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Australia: Tort Law Filling a Human Rights Void

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I. Introduction

Tort law offers real prospects for litigants to pursue human rights claims in Australia. The basic concern of tort law is the protection of certain human interests considered either inviolable or fundamental to social order. It is directed at all social participants and therefore applies to both public and private actors, as well as to both individuals and corporations. As a result, many human rights abuses can be re-characterised as torts, albeit imperfectly. Nevertheless, there has been limited human rights litigation in Australia, probably due to procedural hurdles[1] as well as a relative lack of both litigation and human rights cultures. Nonetheless, there are significant case examples that illustrate how particular torts might apply to certain kinds of rights violations and that exemplify a growth in tort litigation strategies by dedicated human rights organisations and lawyers in Australia.

To explore the potential of Australian tort law as a mechanism for human rights enforcement, this chapter is structured as follows. Following this introduction, section II provides an explanation of the general protection of human rights in Australian law. Section III sets out basic features of the Australian tort law system and its relationship to human rights, before explaining those torts of most significance to human rights claims. Section IV focuses on two case studies that highlight emblematic human rights concerns in Australia. They concern medical treatment for asylum-seekers in detention and asbestos exposure in the workplace (including parent company liability). These case studies enable a closer look at civil liability in Australia animated around specific human rights concerns. Section V concludes.

[1] See, eg, Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States' (2011) 3 *City University Hong Kong Law Review* 1, 22–23.

II. Human Rights in Australian Law

Australia is a party to seven of the nine core United Nations (UN) human rights treaties, as well as most of the Optional Protocols thereto.[2] Australia has a dualist system, whereby international obligations are only enforceable at the domestic level if they have been translated into domestic law. At the national (federal) level, incorporation has occurred to a large extent with the International Convention on the Elimination of all Forms of Racial Discrimination,[3] Convention on the Elimination of all Forms of Discrimination against Women,[4] Convention against Torture,[5] and to a lesser extent with the Convention on the Rights of People with Disabilities[6] and the Convention on the Rights of the Child.[7] The International Covenant on Civil and Political Rights (ICCPR) and especially the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are largely not incorporated into federal laws.

Australia is a federation with nine separate jurisdictions including the federal national jurisdiction, six states and two territories. Its national Constitution is largely concerned with the federal split of powers, and the division of powers between the arms of the Federal Government. It contains few individual rights. Section 116 provides a guarantee of freedom of religion, but it has been interpreted narrowly and has never been the basis for the invalidation of any Australian law.[8] Furthermore, section 116, along with the limited property right in section 51(31) and the right to jury trial for indictable offences in section 80, constrain the Federal Government but not the states. There are also some implied constitutional rights related to the protection of political speech,[9] which constrain the Commonwealth and the states, and voting in federal elections.[10]

ICCPR standards are protected against the actions of 'public authorities' under three sub-national human rights statutes in Victoria, Queensland and the Australian Capital Territory (ACT),[11] while a small number of ICESCR rights are enforceable in Queensland and the ACT.[12] These statutes are modelled on the Human Rights Act 1998 (UK), but they are all weaker than their United Kingdom (UK) counterpart. For example, there is no free-standing cause of action for breach of the statutes in Victoria or Queensland: a cause of action only arises if a separate cause of action

[2] Treaty Body Database, 'Ratification Status for Australia' (United Nations Human Rights Treaty Bodies), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN. All online resources cited in this chapter were accessed on 1 March 2021.

[3] Racial Discrimination Act 1975 (Cth).

[4] Sex Discrimination Act 1984 (Cth).

[5] Criminal Code 1995 (Cth), Div 274.

[6] Disability Discrimination Act 1992 (Cth).

[7] Family Law Act 1975 (Cth), s 60B(4).

[8] Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View*, 5th edn (Lawbook Co, 2019) [12.70]–[12.90].

[9] *ibid* [13.15]–[13.50].

[10] *ibid* [13.60]–[13.70].

[11] Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld).

[12] Human Rights Act 2004 (ACT), ss 27A–27B; Human Rights Act 2019 (Qld), ss 36–37.

already accrues (such as under existing tort law).[13] Damages are not available for breach of any of these statutes.[14]

International standards regarding non-discrimination are enforceable in all Australian jurisdictions, though the relevant laws vary according to the grounds of discrimination covered. Human rights are also protected under numerous laws, such as those relating to police powers[15] and privacy.[16] Such laws do not use human rights language, so they may fail to reflect the gravity of a breach of human rights.

Human rights treaties have had only a limited impact on Australian law where they have not been incorporated into domestic law. As a matter of statutory interpretation, two principles invite judicial reference to international law, but in limited circumstances. First, where there is ambiguity, courts should favour a construction of a statute that is consistent with Australia's international legal obligations. Second, courts must presume, in the absence of clear parliamentary intent to the contrary, that legislation is not intended to breach fundamental human rights.[17]

The use by courts of international human rights law in the development of Australia's common law has been rare and ad hoc.[18] This contrasts with the UK, where courts are relevant 'public authorities' under its Human Rights Act that must therefore take their own human rights obligations into account in deciding cases, even between private parties. No such obligation arises anywhere in Australia.[19] Hence, international human rights obligations have had a more profound impact on common law in the UK than in Australia. For example, human rights considerations have led UK courts to develop common law torts concerned with particular breaches of privacy,[20] whereas such a development has been resisted by Australian appellate courts.[21] Indeed, the impact of human rights legislation upon the development of tort law in other Commonwealth countries will likely limit the influence of such jurisprudence upon Australian tort law.

