include the motivation, physical and mental capacity of the plaintiff. The onus is on the plaintiff to prove that they should be compensated for a real possibility of a yet unexploited capacity which would have emerged to be exploited *but for* the accident. For example, evidence could come in the form of an opportunity to study law and consequently become a qualified lawyer.

It is up to the defendant to prove that the plaintiff still retains the ability to perform certain work in the future. Past income tax returns are the best way of providing evidence for the plaintiff's pre-accident earning capacity; however this may be problematic if full taxable income has not been disclosed. It must be noted that in cases where there is no precise or solid evidence on pre and post accident probable earnings, the judge must still make a decision as to the amount of damages to award.

Compensation for needs created

In theory, all needs arising from the injury are to be fully compensated. These needs include medical, hospital, nursing, ambulance, pharmaceutical and related services. Nowadays, due to the increased cost of hospital fees, the court is willing to compensate for care given to the injured at home. The capital cost of fitting out a home for the maintenance of a victim can also be compensated for.

Compensation for the injury and consequential hurt

The nature itself of the injury might be such that damages should be paid based on the test of what effect the injury has had and will continue to have in the future on the particular individual claimant. To claim for consequential nervous shock (mental harm), liability of the defendant is limited to instances where the shock occurred following exposure to the actual sight or sound of the accident.

B. Tort of Trespass to Land

This tort involves the interference by a defendant with a plaintiff's exclusive possession of land. Normally an action of this sort will only involve intentional interference. Closely related is the tort of private nuisance (see private nuisance below).

Self-Help Remedies

A trespasser may be evicted by the possessor of the land if the force used is reasonably necessary for the eviction. It must be established by the possessor of the land that the force was reasonable. In deciding whether the force used is *reasonably necessary* courts will look at societal standards, the nature of the attack and whether it was the property or the person that was attacked.

C. Tort of Private Nuisance

Damages may be recovered for an unreasonable and substantial interference with the use or enjoyment of land. Interference with one's enjoyment of land may take the form of for example, loud noise or noxious odours produced by the defendant. Often, but not always, the *nuisance* is on-going or recurrent.

Damages for Private Nuisance

If successful in court, a plaintiff can be compensated for all costs flowing from economic loss and loss incurred from physical damage to the land.

D. Tort of Deceit

This is committed when a false representation is made knowingly by the defendant to the plaintiff, with the intention that the plaintiff will believe and act on the false representation. In order for a tort of this nature to be actionable, loss must be sustained by the plaintiff because of their reliance on the false representation.

Damages for Deceit

In an action of deceit, the plaintiff is entitled to recover a sum which represents the prejudice or

disadvantage he has suffered in consequence of his altering his position under the inducement of fraudulent misrepresentations made by the defendant. (per Dixon J in *Totef v Antonas* (1952) 87 CLR 647).

E. Tort of Defamation

The tort of defamation is committed when a matter injurious to a person's reputation has been communicated to a third party. Defamatory comments have the effect of lowering one's estimation in the eyes of others, through the attack of character or reputation.

Two types of defamation include oral or spoken defamation (slander) and written defamation (libel). For oral or spoken defamation, proof of material injury is required. Proof of material injury is not required for written defamation.

Damages for loss of reputation

The lump sum award for defamation is reflective of loss suffered from damage to reputation and injured feelings. The lump sum award will normally also seek to reflect the good or bad conduct of either party.

The damages must also be sufficient in showing the public and society that the plaintiff has been vindicated. The amount of the damages awarded seeks to address the harmful attitude and perceptions of the public that the defamation caused. In addition to this, if the plaintiff can clearly show consequential financial damage (for example in the form of loss of profit, loss of employment or loss of business) these losses may generally be recovered.

NB. For a fuller commentary on the tort of Defamation, see Comasters' article entitled *The Tort of Defamation*.

Comasters is able to assist clients in their court actions in tort.

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