

CONTENTS

About the authors	xix
Acknowledgements	xxii
List of figures and tables	xxiv
Table of cases	xxviii
Table of statutes	lvi
Using your VitalSource enhanced eBook	lxvii
Guide to instructor resources	lxx
Chapter 1 Introduction to the law of torts	1
1.1 Introduction and purpose of tort law	2
1.1.1 What is tort law?	2
1.1.1.1 Purpose of tort law	4
1.1.2 Theories of tort law	7
1.1.2.1 Corrective and distributive justice and economic efficiency	8
1.1.2.2 Feminist critiques	10
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
1.1.6.1 Litigation	30
1.1.6.2 Compensation and reparation	34
1.1.7 Litigating a tort claim	37
1.1.7.1 Procedure	38
1.1.7.2 Proof	39
1.1.7.3 Time limitations	39
1.1.7.4 Uninsured defendant	41
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
1.4.1.1	New Zealand	50
	Key concepts	52
	Problem-solving exercises	52
	Challenge yourself	53
Chapter 2	Duty of care	55
2.1	Introduction	56
2.2	Duty of care: general principles	58
2.2.1	The 'neighbour' principle	58
2.2.2	The rise and fall of 'proximity'	61
2.2.3	The current law	63
2.3	Duty of care: established categories	64
2.3.1	Manufacturer–consumer	67
2.3.2	Employer–employee/master–servant	68
2.3.3	Occupier–entrant	72
2.3.4	Doctor–patient	75
2.3.5	Teacher–pupil and school authority–pupil	76
2.3.6	Duty owed to a rescuer	77
2.3.7	Users of the highway	78
2.4	Duty of care in the novel case	81
2.4.1	Identifying risk: what is foreseeable?	81
2.4.2	'Salient features' or the 'multi-factorial' approach	81
2.4.2.1	Foreseeability	83
2.4.2.2	Plaintiff's harm	83
2.4.2.3	Control	83
2.4.2.4	Vulnerability	84
2.4.2.5	Reliance	85
2.4.2.6	Assumption of responsibility	86
2.4.2.7	Proximity	86
2.4.2.8	Category of relationship	87
2.4.2.9	Nature of the activity	87
2.4.2.10	Nature or degree of danger or hazard	88
2.4.2.11	Knowledge that the conduct will cause harm	88
2.4.2.12	Potential indeterminacy of liability	89
2.4.2.13	Avoidance of harm	89
2.4.2.14	Effect on autonomy or freedom	90

2.4.2.15	Conflicting duties	90
2.4.2.16	Consistency with statute	91
2.4.2.17	Conformance and coherence of structure and fabric of common law	92
2.5	Special duty relationships	95
2.5.1	Duty to prevent psychological injury ('mental harm')	95
2.5.1.1	What is mental harm?	95
2.5.1.2	Policy factors in mental harm cases	96
2.5.1.3	Early decisions	96
2.5.1.4	Development of liability	98
2.5.2	Duty to prevent pure economic loss	100
2.5.2.1	The difference between pure and consequential economic loss	100
2.5.2.2	Pure economic loss due to negligent misstatement	101
2.5.2.3	Pure economic loss due to other factors	105
2.5.3	Special defendants: occupiers	105
2.5.3.1	Meaning of occupier	105
2.5.3.2	Early law: categories of entrant	106
2.5.3.3	Modern law	106
2.5.4	Special defendants: public authorities	107
2.5.4.1	Interpretation of the relevant statute/s	109
2.5.4.2	Common law duty of care	110
2.5.5	Special defendants: a duty to control others	110
2.5.6	Non-delegable duties	111
2.5.6.1	Occupier and entrant	112
2.5.6.2	Independent contractors	112
2.5.6.3	Employer and employee	113
2.5.6.4	School authorities	113
	Key concepts	116
	Problem-solving exercises	116
	Challenge yourself	117
Chapter 3	Breach of duty of care	119
3.1	Introduction	120
3.1.1	What is negligent conduct?	122
3.1.2	No degrees of breach	123
3.1.3	Relevance of past findings of breach	123
3.1.4	Importance of the civil liability legislation	124
3.2	Setting the standard of care: the reasonable person	126
3.2.1	An objective standard	126
3.2.2	Relevant characteristics of the defendant	129
3.2.2.1	Age	129
3.2.2.2	Physical and mental impairment	130