Australia is unusual amongst Western liberal democracies with its absence of comprehensive legal protection for human rights except in three of its nine jurisdictions. There are, therefore, significant obstacles in gaining a remedy for breach of Australia's human rights obligations under Australian law. We turn now to examine the scope for the provision of relevant remedies under Australian tort law.

[13] See, eg, Charter of Human Rights and Responsibilities Act 2006 (Vic), s 39.

[14] See, eg, Human Rights Act 2004 (ACT), s 40C(4).

[15] Police powers are constrained under a variety of state and federal laws, as well as the common law.

[16] See, eg, Privacy Act 1988 (Cth).

[17] Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 457–61.

[18] Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International law and its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228.

[19] Courts are not 'public authorities' for the purposes of the sub-national human rights statutes, except when acting in an administrative capacity: see, eg, Human Rights Act 2019 (Qld), s 9(4)(b).

[20] See, eg, *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *Richard v BBC* [2018] EWHC 1837 (Ch), [2019] Ch 169 (Chancery Division).

[21] Kit Barker, Peter Cane, Mark Lunney and Francis Trindae, *The Law of Torts in Australia*, 5th edn (Oxford University Press, 2012) 392–93.

III. Australian Tort Law and Human Rights

A. Basic Features of Australian Tort Law

Australian tort law originates in English common law, so its foundational principles are shared with other Commonwealth countries. Although it is primarily state and territory based, it is possible to speak of a relatively unitary Australian tort law as Australia has a unified common law system.[22] Aspects of Australian tort law have now been substantially codified in each state and territory.[23] While state and territory civil liability statutes share broadly similar features, variations exist.

State statutory no-fault compensation schemes provide an alternative remedial mechanism to tort litigation for victims injured in certain contexts.[24] They aim to provide a simpler and cheaper means of seeking a remedy than establishing tort liability. They therefore present a distinct potential human rights remedial mechanism. However, they are not comprehensive in their coverage[25] and compensation tends to be lower than in tort litigation.[26] It remains open to claimants to pursue a general tort claim.[27]

The correlation between human rights and torts in Australia is imprecise. Tort law is principally concerned with interpersonal responsibilities between individuals in the context of one-to-one social encounters.[28] It redresses private wrongs. Its conceptual domain is thus distinct to that of human rights law, which focuses on the proper exercise of public power and the relationship between the individual and the state. Nevertheless, tort law clearly has implications for the exercise of public power, particularly where claims address the actions or omissions of public authorities. Despite its formal bilateral structure, tort principles delimit broader normative spheres of public rights and wrongs.[29] It is worth noting that there is no Crown immunity from civil liability in Australia.[30]

Certain human rights claims can be reclassified as tort claims so Australian tort law presents a practical opportunity for victims of human rights abuses to achieve redress. To demonstrate, we now outline some illustrative torts and the kinds of human rights abuses they engage.

[22] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 [135].

[23] See, eg, Civil Liability Act 2002 (NSW).

[24] The main schemes cover motor vehicle accidents (eg, Motor Accidents Injuries Act 2017 (NSW)), workplace environments (eg, Safety, Rehabilitation and Compensation Act 1988 (Cth)) and injuries from crime (eg, Criminal Offence Victims Act 1995 (Qld)).

[25] Harold Luntz, David Hambly, Kylie Burns, Joachim Deitrich, Neil Foster, Sirko Harder and Genevieve Grant, *Torts: Cases and Commentary*, 8th edn (LexisNexis, 2017) 49–59.

[26] Mark Forwood, 'Whither No-Fault Schemes in Australia: Have We Closed the Care and Compensation Gap' (2018) 43(3) *Alternative Law Journal* 166, 168.

[27] Joanna Kyriakakis, Tina Popa, Francine Rochford, Natalia Szablewska, Xiaobo Zhao, Jason Taliadoros, Darren O'Donovan and Lowell Bautista, *Contemporary Australian Tort Law* (Cambridge University Press, 2020) 39.

[28] Barker and others (n 21) 583.

[29] See, eg, Michael Rustad, 'Torts as Public Wrongs' (2011) 38(2) *Pepperdine Law Review* 433.

[30] Crown immunity has been abrogated by statute throughout the country. See, eg, Claims against the Commonwealth Act 1902 (Cth).

