Part I provides historical and conceptual background to the law of compensation. Chapter 1 discusses the definition of ‘tort’ and the classification of torts. It provides a concise account of the historical origins of the common law courts and the early evolution of the law of torts and civil forensic processes, culminating in the 2002–03 Torts Reforms. Chapter 2 examines historical sources of compensation in the law of torts, and explains the nature of compensation, classification and assessment of damages. Chapter 3 focuses on other, mainly statutory, aspects of the law of compensation: survival of actions for personal injury, actions for wrongful death, and statutory compensation schemes.
ONE
INTRODUCTION
TO THE LAW OF TORTS
AND HISTORICAL
OVERVIEW

CHAPTER OVERVIEW

Chapter 1 is divided into four sections. The first section introduces the definition of 'tort' and classification of torts, the second focuses on the short history and evolution of the law of torts, the third discusses briefly the nature of precedents and construction of statutory provisions, while the fourth provides the background to, and overview of, the 2002–03 Torts Reforms.

The notion of common law, as used in this book, refers to the single national customary law which in the late medieval period displaced the local and baronial law in England and was later supplemented by equity, though equity remained separately administered through the Court of Chancery until the Judicature reforms of 1873–75. Based on a system of judge-made precedent, the common law has no organised or unified theory of law except for the normative standards of the rule of law, which encompasses such fundamental principles as:

› The powers exercised by government and its officials must have a legitimate foundation, and they must be legally authorised.
› The law should conform to certain minimum standards of fairness and justice, both substantive and procedural.

Thus the law affecting individual liberty ought to be reasonably certain and predictable; and a person ought not to be deprived of his or her liberty, status, or other substantial interest without having been given the opportunity of a fair hearing before an impartial tribunal.
1.1 DEFINITION AND CLASSIFICATION OF TORTS

1.1.1 What is a tort?

In Latin the word ‘tortus’ means twisted or crooked. In Old French it came to denote some wrong or harm. This meaning was adopted by English common law, where it signifies an actionable, wrongful act, other than breach of contract, done intentionally, negligently, or in circumstances involving strict liability (i.e. where the plaintiff need not prove negligence or fault on the part of the defendant). Guido Calabresi defines torts as the law’s response to ‘breaches in noncriminal, often non-contractual interpersonal relationships’.1

Percy Winfield declared in his Law of Torts that, ‘all injuries done to another person are torts, unless there is some justification recognised by law’.2

The High Court of Australia in John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503 at 519 [21] noted that:

the term ‘tort’ is used … to denote not merely civil wrongs known to the common law but also acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby.

Most relationships arising out of social intercourse and professional endeavour are governed by the law of torts. Each tort relates to a particular interest or interests that the law regards as worthy of protection. For example, the law regards as worthy of safeguarding our interest in personal liberty; in unimpaired reputation; in physical, emotional and economic integrity. Economic integrity refers to the right to security of our property, and the right to exploit it within the limits of the law.

A defendant’s conduct will be deemed wrongful where a failure to act in accordance with normative standards of behaviour occasions an injury to the plaintiff’s interests. For instance, it is a normative standard of civilised society that one person may not interfere with another’s body without the latter’s consent or lawful justification.

Legally recognised wrongs that have specific names are called ‘nominate torts’. By contrast, innominate torts are known by the names of cases that first legally recognised the wrong involved, for example the tort of Wilkinson v Downton ([1897] 2 QB 57). Thus, the law of torts comprises a miscellaneous group of civil wrongs, other than breach of contractual terms, which afford a remedy in the form of damages to a person who has sustained an injury as a result.

1.1.2 Remedies

Litigation—or arbitration, or mediation—is a means of obtaining a legal remedy. Unlike criminal law, which aims to punish the wrongdoer, the main object of torts law is to obtain damages for loss suffered as a result of the tortious conduct. The economic theory of the law of torts suggests that the social function of an award of damages is loss-spreading. Indeed, the central concern

of the law of compensation is not the question of absolute right or wrong, but who should bear responsibility for the injured party’s loss: the injured person or the wrongdoer?

Compensation in the form of damages may not be automatic upon the plaintiff proving wrongful conduct. Before the loss is shifted onto the defendant, the plaintiff must show not only that the injury-causing conduct was legally recognised as wrong, but also that the injury itself was of a kind recognised by the law of torts, and that it was not too remote.