3.2.2.3	Intoxication	133
3.2.2.4	Possession of special skills	134
3.2.2.5	Experience	135
3.2.2.6	Status of professionals	137
3.2.2.7	Public authorities	141
3.2.2.8	Institutions and child abuse	144
3.2.3	Time of assessment	145
3.3	Applying the standard of care: demonstrating breach	147
3.3.1	Reasonable foreseeability	148
3.3.2	'Not insignificant' risk	151
3.3.3	The negligence calculus	153
3.3.3.1	Probability	153
3.3.3.2	Seriousness	156
3.3.3.3	Burden of taking precautions	156
3.3.3.4	Social utility	160
3.3.3.5	Legislative standards	161
3.3.3.6	Common practice	161
3.3.4	Failure to warn	162
3.4	Proving breach	167
3.4.1	The use of inference in negligence law	168
3.4.2	Evidential considerations	169
	Key concepts	170
	Problem-solving exercises	171
	Challenge yourself	173
Chapter 4	Damage: factual causation and scope of liability	174
4.1	Introduction	175
4.1.1	The kind of damage recognised by law	177
4.1.2	The 'loss of a chance' in medical negligence	179
4.1.2.1	The wrongful birth cases	181
4.1.2.2	The wrongful life cases	183
4.1.2.3	The wrongful death cases	184
4.2	Factual causation	188
4.2.1	Onus and standard of proof	188
4.2.1.1	The maxim <i>res ipsa loquitur</i>	189
4.2.2	Civil liability legislation	192
4.2.2.1	The 'necessary condition' test	195
4.2.3	Common law (historical overview and interpretive framework)	200
4.2.3.1	The 'but for' test	201
4.2.3.2	The 'commonsense' test	205
4.2.3.3	The 'material contribution' test (cases of cumulatively caused injury)	206

4.3	Scope of liability	208
4.3.1	Remoteness of damage	210
4.3.1.1	The 'reasonable foreseeability' test	211
4.3.1.2	The eggshell skull principle	213
4.3.2	The chain of causation and intervening causes	214
4.3.2.1	Breaking the chain of causation	214
4.3.2.2	Voluntary human action	218
4.3.2.3	Causally independent events	219
4.3.2.4	Successive causes leading to a similar damage	220
	Key concepts	221
	Problem-solving exercises	221
	Challenge yourself	222
Chapter 5	Defences to negligence	224
5.1	Introduction	225
5.2	Contributory negligence	227
5.2.1	Definitions and rationale	228
5.2.2	The standard of care for contributory negligence	229
5.2.2.1	General rule	229
5.2.2.2	Children	230
5.2.2.3	Plaintiffs with disabilities	232
5.2.2.4	Intoxication	237
5.2.2.5	Obvious recreational risks	238
5.2.2.6	Employees	239
5.2.3	Causation	240
5.2.4	Apportionment	241
5.3	Voluntary assumption of risk	245
5.3.1	Definitions and rationale	245
5.3.2	Knowledge of risk	247
5.3.2.1	Obvious risks	249
5.3.2.2	Unavoidable risks	250
5.3.3	Appreciation of the risk of injury	250
5.3.4	Voluntary acceptance of risk	253
5.4	Illegality	256
5.4.1	Is illegality a defence?	256
5.4.2	The common law position	256
5.4.3	State legislative variations	257
5.5	Other defences	258
5.5.1	Limitation of actions	258
5.5.2	Good Samaritans and volunteers	259