B. Illustrative Torts and Human Rights Issues

i. Trespass and Exceeding Lawful Authority

The trespasses can be described as rights-based torts,[31] which protect common law rights to bodily integrity (assault and battery), to liberty (false imprisonment), and to control over one's property (trespass to goods and land). The relevant protected interests are generally construed as inviolable in the sense that the slightest violation will, absent justification, constitute a wrong.[32]

A trespass requires a positive and voluntary act by a defendant that directly brings about interference with the plaintiff's protected interest, without lawful excuse. Interference must be immediate upon the defendant's wrongful act.[33] This means, for example, that trespass to land can be a mechanism for litigating environmental harms where a tangible pollutant comes immediately into contact with a plaintiff's land (for example, the direct deposit of waste), but not for more causatively complex pollution cases.[34] Unlike in the UK, in Australia a trespass may be either intentional or negligent, though the latter overlap with the distinct tort of negligence.[35]

Trespass has been used to defend human rights related to freedom from interference with one's person, including where that interference has arisen in the context of law enforcement. In such cases, the issue will often be whether the interference was justified because it accorded with law. Numerous cases demonstrate the potential for successful claims where law enforcement officers act beyond the scope of their lawful authority.[36] Research suggests common circumstances giving rise to tort claims against police in Australia include deliberate assaults and excessive use of force, improper strip searches and pressure point holds, and overzealous policing of demonstrations.[37]

However, tort law provides no remedy if police (or other statutory officers) have acted within the law, even if that law fails to conform to Australia's human rights obligations. For example, some Australian states have introduced anti-protest laws that enlarge police powers to search, 'move on', and detain protesters.[38] Given the limited rights protections in Australia, opportunities to challenge the human rights compatibility of such laws are limited.[39]

Litigants have sought to use false imprisonment to pursue action against the state for its historical practices of forcibly removing Aboriginal children from their families in order to assimilate them into non-Indigenous populations and break ties to

[31] Kyriakakis and others (n 27) 16, 225.
[32] Trespasses are actionable per se (without harm).
[33] *Hutchins v Maughan* [1947] VLR 131 (Supreme Court of Victoria).
[34] See, eg, *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182 (Court of Appeal).
[35] *Williams v Milotin* [1957] HCA 83, (1957) 97 CLR 465.
[36] See, eg, *Sleiman v Commissioner, New South Wales Corrective Services* [2009] NSWSC 304 (prisoner unlawfully segregated constituted false imprisonment).
[37] Janet Ransley, Jessica Anderson and Tim Prenzler, 'Civil Litigation against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability' (2007) 40(2) *Australian and New Zealand Journal of Criminology* 143, 148, 156.
[38] Aidan Ricketts, 'Anti-Protest Laws: Lock up Your Nannas' (2017) 42(2) *Alternative Law Journal* 107.
[39] As an exception, see *Brown v Tasmania* (2017) 261 CLR 328 (High Court of Australia).

their culture.[40] Such litigation, commonly referred to as 'Stolen Generations' litigation, has also encompassed tort claims in negligence, misfeasance in public office, and breach of statutory duties.[41] *South Australia v Lampard-Trevorrow* demonstrates the challenges of characterising the relevant state practices as false imprisonment.[42] The South Australian Supreme Court accepted that, in order to constitute false imprisonment, the form of restraint need not comport to what one would ordinarily describe as imprisonment, in the sense of a person being confined to a physically limited space.[43] However, the Court held that it was artificial to describe the care and protection given by a carer to a child, by virtue of their age and vulnerability, as restraint in the necessary sense, notwithstanding the broader context that led to the placement of the child in such care.[44] It expressed concern against expanding false imprisonment 'into previously untouched areas and situations, with unpredictable consequences'.[45] This decision has been criticised as unduly narrow[46] and may have negative implications for claims regarding other detention settings.[47]

Overall, the Stolen Generations tort cases illustrate the limits of civil litigation as a redress mechanism for this kind of state systemic abuse.[48] Instead, some states have introduced reparation schemes to address legacies of past injustices directed at the Stolen Generations.[49]

ii. Negligence and Innovative Rights Claims

The tort of negligence requires that a defendant owed the plaintiff a duty of care, that the duty was breached, and that the breach caused legally recognised damage. It encompasses indirect harms provided the defendant's breach can be said to be a 'necessary condition' of the plaintiff's injury, assessed on the balance of probabilities.[50] Compensable injuries include personal injury, property damage and economic losses. However, certain harms are not sufficient to ground an action in negligence, including

[40] For the history, see Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Commonwealth of Australia, 1997).

[41] Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32(2) *Melbourne University Law Review* 382; Honni Van Rijswijk and Thalia Anthony, 'Can the Common Law Adjudicate Historical Suffering?' (2012) 36 *Melbourne University Law Review* 618.

[42] *South Australia v Lampard-Trevorrow* [2010] SASC 56.

[43] *ibid* [282].

[44] *ibid* [307].

[45] *ibid*.

[46] Van Rijswijk and Anthony (n 41) 631–32.

[47] See, eg, *Darcy v New South Wales* [2011] NSWCA 413.

[48] Buti (n 41); Van Rijswijk and Anthony (n 41).

[49] See, eg, Government of South Australia, Department of Premier and Cabinet, 'Stolen Generations Reparation Scheme', https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme. The online resources used in this chapter were accessed on 20 September 2021.