In other cases, the person will not be compensated because the alleged injury is outside the interests recognised and protected by the law of torts. The law of torts thus differentiates between various interests for which individuals may claim protection against injury or loss by others. Historically, the common law has been more ready to safeguard against intentional deprivation of liberty or trespassory injury to body, property, honour or reputation, than to safeguard against injury to feelings or damage to economic interests through unintentional acts. However, the law is dynamic, and over time, some torts may be judicially or legislatively jettisoned—champerty; seduction; criminal conversation; enticement and harbour—or they may be absorbed into other torts. In the 1980s and 1990s, the tort of negligence ‘swallowed up’ other tortious actions: for example the tort of strict liability known as the special rule in *Rylands v Fletcher* [1868] UKHL 1, (1868) LR 3 HL 330; and general action on the Case, which was absorbed into negligence in *Northern Territory v Mengel* [1995] HCA 65; (1995) 185 CLR 307. New torts are created either by statute (for example, copyright legislation; medical trespass under *Medical Treatment Act 1988* (Vic); racial victimisation under *Civil Liability Act 1936* (SA); s 73; the foreshadowed (at this stage) statutory cause of action for serious invasion of privacy under *Privacy Act 1988* (Cth); and other statutory torts) or by the judiciary (for example, action in negligence for misfeasance in public office; action on the Case for intentional infliction of nervous shock; the tort of unlawful interference with contractual relations, and so forth).

The law of torts also has another function: deterrence. This aspect of the law will be discussed in Chapter 2 (Damages) under punitive damages. However, it is worth noting at this stage that the concept of deterrence, which comes from criminal law, infuses, as it were, the quintessentially private law of torts with public law principles and considerations.4

The law provides for various remedies for conduct which may amount to a tort, a breach of contract, or a breach of trust. There are also non-judicial remedies, such as the self-help remedy of abatement of nuisance, the privilege of recapture of chattels, and alternative dispute resolution (ADR), either through the adversarial process of arbitration or through the non-adversarial process of conciliation and mediation. Judicial remedies include compensation through damages, punishment, restitution, and coercive relief by way of injunction and specific performance. Restitutionary remedies are different from compensation in the form of damages, in that they are based on rectifying the gain to the defendant.5 Other remedies will be discussed in the context of specific torts.

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3 *Copyright Act 1968* (Cth).
1.1.3 Classification of torts

Broadly speaking, at present the law of torts in Australia protects the following interests:

› our right to physical integrity—the immunity of the body from direct and indirect injury, and preservation and furtherance of bodily health—protected by the torts of battery and negligence;

› our right to freedom from serious and unreasonable interference with mental integrity—mental poise and comfort—protected by the torts of assault, action on the Case for intentional infliction of nervous shock (the tort of Wilkinson v Downton), liability for negligently inflicted nervous shock, defamation, and nuisance;

› our right to privacy, which is relatively modern, and has received scant protection at common law—as society ascribes to it more value, statutory protections have been implemented,6 and it is probable that either a new tort protecting privacy will be recognised or that existing torts will be expanded to encompass aspects of the right to privacy;

› our legal interest in freedom of movement—the right of personal liberty to lawfully choose where to be and which way to go—protected by the tort of false imprisonment;

› our right to use land, light, air, running water, the sea, and the shore of the sea—to some degree safeguarded by the torts of trespass to land, private nuisance, public nuisance and, sometimes, the tort of negligence;

› our rights to free belief and opinion, religious and political—partly protected through the torts of malicious prosecution, false imprisonment and defamation;

› our right to free social and commercial exchange without economic or physical duress—protected by means of such torts as interference with contractual relations, conspiracy, duress, and the tort of collateral abuse of process, while the tort of misfeasance in public office protects against intentional misuse of power by public officers;

› our rights of property—corporeal property, including the right of gift and bequest, and intellectual property, such as patents and copyrights—partly protected through such torts as conversion, detinue, trespass to goods, passing off, misrepresentation, and injurious falsehood.

