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Excerpt

[More Information](#)

# 1

# INTRODUCTION TO THE LAW OF TORTS

## 2 CONTEMPORARY AUSTRALIAN TORT LAW

1.1	Introduction and purpose of tort law	2
1.1.1	What is tort law?	2
1.1.2	Theories of tort law	7
1.1.3	Tort law and human rights	13
1.1.4	Overview of intentional torts	18
1.1.5	Overview of negligence	22
1.1.6	Tort law and the Stolen Generations litigation	27
1.1.7	Litigating a tort claim	37
1.2	Civil liability reforms	41
1.2.1	Background to the reforms	42
1.2.2	Overview of the key amendments	43
1.2.3	Response to the reforms	43
1.2.4	Effects of the reforms	44
1.2.5	Additional reforms around institutional child abuse	44
1.3	Australian statutory compensation schemes	45
1.3.1	Transport accident compensation	46
1.3.2	Workers compensation	47
1.3.3	National Disability Insurance Scheme	48
1.3.4	Victims of crime compensation schemes	48
1.3.5	Emerging and ad hoc schemes	49
1.4	International compensation schemes	50
1.4.1	No-fault schemes	50
	Key concepts	52
	Problem-solving exercises	52
	Challenge yourself	53

## 1.1 Introduction and purpose of tort law

Tort law is a compelling and dynamic area of law, affecting many aspects of individuals' lives. A strong understanding of tort principles is important for legal practice, as lawyers may be required to represent clients in a range of tort disputes, from a physical altercation in a bar, to a fall in a supermarket or possibly the lowering of a client's reputation through defamatory material posted on the internet.

### 1.1.1 What is tort law?

At its core, a tort is a civil wrong. Deriving from the Latin word *tortum* ('wrong'), a tort is an act or omission that infringes upon the rights of individuals in society, allowing the aggrieved individual to seek a legal remedy. It is difficult to provide a comprehensive definition of a tort or the types of actions that lie beneath the 'tort umbrella' as definitions vary between jurisdictions and new torts continue to emerge. Liability in tort is based on protections afforded by the law, such as protection of the right to bodily integrity, protection of the right to possession of land and protection of one's reputation. A cause of action in tort can be pursued separately to an action for breach of contract or for breach of equitable obligations.

The person who occasions a wrong by infringing on the legal rights of another is known as a 'tortfeasor'. The accused tortfeasor is the defendant in legal proceedings usually initiated by an aggrieved individual known as the 'plaintiff'. The two main sources of tort law are common law and statute. Common law refers to the legal principles developed by judges in cases, which carry precedential weight in later, similar cases brought before the courts. Until the late 20th century, Australian tort law was based largely on common law principles. Each state and territory has its own civil liability legislation (although the legislation in the Northern Territory is very limited and the common law largely prevails).<sup>1</sup> Accordingly, cases interpreting the wording of the legislation are only of persuasive value in the courts of another jurisdiction – and only to the extent that the same or similar wording is used in the other jurisdiction's legislation. However, decisions of superior courts, such as the High Court of Australia, are binding across the country so as to create a unified common law.<sup>2</sup>

Historically, Australian tort law was heavily influenced by English jurisprudence, as case law from the United Kingdom was binding, rather than merely persuasive. Appeals to the Privy Council ceased with the passing of the *Australia Act 1986* (Cth). While all foreign cases are now regarded as persuasive only, Australian courts continue to consider and refer to decisions in common law jurisdictions such as England and Wales, Canada and New Zealand. The role of legislation in extending, amending or completely abrogating common law principles has become particularly prominent in the past two decades, with significant reform of personal injury law occurring in all Australian jurisdictions in 2002–3 (discussed in Section 1.2).<sup>3</sup> Defamation laws have also undergone legislative reform with a view to achieving national uniformity,<sup>4</sup> with recent amendments brought in to the most states (save for the Northern Territory and Western Australia) to modernise defamation laws in light of technological advances.<sup>5</sup> The increase in legislative intervention in the law of torts has not diminished the importance of the courts; however, their role has shifted from 'discovering' the law of tort to 'interpreting' and applying the legislation of tort.