[50] This is equated to the 'but for' test, though this test is not exhaustive: *March v Stramare* [1991] HCA 12, (1991) 171 CLR 506. In most jurisdictions, causation has been codified: see, eg, Civil Liability Act 2002 (NSW), ss 5-5E.

emotional distress (alone) short of a recognised mental health condition.[51] There are also statutory thresholds on the minimum severity of personal injury before certain damages can be recovered.[52]

The modern Australian approach to the existence of a duty of care in novel circumstances, as may arise in innovative human rights litigation, requires the court to apply a multi-factorial analysis to determine if there is a duty, often referred to as the 'salient features' analysis.[53] This involves a process of analogy from prior cases, emphasising those factors most salient in pressing towards, or away from, a duty of care. Salient features include reasonable foreseeability of harm, the control of the defendant over the relevant risk of harm, the vulnerability of the plaintiff to such harm, reliance by the plaintiff on the defendant, a defendant's assumption of responsibility towards the plaintiff, risks of indeterminate liability, and non-interference with legitimate business activities, among others.[54] It has been suggested that the adoption of the multi-factorial approach to duty in preference to blanket tests and fixed no-duty categories, may, broadly speaking, better align with human rights expectations as it allows judges to pay close attention to the facts of a specific case.[55] An example of a finding of a novel duty is discussed in our first case study on duties to asylum-seekers.

In determining duty for the purposes of a claim against public authorities, particular principles are emphasised. For example, Australian courts will consider whether finding a duty would encroach upon a public authority's 'quasi-legislative' or 'core policy-making' functions; would be inconsistent with relevant legislation (for example, by being inconsistent with a statute's concern with the community in general rather than particular individuals); and whether any purported scope of duty admits of judicial determination against relevant criteria of reasonableness.[56] A common law duty will not be imposed where it creates a conflict with a pre-existing statutory duty on the part of the defendant. This salient feature has been the basis for rejecting a duty of care, for example, on the part of child social services and police in relation to persons they are actively investigating.[57]

Also important is legislation which limits public authority liability in negligence.[58] Examples include requiring courts to consider a public authority's limited resources and broad range of functions when determining duty and breach, and in some states rendering unchallengeable decisions regarding the allocation of limited resources.[59] Some jurisdictions immunise a public authority's exercise, or failure to exercise, a statutory

[51] See, eg, *Tame v New South Wales* [2002] HCA 35, (2002) 211 CLR 317.

[52] See, eg, Wrongs Act 1958 (Vic), ss 28LE–28LF.

[53] See, eg, *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180 [94].

[54] See, eg, *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 259 ALR 616.

[55] Barker and others (n 21) 465–66.

[56] Justine Bell-James and Kit Barker, 'Public Authority Liability for Negligence in the Post-*Ipp* Era: Sceptical Reflections on the "Policy Defence"' (2016) 40(1) *Melbourne University Law Review* 1, 11–12.

[57] *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562; *Cran v State of New South Wales* (2004) 62 NSWLR 95. See also, *Hunter and New England Local Health District v McKenna* [2014] HCA 44, (2014) 253 CLR 270 (no duty to public on part of mental health facility for decisions to release patients from involuntary detention).

[58] For a summary, see Kyriakakis and others (n 27) 119–21.

[59] See, eg, Civil Liability Act 2002 (NSW), s 42.

power from civil liability, unless the relevant decision is so unreasonable that no reasonable public body would make it.[60]

Negligence has the potential to address numerous human rights violations because of its flexibility to encompass factually diverse harm scenarios and to develop in novel ways. A recent discussion, for example, concerns the potential for climate change litigation based on this tort.[61] Legal commentators have highlighted the challenges to doing so.[62] However, a recent landmark judgment demonstrates that Australian negligence law is amenable to such development. In *Sharma v Minister for the Environment*,[63] a group of eight representative children (aged 13–17) sought an injunction from the Federal Court to restrain the Minster from approving an extension to the amount of allowable coal extraction at the Vickery Coal Project, a mine located in New South Wales.[64] Bromberg J dismissed the children's application for injunctive relief because they had not demonstrated a reasonable apprehension that the Minister would breach her duty in whatever decision she took.[65] However, in a remarkable judgment, the Court put the Minister on notice as to her legal responsibilities under negligence law.[66]

Bromberg J held that the Minister has a duty to children residing in Australia to exercise reasonable care in deciding the application which, if approved, will facilitate the emission of 100 million tonnes of carbon dioxide (CO2) into the Earth's atmosphere.[67] Acknowledging that such a duty is novel, Justice Bromberg nonetheless held that salient features pointed strongly towards such a duty in respect of the personal harms, both physical and mental, that are a foreseeable consequence of an approval, in light of the material contribution this will make to the warming of the Earth's surface and thus the health impacts that plausible future world scenarios pose to the children within their lifetimes.[68] The Court's reasoning emphasised the children's vulnerability, and indeed their innocence, in respect of the future risks they face; the Minister's control over those risks; their reasonable reliance upon her; and the coherence of a common law duty with the statutory scheme under which the Minister acts.[69] In a moving part of the judgment, Bromberg J stated:

> It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of

[60] *ibid* s 43A.
[61] Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the Next Generation of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793–844.
[62] *ibid* 820–25.
[63] *Sharma v Minister for Environment* [2021] FCA 560.
[64] Such an approval was required under federal environmental protection laws.
[65] *Sharma* (n 63) [492]–[512].
[66] *ibid* [503]–[505].
[67] *ibid* [7] and [491].
[68] *ibid* [247]–[257]. The Court rejected any duty to prevent property damage and pure economic loss: [148].
[69] *ibid* [258]–[427].

> nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.[70]

While the duty of care in this case has been carefully limited to the coal extraction application in question, it undoubtedly has implications for other approvals that would generate similar or greater CO2 emissions. Coupled with the recent decision in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd*,[71] which held that an Australian company was liable in negligence to Indonesian seaweed farmers for damage to their seaweed crops and livelihoods caused by an oil spill in the Timor Sea, the ways in which the tort of negligence can ground causatively complex, future-oriented, and transnational environment harm claims in Australia, is coming into clearer view.

iii. Nuisance and Environmental Harms

Another tort positioned to address environmental pollution is nuisance. Private nuisance is 'an unlawful interference with a person's use or enjoyment of land or some right over, or in connection, with it'.[72] An interference is unlawful if it is objectively substantial and unreasonable. It may involve material damage to the plaintiff's land – such as might be caused by flooding or pollution. Or, it may involve intangible interferences, such as noise, dust and pollutants, which affect the amenity a person is entitled to expect.[73] In cases involving material damage, any damage that is more than trivial will generally suggest a nuisance.[74] In cases involving interference with amenity, the court will weigh up various factors (such as locality, intensity of the interference, undue plaintiff sensitivity, and reasonableness of the defendant's activity) to determine whether the interference goes beyond what neighbours ought to endure in the interest of social cohabitation.[75] Nuisance overlaps in complex ways with negligence and it is possible for the same facts to constitute both torts.[76]

Given its concern with indirect interferences with public rights, land use and enjoyment, nuisance can be re-characterised as a type of environmental regulation that requires a polluter to internalise the social costs of their activity. It has some advantages over negligence in that it does not require the plaintiff to establish a duty of care or (in some instances) show fault on the part of the defendant.[77] Challenges to its use for human rights redress, however, arise from the tort's concern with 'interests *in* land rather than the interests of those living *on* the land'.[78] Not all interests are therefore

[70] *ibid* [293].

[71] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237.

[72] *Hargrave v Goldman* [1963] HCA 56, (1963) 110 CLR 40, 59. The distinct tort of public nuisance allows the Attorney-General to bring an action where public rights have been interfered with. An individual may bring a claim where they have experienced some 'special damage' above that of the general public: see Kyriakakis and others (n 27) 391–95.

[73] See, eg, *Robson v Leischke* (2008) 72 NSWLR 98, [2008] NSWLEC 152 [54].

[74] *St Helen's Smelting Co v Tipping* (1865) 11 ER 1483 (House of Lords).

[75] To a lesser degree, these factors also play a role in material damage cases.

[76] See, eg, *Miller v Jackson* [1977] QB 966, 985–86 (Court of Appeal Civil Division).

[77] Liability fixes strictly on the creator of the nuisance, as well as those who adopt, authorise, or continue a nuisance.

[78] Barker and others (n 21) 186.

protected. For example, the tort does not encompass a right to be free from view (privacy).[79] Another consequence is that plaintiffs only have standing to sue if they enjoy exclusive possession of land; mere licence is insufficient.[80]

Australia also has complex federal, state and territory environmental protection legislation.[81] The protection of the environment in Australia is broadly treated as a matter of public interest undertaken principally by the state, through the executive's role in environmental planning, decision-making, and oversight.[82] Despite this, some provisions allow civil proceedings to be brought in order to remedy environmental breaches, either by privately affected individuals[83] or (more commonly) by the relevant public regulator seeking civil penalties for breach.[84]

C. Joint Liability

More than one party can be liable for the same tort, as explained below. Importantly, joint liability principles increase the viability of tort law as a human rights remedial mechanism by allowing multiple possible parties to be financially responsible for remedies.

i. Vicarious Liability

Vicarious liability means one person is financially liable for the tort of another. Generally, it operates to render both people concurrently liable, rather than by immunising the direct tortfeasor. It arises where a particular relationship exists between the tortfeasor and another, the most significant being employer-employee.[85] Employers are vicariously liable where an employee (not an independent contractor) commits a tort in the course of their employment. It is a form of strict liability and is crucial if Australian civil law is to function as a form of human rights redress, both practically (in terms of enabling the financial viability of many claims) and normatively (in terms of its tendency to incentivise structural changes at an organisational level aimed at harm minimisation).

Under common law, an employer cannot be vicariously liable for the torts of an employee that result from the exercise of an independent discretion conferred by law. This encompasses certain conduct by government officers such as magistrates, police, and prosecutors, among others.[86] This principle has been abrogated to varying extents by statute in all jurisdictions in relation to police[87] and, in some instances,

[79] *Victoria Park Racing & Recreation Grounds v Taylor* [1937] HCA 45, (1937) 58 CLR 479.
[80] *Hunter v Canary Wharf Ltd* [1997] AC 655 (House of Lords).
[81] The principal federal law is the Environment Protection and Biodiversity Conservation Act 1999 (Cth).
[82] Douglas Edgar Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 2014) 589.
[83] See, eg, Environmental Protection and Biodiversity Conservation Act 1999 (Cth) s 475 (allowing actions seeking injunctions and remedial orders).
[84] See, eg, *ibid* ss 481–85.
[85] Other categories are principal-agent and business partnerships.
[86] Barker and others (n 21) 757–58.
[87] See, eg, Australian Federal Police Act 1979 (Cth), s 64B.

more broadly.[88] Nonetheless, it retains some potential to limit civil litigation to remedy public officer torts.