To sum up, the book covers the following torts:

› trespass to person (battery, assault, and false imprisonment);

› trespass to land;

› action on the Case for intentional infliction of physical harm;

› action on the Case for intentional infliction of nervous shock;

› malicious prosecution;

› collateral abuse of power;

› misfeasance in public office;

› trespass to goods;

› detinue;

› conversion;

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6 Privacy Act 1988 (Cth); Health Records Act 2001 (Vic); Health Records (Privacy and Access) Act 1997 (ACT); and Health Records and Information Privacy Act 2002 (NSW).
negligence including:
- non-delegable duty of care
- omissions
- pure economic loss
- nervous shock: liability for negligently occasioned pure psychiatric injury
- defamation;
- deceit and injurious falsehood;
- nuisance; and
- breach of statutory duty.

Priority is given to the study of the tort of negligence because of its comparative importance.

TABLE 1.1 NOMINATE TORTS CATEGORISED BY AREA OF IMPACT

<table>
<thead>
<tr>
<th>INTENTIONAL TORTS</th>
<th>Indirect intentional torts</th>
<th>Tortious communications</th>
<th>Economic torts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trespass</td>
<td>Action on the Case for intentional infliction of physical injury</td>
<td>Defamation</td>
<td>Interference with contractual relations</td>
</tr>
<tr>
<td>Battery</td>
<td></td>
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</tr>
<tr>
<td>Assault</td>
<td>Action on the Case for the intentional infliction of nervous shock</td>
<td>Slander</td>
<td>Conspiracy</td>
</tr>
<tr>
<td>False imprisonment</td>
<td>Misfeasance in public office</td>
<td>Libel</td>
<td>Unfair competition</td>
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<td>Trespass to land</td>
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<td></td>
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</tr>
</tbody>
</table>

| UNINTENTIONAL TORTS               |                            |                         |                                     |
| Negligence                        | Breach of statutory duty   |                         |                                     |

| MISCELLANEOUS TORTS               |                            |                         |                                     |
| Private nuisance                  | Liability for animals      |                         |                                     |

The law of torts can be divided into three main taxonomic categories: statutory torts, trespass, and action on the Case.
The common law tort species of the genus of trespass can be diagrammatically summarised as in figures 1.1 and 1.2.

**FIGURE 1.1 TRESPASS**

The tort of negligence is one of the species of action on the Case. Its place within the context of the law of torts can be expressed in the diagrammatic form shown below.

Breach of statutory duty is a statutory tort.

**FIGURE 1.2 ACTION ON THE CASE**
1.2 HISTORICAL ORIGINS OF THE LAW OF TORTS

1.2.1 Origins of customary law of torts

The word ‘law’ is not derived directly from the Latin ‘lex’, but from the Old Norse ‘lagu’ (something ‘laid down’ or fixed), and Old North German ‘lagh’. The Romans ruled most of Britain for 400 years. Yet the withdrawal of Roman military and civil administration from Britain in 410 was followed by a rapid collapse of physical, administrative and cultural infrastructure of the British Roman towns and provinces. Within some 30 years, the knowledge of Latin, and hence of the Roman law, became a rarity. The illiterate Germanic tribes—Angle, Saxon, and Jute—settled most of the country through conquest and migration and created a network of tribal, hereditary kingships. The Anglo-Saxons, as they came to be called, introduced their own customary laws, which were modified after the Viking Danish conquered eastern England in the ninth century and imposed ‘Danelaw’.

Germanic laws (Salic) of the Anglo-Saxons and Danes recognised conduct that we would today consider wrong or tortious, but they dealt with it in terms of ‘folk-rights’. These were unwritten customs developed by a particular locality or tribe. In some localities, for example, wronged persons were expected to personally pursue the wrongdoer. If the wrongdoer was caught ‘hand-having’ or ‘back-bearing’ (ie ‘red-handed’), the victim was allowed to execute the wrongdoer on the spot.7 Thus, the Northumberland Assize Rolls for 1255 record that a certain ‘foreigner’, Gilbert of Niddesdale, met a hermit on the moors of Northumberland. Gilbert ‘beat him and wounded him and left him half dead, and stole his garments and one penny, and fled away’. When Gilbert was caught, the hermit asked for his stolen penny. However, he was told that by the custom of the county, in order to recover his stolen goods, he must behead the thief with his own hands. Determined to regain his penny, the hermit did so.8 The custom referred to was blood feud under the law of vengeance.