Regardless of whether a tort principle derives from common law or legislation, the plaintiff must satisfy the court of all elements of a particular cause of action before initiating proceedings. Generally, the civil liability legislation seeks to lay down the principles previously embodied in the common law, with some variations or limitations on their application. In some instances, the legislation creates new principles and significantly modifies other principles. Yet, many legal terms used in the civil liability legislation depend on a prior understanding of the common law regarding their cause and effect.

1 *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA). The Northern Territory has the *Personal Injuries (Liabilities and Damages) Act 2003* (NT).

2 *Lipobar v The Queen* (1999) 200 CLR 485, [44] per Gaudron, Gummow and Hayne JJ.

3 See, eg, *Review of the Law of Negligence* (Final Report, September 2002).

4 *Civil Law (Wrongs) Amendment Act 2006* (ACT) amending the *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2005* (NSW); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

5 On 1 July 2021, stage 1 of the *Model Defamation Amendment Provisions 2020* commenced in South Australia, Victoria and New South Wales. The second stage of the reform processes commenced in March 2021 with the release of the *Attorneys-General Review of Model Defamation Provisions: Stage 2* (Discussion Paper, 31 March 2021).

## 4 CONTEMPORARY AUSTRALIAN TORT LAW

Causes of action in tort can be grouped into three broad categories: intentional torts, negligence and torts of strict liability. As the name of the first category suggests, *intentional torts* are intentional infringements by a tortfeasor of an individual's legal rights. For instance, hitting somebody intentionally is a violation of their bodily integrity and constitutes the tort of battery. In some cases, intention can be established by proving the failure to take care, such as where negligent driving causes injury to another, amounting to battery.<sup>6</sup> Some individual torts can be categorised as intentional torts: trespass to the person (encompassing assault, battery and false imprisonment); trespass to chattels (encompassing trespass to goods, conversion and detinue); and trespass to land. Other torts, such as public and private nuisance, are a hybrid of intentional torts and negligence. Intentional torts are actionable 'per se', meaning that the plaintiff does not have to prove loss to initiate action against the alleged wrongdoer.

In contrast, *negligence* does not require an intentional act by a tortfeasor. Rather, a cause of action arises out of the defendant's failure to take reasonable care regarding an act or omission and the plaintiff has suffered a legally recognised loss. The tort of negligence allows a person who has suffered a legally recognised loss, as a consequence of the tortfeasor's failure to take reasonable care, to sue for compensation. To establish a cause of action in negligence, a plaintiff must prove that the defendant owed a duty of care, that the defendant breached their duty and that the breach caused the harm. As an example of a duty of care, the law recognises that medical practitioners owe patients a duty to take care when providing medical treatment or when warning of the risks associated with a medical procedure.<sup>7</sup> Sometimes two causes of action, such as battery and negligence, can arise out of the same set of facts.<sup>8</sup>

Where liability in tort is *strict*, the law imposes legal responsibility regardless of the tortfeasor's intention or negligence. A common example of strict liability is the vicarious liability of an employer for the actions of an employee.<sup>9</sup> Another example is liability for defamation. Defamation involves publishing a statement that lowers the reputation of a person in the eyes of reasonable members of society. Where a defamatory statement is published, the maker of the statement is liable, regardless of their intention or carelessness.

### 1.1.1.1 Purpose of tort law

The main purpose of tort law is to provide a remedy to individuals and legal entities whose legal rights have been infringed. The remedy usually comprises *damages*, consisting of sums of money intended to compensate for the harm suffered, for example, personal injury, property damage or economic loss. Damages have a compensatory purpose to correct wrongs. They are designed to restore the plaintiff to their original position (as far as possible), before the wrong was committed. Damages awarded to a plaintiff for a defendant's trespass to the person can also have a deterrent purpose, as courts are permitted to award *aggravated damages* and *exemplary damages*, requiring the tortfeasor to pay additional compensation to the aggrieved individual, including in the absence of damage or injury. The

<sup>6</sup> *Williams v Milotin* (1957) 97 CLR 465; *Venning v Chin* (1974) 10 SASR 299.

<sup>7</sup> *Rogers v Whitaker* (1992) 175 CLR 479.