An open question for a time in Australia was whether and when vicarious liability extends to intentional crimes.[89] The issue arose particularly in the context of institutional child sexual abuse litigation. The High Court in *Prince Alfred College Incorporated v ADC* has recently confirmed that there is no categorical exclusion of such wrongs from the remit of vicarious liability.[90] While the Court chose not to follow Canada and the UK in developing a tailored approach to such cases,[91] it has demonstrated how orthodox rules of vicarious liability enable similar considerations as those emphasised in those jurisdictions to be taken into account. This includes how the employer positions the employee in relation to the victim such as to enable them to offend, raising issues of relational authority, power, control and intimacy.[92] The Australian position therefore provides reasonable scope for such claims to proceed.

ii. Non-Delegable Duty

Non-delegable duty operates to preclude a person from immunising themselves from liability to another for negligent harm by delegating a task to a third party (such as to independent contractors). It operates in limited special relationships characterised by relational control and vulnerability such as: hospitals to their patients; schools to their pupils; and prison and detention facilities to their detainees.[93] A non-delegable duty does not constitute an indemnity against harm and there is authority that it does not extend to situations where the delegate commits intentional criminal harms.[94] However, if a person has a duty in negligence law to control a third party and fails to do so, that person can be liable for their failure to control the other. While the general rule is that a person has no duty to prevent another from doing damage to a third,[95] certain special relationships characterised by a high degree of control over the safety of another can give rise to it. One example is the duty of a prison authority to control inmates and protect against even intentional assaults in prisons.[96]

iii. Accessory Liability

Accessory liability arises where one person contributes to the wrong of another. Australian courts have rarely elaborated on the principles of accessory liability specifically (as opposed to joint liability generally), most likely due to the ways in which wider principles of vicarious liability and of direct personal liability for certain torts can capture secondary participants, rendering accessory principles unnecessary.[97]

[88] See, eg, Law Reform (Vicarious Liability) Act 1983 (NSW), ss 7–8.
[89] See, eg, *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511.
[90] *Prince Alfred College Incorporated v ADC* [2016] HCA 37, (2016) 258 CLR 134, 159.
[91] *ibid* 153–60.
[92] *ibid* 159–60.
[93] Kyriakakis and others (n 27) 416–24.
[94] *Lepore* (n 89).
[95] *Smith v Leurs* [1945] HCA 27, (1945) 70 CLR 256, 262.
[96] See, eg, *Price v NSW* [2011] NSWCA 341 [35].
[97] Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2016) 98–104.

Nonetheless, accessory liability arises in Australian tort law where a person procures or authorises a wrong, or where they participate in a common design. Procurement requires conduct that seeks to bring about a particular outcome,[98] by inducing, inciting, encouraging, persuading, or counselling another to commit the wrong.[99] A person will also be liable where they authorise another to commit a wrongful act by granting authority in a situation involving control over another.[100] Finally, a common design exists where a person has 'assisted the commission of the tort by another person … pursuant to a common design with that person … to do an act which is, or turns out to be, tortious'.[101] This requires a common agreement to exist between the parties[102] and a person's contribution to the plan to be more than *de minimus*.[103]

Apart from these categories, whether accessory liability arises based merely (and without more) upon assisting the tort of another is more contentious. Mere assistance liability has been rejected in the UK,[104] but the position in Australia remains unsettled.[105]

D. Remedies

The main remedy in a tort litigation is compensatory damages, which aims to put the claimant in the position they would have been had the tort not occurred.[106] Australian courts can also impose nominal and exemplary damages where appropriate. The latter seeks to punish the defendant where they have 'shown a conscious and contumelious disregard for the plaintiff's rights'.[107] Courts can also impose injunctions that require a defendant to do, or cease to do, something. Injunctions are particularly relevant to nuisance claims.

With this overview in mind, we now move to explore the link between human rights and civil litigation in a more contextualised way through two case studies.

IV. Case Studies

A. Rights in Detention: Australian Asylum-Seeker Cases

i. Onshore Detention and International Human Rights Law

Australia's treatment of asylum-seekers, particularly those arriving by boat, is one of the country's highest profile human rights issues.[108] Since the 1970s, thousands of

[98] *ibid* 122.
[99] Henry Cooper, 'Liability for Assisting Torts' (2017) 41(2) *Melbourne University Law Review* 571, 574.
[100] Hazel Catty, 'Joint Tortfeasance and Assistance Liability' (1999) 19(4) *Legal Studies* 489, 495.
[101] Cooper (n 99) 574. See, eg, *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, [2015] 2 WLR 694 [55], [37].
[102] *Thompson v Australian Capital Television Pty Ltd* [1996] HCA 38, (1996) 186 CLR 574, 581.
[103] *Sea Shepherd* (n 101) [57].
[104] *ibid*.
[105] Cooper (n 99) 578–80.
[106] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (House of Lords (Scotland)).
[107] *XL Petroleum (NSW) v Caltex Oil (Aus)* [1985] HCA 12, (1985) 155 CLR 448, 471.
[108] For example, this is the first issue explored by Human Rights Watch, 'World Report of 2021: Australia Events of 2020' www.hrw.org/world-report/2021/country-chapters/australia.

