

The Rule of Law Institute of Australia is an independent not-for-profit body formed to uphold the rule of law in Australia. Through the publishing of a series of youtube videos the Institute aims to not only promote discussion on the importance of the principles which underpin the rule of law but to provide high school students and their teachers with an informative and practical resource.

Torts and the Rule of Law

Definition

A tort is a legal wrong. It involves deciding who has to bear the loss in a situation where one person is harmed by another. An action in tort is a civil action. The existence of a tort gives the injured party a right to sue. There is not just one tort rather there are many different actions in tort that include; trespass, negligence, defamation and nuisance. Currently the government is discussing the introduction of a statutory right tort of privacy.

A famous tort case

The most famous tort case is that of *Donoghue v Stevenson*¹. The facts of the case are as follows; May Donoghue and a friend were at a café where May ordered a ginger bear ice-cream float. When May poured the Ginger beer over the ice-cream she noticed a small object had fallen from the bottle. On closer inspection the object appeared to be a decomposing snail. Neither May or the café owner could see the object in the bottle because it was made out of opaque glass. Action against the manufacturer was undertaken and ultimately it was held that they had a duty to ensure that the bottle was free from impurities.

Example of a situation that would give rise to a tort

If an individual slips and falls down a hole in a footpath left by a construction company that are doing work in the area it is likely that the construction company would liable for any damage that the person suffers.

The relationship between torts and the rule of law

Tort law is largely a common law doctrine and has limited legislation thus can be viewed as predominantly judge made law. Judge made law means that judges in interpreting the existing law may need to make a decision where there is no settled precedent and in doing so their decision becomes law. Some may consider that judge made law is against the rule of law because if judges are creating law they are not strictly applying the law. However what the rule of law really demands is that there is no uncontrolled use of power by the individual, groups or government. This means that judge made precedent is OK under the rule of law because judges are only

¹ [1932] All ER Rep 1.

changing the law in an incremental manner. Judicial activism, a concept where judges make decisions based on personal or political grounds rather than the existing law is against the rule of law but judicial activism is commonly frowned upon and not often used.

Review Questions:

1. Is tort Law a criminal or civil action? Explain your answer.
2. Outline a situation where you believe a tort would arise, why?