Key concepts	260
Problem-solving exercises	261
Challenge yourself	262
Chapter 6 Trespass to the person	263
6.1 Introduction	264
6.2 Historical origins of trespass and relationship with negligence	264
6.2.1 Trespass	265
6.2.2 Action on the case	265
6.2.3 Choosing between trespass and case	266
6.3 The trespass action	271
6.3.1 Direct interference	271
6.3.2 Fault of the defendant	272
6.3.2.1 Intention	272
6.3.2.2 Lack of care	273
6.3.3 Actionable per se	274
6.3.4 Onus of proof	274
6.4 Trespass to the person	276
6.4.1 Battery	277
6.4.1.1 A positive act	277
6.4.1.2 Direct application of force	278
6.4.1.3 Unlawful touching or offensive contact	279
6.4.1.4 Fault of the defendant	282
6.4.2 Assault	284
6.4.2.1 Threat of imminent harmful or offensive contact	286
6.4.2.2 Reasonable apprehension	289
6.4.2.3 Subjective intention	291
6.4.3 False imprisonment	292
6.4.3.1 Direct interference	293
6.4.3.2 Restraint in all directions	296
6.4.3.3 The defendant at fault	305
6.5 Remedies for trespass to the person	307
Key concepts	308
Problem-solving exercises	308
Challenge yourself	309
Chapter 7 Trespass to land and trespass to personal property	311
7.1 Introduction	312
7.2 Trespass to land	312
7.2.1 Defining trespass to land	314

7.2.2	Title to sue: possession	314
7.2.2.1	Plaintiff's interest	314
7.2.2.2	Tenants and lessors	316
7.2.2.3	Licensees	316
7.2.2.4	Easements and <i>profit à prendre</i>	317
7.2.2.5	Co-owners	317
7.2.3	Actionable interferences	317
7.2.3.1	Direct interference	317
7.2.3.2	Interference with land	318
7.2.4	Interference without lawful justification	324
7.2.4.1	Express licence	324
7.2.4.2	Implied licence	326
7.2.4.3	Exceeding the licence	330
7.2.4.4	Revocation or withdrawal of licence	332
7.2.4.5	Authorised by law	333
7.2.4.6	Trespass ab initio	336
7.2.4.7	Continuing trespass	337
7.2.5	Fault	338
7.3	Trespass to personal property	339
7.3.1	Trespass to goods	343
7.3.1.1	Title to sue	344
7.3.1.2	Bailment exception	344
7.3.1.3	Direct interference	347
7.3.1.4	Fault	348
7.3.2	Conversion	348
7.3.2.1	Title to sue	349
7.3.2.2	Repugnant dealing	353
7.3.2.3	Fault	359
7.3.3	Detinue	359
7.3.3.1	Title to sue	360
7.3.3.2	Demand and refusal	360
7.3.3.3	Fault	362
	Key concepts	363
	Problem-solving exercises	363
	Challenge yourself	364
	Chapter 8 Defences to and remedies for trespass	366
8.1	Introduction	367
8.2	Defences to trespass	369
8.2.1	Self-defence	369
8.2.2	Defence of another	374
8.2.3	Defence of property	374