asylum-seekers have sought protection in Australia by arriving by boat without prior authorisation. Most have been found to be refugees, and have been permitted to settle in Australia. From 1992, federal law has authorised the mandatory detention of such people until their claims are processed, or until they leave the country.[109] The laws were said to preserve the integrity of Australia's immigration system and to deter boat arrivals, in light of political and community concerns over their numbers.[110] The constitutionality of the regime was confirmed by the High Court in *Chu Kheng Lim v Minister for Immigration*.[111] However, mandatory detention has repeatedly been found in breach of Australia's international human rights obligations, particularly the right to be free from arbitrary detention.[112] Aspects of the regime have also been challenged under tort law, to which we now turn.

ii. Onshore Detention and Tort Law

S v Department of Immigration[113] was a case brought by two asylum-seekers who had been held for about five years in immigration detention. Both men had been diagnosed with severe depression. They sued the Commonwealth for negligence, alleging a breach of its duty of care towards them in its failure to take adequate care for their mental health whilst in immigration detention.

The Commonwealth conceded that it had a non-delegable duty to ensure proper care for the detainees' welfare, a concession 'properly made'.[114] The Commonwealth had a duty to ensure 'that a level of medical care [was] made available which is reasonably designed to meet [the applicants'] health care needs including psychiatric health care',[115] and 'that the requisite level of mental health care was in fact being provided and with reasonable care and skill'.[116] Finn J found that the psychiatric care that had been provided within the Baxter Detention Centre was 'clearly inadequate', and that the Commonwealth failed 'to inform itself of this inadequacy'.[117] Indeed, he found the Commonwealth's arrangements of outsourcing health services required review.[118]

SBEG v Commonwealth[119] demonstrates the limits of the practical usefulness of this duty of care to immigration detainees. The appellant claimed to have suffered major psychiatric illness due to the Commonwealth's alleged negligence in keeping him in immigration detention despite his worsening illness. He sought an injunction to compel the Commonwealth to place him into a less severe form of detention. His action failed. His detention was, after all, 'required by statute'. Hence, '[t]o the extent that his disorder

[109] Janet Philips and Harriet Spinks, 'Immigration Detention in Australia' (Parliament of Australia, Department of Parliamentary Services, 2013) 5–8.
[110] *ibid*.
[111] *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64, (1992) 176 CLR 1.
[112] The first of many such cases was *A v Australia*, Communication No 560/1993 (3 April 1997) UN Doc CCPR/C/59/D/560/1993.
[113] *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549.
[114] *ibid* [199]. See earlier text regarding non-delegable duties.
[115] *ibid* [212].
[116] *ibid* [220].
[117] *ibid* [258].
[118] *ibid* [259].
[119] *SBEG v Commonwealth* [2012] FCACF 189.

is attributable only to lawful detention, it could not give rise to liability in tort'.[120] The Court accordingly found that no negligence had been made out, so the Commonwealth could not be compelled to devise a less severe form of detention which was more amenable to the preservation of his mental health. *SBEG* demonstrated the lack of a remedy under tort when the wrong is effectively driven by detention which is per se authorised, and even demanded, under statute.[121]

iii. Offshore Detention and Human Rights Law

From 2001–2007, and since 2012, unauthorised maritime arrivals (UMAs) to Australia are forcibly transferred to other states for the processing of their refugee claims. Around 4000 people have been transferred offshore under these arrangements.[122] UMAs were initially detained in centres located on Nauru and Manus Island in Papua New Guinea (PNG), which were run by companies contracted by the Australian Government. The detention centre in Manus Island was shut in 2017 and all UMAs were relocated to other parts of PNG.[123] In Nauru, UMAs are no longer housed in a closed detention centre, though an open centre run by contractors to the Australian Government remains available for them. The constitutionality of the offshore processing and detention scheme in Nauru (and presumably PNG) was upheld in *M68/2015 v Minister for Immigration and Border Protection*.[124]

Even if a UMA is found to be a refugee, they are not permitted to settle in Australia. They are instead offered a visa to remain in either PNG or Nauru, or to move to a third state if it will accept them. Hundreds of transferees sent by Australia to PNG and Nauru remain there. There are limited facilities for refugees and under-developed immigration, integration and employment programmes. There have also been instances of violence, including sexual violence, against UMAs in both states. For example, Reza Berati, an Iranian asylum-seeker, was murdered in the Manus Island detention centre by local PNG men in February 2014.[125]

The ongoing situation has led to well-documented serious health issues amongst the asylum seekers. One transferee, Hamid Kehazaei, died on Manus Island in 2014 from a heart attack after an infection in his leg was not treated adequately.[126] The situation is even more acute regarding mental health.[127] There have been many instances of

[120] *ibid* [18]. See also [48].

[121] Gabrielle Holly, 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation', (2020) 21(3) *German Law Journal* 549, 560. See also *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, (2015) 255 CLR 514 (legality of detention at sea).

[122] Tania Penovic, 'Boat People and the Entrenchment of Exclusion' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights in Australia: Volume 1* (Thomson Reuters, 2021) 373, 383.