<sup>8</sup> *Ljubic v Armellin* [2009] ACTSC 21. In this case, Dr Armellin's removal of Mrs Ljubic's ovaries without her consent constituted a medical battery and medical negligence.

<sup>9</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

rationale for allowing exemplary damages in this context is centred on protecting bodily integrity, punishing the defendant for disregarding the plaintiff's rights and serving as moral retribution or deterrence. For instance, in *Schmidt v Argent*, the Queensland Court of Appeal upheld an award of aggravated and exemplary damages against police officers who showed a blatant disregard for the plaintiff's rights in arresting her without a valid warrant.<sup>10</sup> The award of aggravated and exemplary damages for negligence is prohibited in some states.<sup>11</sup> Tort law can also offer non-monetary remedies, such as an injunction requiring an individual to cease conduct amounting to a trespass or to remove the cause of a nuisance. For example, in *Janney v Steller Works Pty Ltd*,<sup>12</sup> the court awarded an injunction to plaintiffs affected by a tower crane next to residential premises. For a contemporary illustration of damages awards, see the following case example.

### Case: *Cruse v Victoria* (2019) VR 241

#### Facts

On 18 April 2015, police officers raided the plaintiff's home as part of terror raids at six locations. The police arrested the plaintiff (Eathan Cruse) but subsequently released him the following day without charge. No subsequent charges were laid.

During the raid, the plaintiff sustained serious injuries to his head and upper body. He alleged the police partook in several acts of violence including: that he was struck to the left side of his head; that he was lifted and moved from the hallway to the kitchen; that he was slammed against the fridge and pushed to the floor. His wrist was also twisted while the police used profanities and told him: 'Don't say a \*\*\*\*\* word'. The plaintiff was diagnosed with post-traumatic stress disorder and major depression, in addition to sustaining physical injuries. The plaintiff sued for battery and assault.

#### Issue

Was the plaintiff entitled to aggravated and exemplary damages for the excessive nature of the police officers' conduct?

#### Decision

Richards J awarded the plaintiff \$400 000 in damages consisting of:

- \$200 000 in general damages
- \$20 000 in damages for future economic loss
- \$80 000 for aggravated damages
- \$100 000 in exemplary damages.

10 [2003] QCA 507, [50] (Dutney J). ('Exemplary damages differ from aggravated damages in that they are intended to punish the defendant for conduct showing contumelious disregard for the plaintiff's rights and to deter the defendant from similar conduct in future.')

11 See, eg, *Civil Liability Act 2002* (NSW) s 21. ('In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.')

12 (2017) 53 VR 677.

## 6 CONTEMPORARY AUSTRALIAN TORT LAW

**Significance**

The case illustrates the compensatory purpose of tort law and demonstrates that tortfeasors may be liable for additional damages for the brazen disregard of others' rights.

**Question**

What parts of the police officers' conduct satisfied the judge that aggravated and exemplary damages ought to be awarded?



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The right to commence tort action is embedded in civil law and these principles can be contrasted with principles of criminal law. A tort is a civil action taken by an individual or legal entity against another individual or legal entity and is initiated in a private context. By contrast, a criminal action is prosecuted on behalf of the State. Also, the purpose of remedies in tort law is mainly to compensate for the harm caused to the plaintiff, whereas the purpose of criminal penalties is mainly to punish the defendant. The same incident can give rise to both civil and criminal actions. For example, if A strikes B, that act can constitute a civil battery and/or assault, as well as a criminal assault. While an injured plaintiff may report an incident (such as a physical altercation) to the police, ultimately it is the plaintiff who elects whether to pursue a civil remedy. In contrast, where a criminal act is committed, the police are almost certain to press charges or impose a penalty to preserve the safety of the general community and deter future misconduct. Table 1.1 illustrates the main differences between a tort and a crime.