8.2.4	Necessity	375
8.2.4.1	Imminent danger	376
8.2.4.2	Reasonable necessity	378
8.2.4.3	Imminent danger not due to the defendant's fault	378
8.2.4.4	Proportionate to the danger to be avoided	379
8.2.5	Abatement	379
8.2.5.1	Recaption of goods	379
8.2.5.2	Re-entry of land	383
8.2.5.3	Abatement of nuisance	383
8.2.6	Consent	383
8.2.6.1	Express or implied consent	384
8.2.6.2	Real and voluntarily given	388
8.2.6.3	Capacity to consent	389
8.2.6.4	Revocation and expiration of consent	392
8.2.6.5	Scope of consent	393
8.2.7	Disciplinary powers	393
8.2.8	Inevitable accident	394
8.2.9	Non-defences	394
8.2.9.1	Provocation	395
8.2.9.2	Mistake	395
8.2.9.3	Contributory negligence	396
8.2.9.4	Incapacity	396
8.3	Remedies for trespass	397
8.3.1	Remedies for trespass to the person	397
8.3.1.1	Nominal damages	397
8.3.1.2	Compensatory damages	397
8.3.1.3	Aggravated damages	398
8.3.1.4	Exemplary damages	399
8.3.1.5	Injunctions	400
8.3.2	Remedies for trespass to land	400
8.3.2.1	Nominal damages	401
8.3.2.2	Compensatory damages	401
8.3.2.3	Aggravated damages	403
8.3.2.4	Exemplary damages	404
8.3.2.5	Injunctions	404
8.3.2.6	Self-help	405
8.3.2.7	Mesne profits	405
8.3.3	Remedies for trespass to personal property	407
8.3.3.1	Remedies for trespass to goods	407
8.3.3.2	Remedies for conversion	408
8.3.3.3	Remedies for detainment	410
	Key concepts	412

Problem-solving exercises	413
Challenge yourself	414
Chapter 9 Nuisance	415
9.1 Introduction	417
9.1.1 Private nuisance: interference with the use and enjoyment of land	417
9.2 Unreasonable interference	420
9.2.1 Type of damage	422
9.2.1.1 Physical: material damage	422
9.2.1.2 Non-physical: interference with use and enjoyment of land	423
9.2.2 The principle of triviality	424
9.2.3 Locality	425
9.2.4 Intensity, time and duration	428
9.2.5 The sensitive plaintiff	428
9.2.6 The nature of the defendant's activity and the public interest	430
9.2.7 Practicality of avoiding interference	432
9.2.8 Malice	433
9.2.9 An ultimate question of fact	433
9.3 Who can sue?	435
9.4 Who can be sued?	436
9.4.1 Creators of a nuisance	436
9.4.2 Authorisation of a nuisance	437
9.4.3 Adopting or continuing a nuisance	438
9.5 Unprotected interests	439
9.5.1 The right of support	439
9.5.2 The right to a view and aesthetic appearance	440
9.5.3 The right of privacy	440
9.6 Defences	442
9.6.1 Prescription	442
9.6.2 Statutory authorisation	443
9.6.3 Non-defences	446
9.6.3.1 Coming to the nuisance	446
9.6.3.2 Nuisance due to numerous independent acts	447
9.7 Remoteness of damage	448
9.8 Relationship with other torts	449
9.8.1 Private nuisance and public nuisance	449
9.8.2 Private nuisance and negligence	450
9.8.3 Nuisance and trespass to land	451
9.9 Public nuisance	451
9.9.1 Unreasonable and substantial interference	452
9.9.2 Special or particular damage	452

9.10 Conclusion	455
Key concepts	455
Problem-solving exercises	456
Challenge yourself	456
Chapter 10 Vicarious liability and non-delegable duty	458
10.1 Introduction	459
10.2 Vicarious liability	460
10.2.1 The 'agency' theory of vicarious liability	462
10.2.2 Vicarious liability in the employment context	465
10.2.2.1 The master–servant theory	466
10.2.2.2 Establishing an employer–employee relationship	467
10.2.3 Acting in the course (scope) of employment	472
10.2.3.1 Establishing the scope of employment	473
10.2.4 Exception to employer's vicarious liability	478
10.2.5 Employer's right of indemnity	479
10.3 Non-delegable duty	481
10.3.1 Special relationships	482
10.3.1.1 Hospitals	483
10.3.1.2 Schools	485
10.3.1.3 Occupiers of premises	486
10.3.1.4 Places of employment	487
10.3.1.5 Prisons and detention facilities	488
10.4 Cases on the non-delegable duty of care and vicarious liability	489
10.4.1 Legal liability of an employer for acts of sexual abuse committed by an employee	491
10.4.1.1 Non-delegable duty	492
10.4.1.2 Vicarious liability	493
Key concepts	502
Problem-solving exercises	502
Challenge yourself	503
Chapter 11 Defamation	505
11.1 Introduction and purpose of defamation laws	507
11.1.1 What is defamation?	507
11.1.2 Purpose of defamation law	508
11.1.3 Background to the 2005 and 2021 reforms to the uniform defamation legislation	509
11.1.3.1 Overview of the 2005 legislative reforms	509
11.1.3.2 Overview of the 2021 legislative reforms	511