In Anglo-Saxon England, customary laws of private vengeance and solidarity of kindreds in feuds (the family feud was known as faida), were long-standing and widespread. These were based upon a highly sensitised understanding of family honour and loyalty combined with encouragement to immediate retaliation. The law of vengeance was generally invoked for murder, adultery, violation or rape of a married woman, violation of the dead, aggravated robbery, or, importantly, any insult to the family honour.9 It was open to all ranks among the Germanic, English, and Frankish people of the early Middle Ages, and for centuries the royal authority—before and after the Norman invasion—as well as the Church, struggled to suppress

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9 Duels of honour—private combat in the form of consensual revenge for the perceived injury to the participants’ honour and reputation—were probably the best known vestiges of the law of vengeance.
Part I

Intruduction

Thus the code of Æthelberht, King of Wessex (d 865), contains elaborate tariffs of fines for breach of the peace. The preservation of peace would be the mainspring of the law of trespass.¹⁰

### 1.2.2 The institution of ordeals

Forensic procedures of customary law were based upon a premise that law was not ‘made’ or ‘created’ but rather ‘declared’ by those familiar with the custom of a certain territory. Customary laws approved by use carried the greatest authority. The wise men of each community were familiar with procedures for settling disputes by imposition of physical tests, known as ‘ordeals’. Ordeals were meant to invoke the miraculous intervention of God in settling human disputes.

In an ordeal of hot iron, a piece of iron would be placed in the fire and then handed to the suspect, who had to carry the red-hot iron, weighing between 500 g and 1.5 kg, over a distance of between three and nine paces. Sometimes, the suspect had to walk barefoot over nine red-hot ploughshares. The suspect’s hands or feet were inspected by the priest three days later; if the burn had festered, God was taken to have decided against the party. The ordeal by hot water followed a similar procedure. Failure of the test meant not only loss of the suit, but also a conviction for perjury. Ordeals were abolished as part of the canon law by the Fourth Lateran Council in 1215, but persisted in common law for a number of centuries.

The administration of the oath or ‘wager of law’ was also governed by custom. With the court’s consent, either of the parties could be required to swear to the truth of their case on the holy evangels. The custom required that the party swearing the oath bring a number of compurgators or ‘oath-helpers’, usually kinsmen or peers who also swore the oath, to back up the assertions. If pronounced in the correct manner, the oaths were considered as proof. There was always a danger that the party who had more money to bribe the greatest number of witnesses would win. The Frankish Queen Fredegond (d 597) persuaded three bishops and three hundred nobles to swear that the infant prince was actually begotten by her deceased husband.¹¹ Nevertheless, the ‘wager of law’ persisted until 1833.

The oaths and ordeals were intended to preclude human judgment on the merits of the case. The Normans introduced the form of judicial combat called ordeal by battle both upon accusations of felony (an ancient form of a law suit known as ‘appeal’) and on an equally ancient writ of right for the recovery of land.¹² Where, by reason of age or physical incapacity, a party could not fight, or if the party were a woman or an ecclesiastic, a substitute, usually a kinsman or a hired champion, could fight the combat. The first recorded refusal of trial by battle in an action for trespass dates back to 1304.¹³ According to William Blackstone, the last trial by battle allowed in a civil suit was during the reign of Queen Elizabeth I.¹⁴

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¹³ YB 32; See also 33 Edw I (RS) 318, 320.

Traditionally, the adversarial civil litigation process is considered to be essentially a fact-finding endeavour in the sense that it is a trial of the strength of each side’s advocacy and ability to adduce the most credible evidence in support of its pleas and allegations. In his book *The Judge*, Lord Devlin observed that ‘the centrepiece of the adversary system is the oral trial and everything that goes before it is a preparation for the battlefield.’ The presumption is that ‘the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light.’ Lord Devlin’s reference to ‘battlefield’ aptly characterises the nature of cross-examination of witnesses in the open court, which aims to expose dissimulation, concealment, and fraud—and which often leaves deep emotional scars.

More recently, however, Kirby J, in a dissenting judgment in *Whisprun Pty Ltd v Dixon* ([2003] HCA 48 at [117]–[118]), noted that the function of the trial judge is intellectually more complex:

> With respect, the joint reasons in this Court, and the reasons of the primary judge, appear to approach that function as if the judge were the successor to the adjudicator of the combat of knights of old—in a kind of public tournament between parties. In my view, we have travelled some distance since those times. The modern civil trial process is a more rational undertaking. It is based upon a close analysis of the relevant evidence, evaluated by a competent decision-maker who is obliged, if a judge, to give reasons which explain the decision arrived at … The law has advanced since the days when truth was distinguished from falsehood at trial by battle and ordeal or by their modern equivalent—conclusive judicial assessment based on impression and on necessarily limited evidence.