**Table 1.1** Main differences between a tort and crime

Characteristic	Tort	Crime
Parties	Plaintiff v defendant (the 'v' is said as 'and')	Prosecution v defendant (the 'v' is said as 'against')
Party taking action	Individual or entity	Police/Director of Public Prosecutions (DPP)
Type of wrong	Private wrong against individual or entity	Public wrong against the State or society
Purpose	To restore or compensate	To protect, deter, punish and rehabilitate
Outcome	Damages or injunction	Criminal punishment (fines, imprisonment)
Burden of proof	On the plaintiff	On the police
Standard of proof	On the balance of probabilities	Beyond reasonable doubt

A tort can also be contrasted with a breach of contract. Both originate in civil law. However, pursuing damages for a breach of contract requires an enforceable agreement to exist between the parties, either expressly or through implied conduct. In tort law, no such requirement for a contract exists: plaintiffs may pursue damages for a breach of standards imposed by law. Another fundamental difference between contract and tort is



in the operation of damages. In both tort law and contract law, the purpose of damages is to return the plaintiff to the position they would have been in, had it not been for the defendant's wrongdoing. However, in contract, an award of damages for non-performance 'looks forward' to the position the plaintiff would be in were the contract performed; in tort, an award of damages 'looks back' to the position the plaintiff would be in had the wrongful act not occurred. Theoretically, damages in tort can protect a wider range of interests than 'merely' contractual rights, such as the right to bodily integrity, possession of goods or land, or personal reputation. Yet in practice, one can acquire contractual rights over the same matters. For example, a surgeon who performs an operation carelessly can be sued for breach of contract as well as in negligence.

Actions for a breach of contract and a tort can arise out of the same circumstances, as in the example of a surgeon who performs an operation carelessly. In *Chappel v Hart*, a doctor negligently performed an operation on the plaintiff's throat, leaving her with paralysis of the right vocal cord.<sup>13</sup> Gummow J acknowledged that the plaintiff could have recovered nominal damages for breach of contract, but that an action in tort allowed her to pursue a wider range of damages or interests.<sup>14</sup> Table 1.2 illustrates the main differences between a tort and a contract.

**Table 1.2** Main differences between a tort and contract

Characteristic	Tort	Contract
Obligations	Obligations imposed by the law based on reasonable standards of conduct	Promises made by parties either expressly or implicitly
Remedies	Damages	Damages and equitable remedies such as an injunction and specific performance
Purpose of damages	To restore the plaintiff to the position they would have been in if the wrong had not occurred	To place the plaintiff in a position they would have been in if the contract had been performed

### 1.1.2 Theories of tort law

A variety of conceptual frameworks and theories have been applied to tort law, including corrective justice and economic efficiency theory and feminist theory. Understanding the theoretical framework of an area of law is important because it can assist in explaining the basis for the law, understanding reasons behind a judicial decision or justifying certain policy stances. Theories can also justify policy decisions.<sup>15</sup> While theories emerge from the work of eminent scholars, they find contemporary relevance when principles are applied by judges in case law and when legislation is drafted by Parliament. The purpose of this section is to introduce the most prominent theories, which are essential to understanding tort law, and to provide a catalyst for further consideration of these paradigms. It is difficult

<sup>13</sup> (1998) 195 CLR 232.

<sup>14</sup> *Ibid* 254.

<sup>15</sup> Illustrations of policy considerations may also be found in tort law decisions involving wrongful births and wrongful life cases: see *Cattanach v Melchior* (2003) 215 CLR 1; *Harriton v Stephens* (2006) 226 CLR 52.

## 8 CONTEMPORARY AUSTRALIAN TORT LAW

to claim that a single theory offers a complete account of tort law; therefore it is important to consider the breadth of scholarly literature as it applies to various aspects of that law.

### 1.1.2.1 Corrective and distributive justice and economic efficiency

Tort law plays an important role in balancing the rights and interests of all members of society. We have noted that where one individual infringes upon the legal rights of another, an aim of tort law is to require the tortfeasor to repair the harm they have caused. This corrective purpose gives aggrieved individuals the right to seek compensation through the courts or non-litigious avenues. However, this right must be balanced with other public interests such as interests in affordable compensation and the ongoing availability of indemnity insurance. Such aims may at times seem to be at odds with one another. This friction is reflected in the principles of corrective justice, distributive justice and economic efficiency theory, which aid in understanding the development of current tort principles. Many tort scholars contend that tort law has a *corrective justice* purpose, since it imposes an obligation on the tortfeasor to correct or remedy wrongdoing to the aggrieved individual.<sup>16</sup> In the tort of negligence, awards of damages arguably have a corrective purpose as they are designed to remediate the harm or damage caused by the tortfeasor. Theorist Ernest Weinrib defines corrective justice as a bilateral relationship in which each party adopts either an active or passive pole of the same injustice.<sup>17</sup> Allan Beever describes this relationship as ‘interpersonal justice’: if one person wrongs the other by infringing on their legal rights, there is an obligation to restore the equality of the parties.<sup>18</sup> In this way, Beever posits that the law of negligence is best understood in terms of principles of morality.<sup>19</sup>