11.1.4	Existing defamation legislative frameworks	514
11.1.5	Common law and legislative frameworks	514
11.2	Elements of defamation	515
11.2.1	Does the matter contain a defamatory imputation?	515
11.2.1.1	Definition of 'matter'	516
11.2.1.2	Defamatory imputations	517
11.2.1.3	True and false innuendo	517
11.2.1.4	Definition of 'defamatory'	518
11.2.2	Does the matter identify the plaintiff?	525
11.2.2.1	Express identification of plaintiff	525
11.2.2.2	Reasonable to identify plaintiff	526
11.2.3	Has the statement been published?	529
11.2.3.1	Definition and interpretation of 'publication'	529
11.2.4	'Serious harm' test	533
11.2.5	Standing to sue	535
11.2.6	Defamation and injurious falsehood	536
11.3	Defences	538
11.3.1	Justification	538
11.3.2	Contextual truth	542
11.3.3	Absolute privilege	546
11.3.4	Publication of public documents	547
11.3.5	Fair report of proceedings of public concern	549
11.3.6	Publication of matter concerning an issue of public interest	550
11.3.7	Qualified privilege	551
11.3.8	Scientific or academic peer review	555
11.3.9	Honest opinion	556
11.3.10	Innocent dissemination	559
11.3.11	Triviality defence abolished	559
11.4	Remedies and dispute resolution	560
11.4.1	Damages	560
11.4.1.1	Economic loss	561
11.4.1.2	Non-economic loss	561
11.4.1.3	Aggravated damages	562
11.4.1.4	Exemplary damages prohibited	562
11.4.2	Injunction	563
11.4.3	Role of apology	563
11.4.4	Dispute resolution	564
11.5	Defamation and social media	565
11.5.1	Introduction to defamation and the internet	565
11.5.2	Liability of anonymous users	565
11.5.3	Liability of intermediaries	566
11.6	Privacy and breach of confidentiality	571

Key concepts	575
Problem-solving exercises	575
Challenge yourself	577
Chapter 12 Remedies	579
12.1 Introduction	580
12.2 Self-help remedies	581
12.2.1 Eviction of trespassers and re-entry of land	582
12.2.2 Self-defence of the person	582
12.2.2.1 Elements of self-defence	582
12.2.2.2 Reasonable need to protect oneself	583
12.2.2.3 Force used was reasonable	583
12.2.3 Abatement	583
12.2.3.1 Recaption	583
12.2.3.2 Replevin	584
12.2.3.3 Abatement of nuisance	584
12.2.4 Apology	585
12.3 Damages	585
12.3.1 Introduction	585
12.3.1.1 'Damage' and 'damages'	586
12.3.1.2 'Special' and 'general' damages	586
12.3.1.3 Damages awarded for torts actionable 'per se' versus torts in which damage is the 'gist' of the action	586
12.3.2 Types of damages	587
12.3.2.1 Compensatory damages	588
12.3.2.2 Statutory damages and compensation	590
12.3.2.3 Nominal damages	590
12.3.2.4 Contemptuous damages	591
12.3.2.5 Vindictory damages	591
12.3.2.6 Restitutionary damages or 'reasonable user fee' damages	592
12.3.2.7 Aggravated damages	592
12.3.2.8 Exemplary damages	594
12.3.3 Compensatory damages for property damage	600
12.3.3.1 Cost of repair or diminished value	600
12.3.4 Compensatory damages for personal injury	606
12.3.4.1 Four basic principles	606
12.3.4.2 The impact of the civil liability legislation on compensatory damages	608
12.3.4.3 Heads of damage	609
12.3.5 Pecuniary damages	612
12.3.5.1 Loss of earning capacity and loss of earnings	612
12.3.5.2 Net earnings	613