His Honour (at [120]) went on to define the function of the trial judge in a civil trial thus:

> the ultimate duty of the decision-maker in an Australian court [is] to decide a case according to law and the substantial justice of the matter proved in the evidence, not as some kind of sport or contest wholly reliant on the way the case was presented by a party.

### 1.2.3 The courts

At the time of the Norman Conquest, England was divided into counties and hundreds (an administrative subdivision of counties sufficient to sustain one hundred families). Customary laws administered in shire-moots, hundreds, and county courts were very diverse, and in many ways incapable of adapting to social and political change. With the growth of the feudal system and its institutions of overlordship and vassalage, traditional communal courts based upon customary law gave way to the seignorial (baronial) courts.

Following the Norman Conquest in 1066, William the Conqueror (r 1066–87) began the process of administrative and judicial centralisation in England by organising the judiciary and regulating criminal and evidentiary law. The royal courts, known as *curiae regis*, were created as part of the efforts by Henry II (r 1154–89) to establish legal institutions capable of maintaining

social order. Initially, royal justice was dispensed by the King. He exercised judicial powers personally, or through appointed surrogates—earls, bishops, abbots and royal counsellors—in his council, the Curia Regis.\(^\text{17}\) This court came to be known as coram rege (before the King) or the Court of King’s Bench.

The beginnings of the modern law of torts are generally traced to the twelfth century when, under Henry II, royal courts were vested with jurisdiction to protect peaceable possession of land. The Court of Exchequer (or Exchequer of Pleas) was the first court to be established as a separate royal court. Originally it dealt with revenue cases, but later became the main court of equity as well as having limited jurisdiction to hear civil cases.\(^\text{18}\) The Court of Common Pleas was the central royal court that sat at Westminster. The Court of Common Pleas had jurisdiction throughout England for most civil actions (real and personal) at first instance, particularly those where the breach of peace was involved, as well as all actions relating to land under the feudal system.

From 1179, in any case concerning property rights the defendant could choose between trial by jury in the royal courts and trial by battle in the baronial courts. Trial by jury has its origins in the Republican Rome of 149 BCE, when jurors (iudices) were selected from a standing list to a permanent tribunal investigating charges of extortion. The cases were determined by majority vote.\(^\text{19}\) However, the direct predecessor of the English jury system was the French royal inquisition established under Charlemagne. The jury, arraigned from free men who came from the locality where the dispute arose, was entrusted with the task of resolving questions of fact. The jury thus replaced ordeals, and in particular, the judicial duel, as the means of proof in civil matters.\(^\text{20}\)

However, in medieval times, travel was slow and dangerous, and it was very inconvenient for the jurors to have to come to Westminster. Henry II’s royal sessions, the Assize of Clarendon (1166) and the Assize of Northampton (1176), established the system of circuit judges\(^\text{21}\) who travelled throughout the country during four ‘law terms’.\(^\text{22}\) Their rounds were organised in 1328 into a fixed pattern of six circuits. These remained virtually unchanged in England until 1971. In Australia, as in England, senior judges of the Supreme Court and County or District Court in each jurisdiction, as well as judges of the Federal Court and the High Court, still go ‘on circuit’.

From the beginning of the fourteenth century, civil cases were generally tried by summoning the juries to the Court of Common Pleas at Westminster or to the Court of King’s Bench, unless (nisi prius) the judges had earlier visited the locality to hear the juries’ verdict. Judges would then

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\(^{18}\) The Court of Common Pleas had sole jurisdiction over real actions.


\(^{21}\) Courts Act 1971 (UK).

\(^{22}\) From the twelfth century, the Court of Common Pleas and other courts heard cases almost continuously during four distinct periods of the year, known as the law terms: Michaelmas term (autumn); Hilary term (winter); Easter term; and Trinity term (summer). *The Supreme Court of Judicature Act 1873* (36 & 37 Vict, c 66) abolished the legal terms and replaced them with court ‘sittings’, at times which correspond to the old ‘terms’. See: *Historical Note on the Legal Terms* at <www.newsquarechambers.co.uk/calculators/termdatecalculator.html##historicalnote> accessed 27 May 2014.