Corrective justice theory originated with Aristotle, who distinguished between ‘corrective justice’ and ‘distributive justice’.<sup>20</sup> Aristotle envisaged two parties starting in a position of equality. If one party disrupts that equality, corrective justice demands the restoration of equality by deducting something from the party who disturbed the equality and giving it to the disrupted party.<sup>21</sup> Corrective justice requires the negligent person to repair the injured person’s loss, which is achieved through compensation. An example of corrective justice theory in operation is a fault-based tort system which requires the plaintiff to prove the element of causation (ie, to demonstrate that the wrongdoer’s negligence *caused* the plaintiff’s harm).

Corrective justice can be contrasted with *distributive justice*, which is concerned with the equal distribution of goods and wealth in society.<sup>22</sup> Distributive justice addresses justice

16 EJ Weinrib, ‘Corrective Justice’ (1992) 77(2) *Iowa Law Review* 403; EJ Weinrib, ‘Toward a Moral Theory of Negligence Law’ (1983) 2(1) *Law and Philosophy* 37; EJ Weinrib, ‘The Special Morality of Tort Law’ (1989) 34(3) *McGill Law Journal* 403; JL Coleman, ‘Tort Law and the Demands of Corrective Justice’ (1992) 67(2) *Indiana Law Journal* 349; S Erbacher, *Negligence and Illegality* (Hart Publishing, 2017); G Turton, *Evidential Uncertainty in Causation* (Hart Publishing, 2016).

17 EJ Weinrib, *Corrective Justice* (Oxford University Press, 2012) 2. See also EJ Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 *University of Toronto Law Journal* 349; EJ Weinrib, ‘The Special Morality of Tort Law’ (1989) 34(3) *McGill Law Journal* 403.

18 A Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013) 80.

19 A Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007).

20 MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (Thomson Reuters, 9th ed, 2014) 481.

21 S Hershovitz, ‘Tort as a Substitute for Revenge’ in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 89.

22 J Rawls, *A Theory of Justice* (Oxford University Press, rev ed, 1999).



across a community based on a criterion of merit, requiring a broad institution to implement appropriate distribution across the community.<sup>23</sup> An example of distributive justice is a compensation scheme that distributes resources from a pool of funds to members of society who may need them. For instance, a compulsory third party insurance scheme requires all drivers to register their motor vehicles and pay an annual registration fee. Those fees are pooled together to fund state compensation schemes for individuals involved in vehicle collisions.

### HINTS AND TIPS

A traditional torts system that requires a plaintiff to establish a causal link between a breach of duty and damage is an example of corrective justice. Statutory schemes, such as a victims of crime compensation scheme or the National Disability Insurance Scheme (NDIS), are examples of distributive justice.

These theoretical frameworks can be illustrated by an example. Imagine that D fails to take reasonable care while driving by using his mobile phone and that this failure causes a car crash with P, who suffers a broken leg. The balance between D and P has been distorted. Corrective justice theory requires D to correct the balance by providing P with a remedy (such as compensation to cover P's medical bills). Yet if D cannot afford the compensation, P's needs will not be met and the wrong will not be rectified. In such circumstances, state compensation schemes (discussed in Section 1.3) can provide much-needed remedies. Given that the injury arose out of a car collision, P's medical expenses will be covered by a state compensation scheme for motor vehicle accidents. Corrective justice theorists assert that the law should facilitate the reparation of harm between the tortfeasor and the injured plaintiff. Yet in practice, it is often difficult to strike the right balance between all members of society.