12.3.5.3	Assessment period	614
12.3.5.4	Earnings cap	615
12.3.5.5	Hospital and medical expenses	616
12.3.5.6	Gratuitous services provided to the plaintiff	619
12.3.5.7	Loss of ability of plaintiff to provide gratuitous services to others	624
12.3.5.8	Deductions or allowances	626
12.3.6	Non-pecuniary damages	635
12.3.6.1	Heads of damage	635
12.3.6.2	Thresholds and caps	636
12.3.6.3	Method for assessment of damages	637
12.3.6.4	Pain and suffering	638
12.3.6.5	Loss of amenities of life/loss of enjoyment of life	638
12.3.6.6	Loss of expectation of life	639
12.3.7	Claims upon the death of a person	640
12.3.7.1	Claims by the estate of the deceased (survival of causes of action claim)	641
12.3.7.2	Claims by the dependants of the deceased (dependants' action)	642
12.3.7.3	Damages	646
12.3.8	Other factors affecting the assessment of damages	648
12.4	Injunctions	649
12.4.1	Types of injunctions	650
12.4.2	In what circumstances is an injunction ordered?	650
12.4.2.1	Is a proprietary interest required?	650
12.4.2.2	Adequacy of damages as a remedy	650
12.4.2.3	Rights protected by injunction	651
12.4.2.4	Quia timet injunctions	652
12.4.2.5	Discretionary factors and bars to relief	652
12.4.2.6	Interlocutory injunctions: requirements	653
12.4.2.7	Damages awarded instead of or in addition to injunction	653
12.5	Declarations	654
12.6	Multiple tortfeasors	654
12.6.1	Liability	654
12.6.1.1	Joint tortfeasors versus several tortfeasors	655
12.6.1.2	Concurrent liability	655
12.6.1.3	Solidary liability	656
12.6.1.4	Proportionate liability	656
12.6.1.5	Joint tortfeasors: what is the effect of judgment and a release?	656
12.6.1.6	Proportionate liability under legislation	657
12.6.1.7	Liability of several tortfeasors for distinct damage	659

12.6.2 Contribution	659
12.6.2.1 Who, as a liable tortfeasor, may claim contribution?	660
12.6.2.2 Against whom may contribution be claimed?	660
12.6.2.3 Assessment of contribution	660
Key concepts	661
Problem-solving exercises	661
Challenge yourself	662
Chapter 13 Torts arising from statutory duties and powers	663
13.1 Introduction	664
13.2 Action for breach of statutory duty	664
13.2.1 When will this action be available?	664
13.2.2 Elements of the action	665
13.2.2.1 Did Parliament intend to allow an action under the particular statute?	665
13.2.2.2 Does the plaintiff belong to the class of persons protected by the statute?	672
13.2.2.3 Does the defendant bear the relevant duty under the statute?	673
13.2.2.4 Was the duty breached?	673
13.2.2.5 Does the damage suffered fall within the scope of the statute?	676
13.2.2.6 Did the breach cause the injury suffered by the plaintiff?	677
13.2.2.7 Defences	677
13.3 Misfeasance in public office	679
13.3.1 A public law tort	679
13.3.2 Elements of the tort	680
13.3.2.1 Is the defendant the 'holder of a public office'?	681
13.3.2.2 Is the defendant fulfilling a public function?	682
13.3.2.3 Did the defendant have the requisite 'bad faith' intention?	683
13.3.2.4 Did the plaintiff suffer material damage?	688
13.3.3 Liability of government entities for misfeasance of individuals	690
Key concepts	692
Problem-solving exercises	693
Challenge yourself	696
Index	698