*Economic efficiency* theorists are concerned with the distribution of wealth in society.<sup>24</sup> The focus for them is not on how to restore equality between a wrongdoer and a victim, but on how resources can be optimally allocated to serve society's economic wellbeing. Richard Posner contended: 'the common law is best explained as if the judges were trying to maximize economic welfare'.<sup>25</sup> According to the tenets of economic theory, judges should decide cases with the aim of maximising society's total wealth.<sup>26</sup> In other words, justice can be equated to wealth maximisation and the role of tort law is simply to allocate costs with the aims of minimising the cost of accidents and reducing the cost of avoiding them.<sup>27</sup> Hence, if the cost of taking care to avoid injury is less than the cost of compensating for an injury sustained, people should be encouraged to take action to avoid the risk of injury.

23 G Turton, *Evidential Uncertainty in Causation* (Hart Publishing, 2016) 10.

24 R Posner, *The Economics of Justice* (Harvard University Press, 2nd ed, 1983); D Partlett, 'Economic Analysis and Some Problems in the Law of Torts' (1982) 13(3) *Melbourne University Law Review* 398.

25 R Posner, *The Economics of Justice* (Harvard University Press, 2nd ed, 1983) 4.

26 MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Thomson Reuters, 9th ed, 2014) 520.

27 G Calabresi, *The Cost of Accidents* (Yale University Press, 1970).

## 10 CONTEMPORARY AUSTRALIAN TORT LAW

Economic efficiency theory may best explain the rationale for the 2002–3 statutory civil liability reforms (discussed in Section 1.2), which were argued to be necessary in response to a perceived insurance crisis because the ‘efficiency’ of resource allocation trumped the notion of a just outcome. In the lead-up to the reforms, certain groups lobbied for restrictions on compensation payments, arguing that the increasing cost of insurance meant that many professionals (such as doctors) could no longer afford indemnity cover. The statutory reforms made drastic changes to negligence principles nationally, curtailing the rights of plaintiffs to access compensation, even in meritorious claims.

One of the criticisms of the pursuit of economic efficiency is that it leads to inequality. Jules Coleman contended that it causes the wealthy to gain more rights and increase their wealth while the poor become worse off.<sup>28</sup> Using the example of the tort reforms, economic efficiency allows professionals (such as doctors) to continue running their practices while claimants injured as a result of medical negligence may struggle to obtain adequate compensation due to the restrictions.

### 1.1.2.2 Feminist critiques

As with any branch of law, modern tort law needs to be contextualised within its historical setting and social context. The law of torts, as you have already learnt by now, has developed categories of torts to protect certain interests, such as personal interests, property interests and business interests. Thus, it needs to be comprehended within the wider context of changing social norms and how these affect the development of tortious liability vis-à-vis those interests. In that sense, law is never really ‘neutral’ as it reflects society and its values at a particular time.<sup>29</sup> Thus, it often presents a particular ‘point of view’, which in consequence means that not all interests of all groups in society are necessarily equally represented. Inevitably, it poses a challenge but, at the same time, it represents an opportunity for a lawyer to contest some of these standards if they do not operate fairly towards all in the society. Feminist critique of tort law is one such attempt.

Feminist theory varies and constantly evolves to adapt to the changing social and cultural environment. In fact, there is more than one feminist theory. But in its basic form, a feminist approach calls for recognition that women and men are equal, and that gender inequality stems from unequal participation in spheres such as family, education and paid labour. But unequal participation does not need to be the case. Hence, feminist scholars critically question the status quo of certain values and perspectives, and consequently how law – including the law of torts – privileges certain groups and their interests, to the detriment of others. This approach challenges ‘patriarchy’ in society,<sup>30</sup> understood as a male-dominated

28 J Coleman, ‘Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law’ (1984) 94(4) *Ethics* 649, 662 cited in MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (Thomson Reuters, 9th ed, 2014) 521.

29 This explains, for example, the differences between modern Australian and English tort laws, despite their common historical roots and mutual jurisprudential and adjudicative influences.

30 For an excellent overview of the historical development of the patriarchy, see the seminal work by historian G Lerner, *The Creation of Patriarchy* (Oxford University Press, 1987). Lerner’s main argument is that patriarchy is neither natural nor biological; rather, it developed as a particular system of organising society, beginning around the second millennium BCE in the ancient Middle East, and thus can be ended by cultural and societal processes.