[123] Holly (n 121) 553.

[124] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, (2016) 257 CLR 42.

[125] Eric Tlozek, 'Reza Bharati Death: Two Men Jailed over 2014 Murder of Asylum Seeker at Manus Island Detention Centre' *ABC News* (Australia, 19 April 2016), www.abc.net.au/news/2016-04-19/reza-barati-death-two-men-sentenced-to-10-years-over-murder/7338928.

[126] Penovic (n 122) 383.

[127] Medecins sans Frontieres, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Detention on Nauru* (December 2018).

self-harm, including self-immolation, in some instances resulting in death.[128] In 2017, the UN Human Rights Committee expressed concern about:

> The conditions in the offshore immigration processing facilities in Papua New Guinea (Manus Island) and Nauru that also hold children, including inadequate mental health services, serious safety concerns and instances of assault, sexual abuse, self-harm and suspicious deaths …; and about reports that harsh conditions compelled some asylum seekers to return to their country of origin despite the risks that they face there …[129]

Australia retains considerable responsibility under international law for the UMAs' human rights despite their location outside Australia.[130] To what extent can those responsibilities be enforced under Australian tort law?

iv. Offshore Detention and Tort Law

In September 2017, the Supreme Court of Victoria approved a AUD 70 million settlement in *Kamasaee v Commonwealth of Australia*, a claim in negligence and false imprisonment brought as a class action by UMAs on Manus Island against the Commonwealth Government and private contractors involved in the PNG detention regime.[131] The claim arose from the continued detention of men after their detention had been ruled to be unlawful under PNG law by the PNG Supreme Court.[132] The settlement was made without admission of liability, and halted those proceedings. Hence, the case sheds no light on the existence or extent of any duty of care owed by Australia and the contractors in respect of that regime, or on whether the detentions constituted false imprisonment.

The Commonwealth has not conceded the existence of a duty of care in relation to the offshore processing regime, notwithstanding the *Kamasaee* settlement. Nonetheless, the Federal Court found that such a duty of care existed in *Plaintiff S99/2016 v Minister for Immigration and Border Protection*.[133] In *S99*, the applicant had been transferred to Nauru by Australia, and had been found to be a refugee. She became pregnant after being raped on Nauru, and was seeking an abortion. Abortion is illegal on Nauru, so the Australian Minister for Immigration arranged for her transfer to PNG for the relevant health services. The applicant sought an order that the Commonwealth had a duty of care to procure a safe and legal abortion for her, and that the procurement of an abortion in PNG would breach that duty as it would be neither legal nor safe.[134] Hence, the action concerned an anticipated breach of duty rather than a completed breach.

[128] Ben Doherty and Helen Davidson, 'Self-Immolation: Desperate Protests against Australia's Detention Regime' *The Guardian* (Australia, 3 May 2016), www.theguardian.com/australia-news/2016/may/03/asylum-seekers-set-themselves-alight-nauru.

[129] United Nations Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Australia' (9 November 2017) UN Doc CCPR/C/AUS/CO/6 [35(a)].

[130] Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 'Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru' (Commonwealth of Australia, August 2015) Ch 2 and [5.15]–[5.21].

[131] *Kamasaee v Commonwealth of Australia*, S CI 2014 6770 [2017] VSC 537.

[132] *Nama v Pato* [2016] PGSC 13 (26 April 2016).

[133] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, 243 FCR 17.

[134] *ibid* [22].

While the Commonwealth accepted that the only way she could attain an abortion was if it procured one for her, it did not accept the existence of the claimed duty of care.[135] No argument was made regarding her human rights, but a failure to provide her with a safe and legal abortion in all of the circumstances would breach her rights to be free from torture, inhuman and degrading treatment, and her rights to bodily integrity as an aspect of her right to privacy.[136]

The Minister's statutory role arguably mitigated against any finding of a duty of care. '[G]enerally a public authority under no statutory obligation to exercise a power comes under no common law duty to exercise it'.[137] Nevertheless, exceptions exist to that principle. In identifying a novel duty, Bromberg J relied on the salient features of the case, as outlined earlier in this chapter.

Under the Migration Act 1958 (Cth), the Commonwealth is empowered rather than compelled to enter into agreements to provide assistance in relation to offshore processing.[138] With regard to offshore processing on Nauru, the Commonwealth provided substantial assistance, including in regard to the 'conditions of existence' of the applicant (and to UMAs generally):

> The applicant … was dependent upon the Commonwealth for her very existence. The same may be said of each of the persons in the class. Again, it is not necessary that I consider whether a general duty of care was owed by the Commonwealth to the applicant to maintain her basic needs whilst a refugee on Nauru. However, the applicant's dependence upon the Commonwealth for her very existence provides the contextual framework in which the specific duty of care claimed should be properly considered.[139]

In finding a duty, Bromberg J relied upon the clear harm that would ensue if the applicant failed to gain access to a safe and legal abortion. Also important were the fact that she was completely reliant on the Minister in order to attain such an abortion, who in turn had control over whether such a procedure would take place.

Importantly, the Minister had already voluntarily taken steps to procure an abortion for her. For Bromberg J, the Minister's assumption of responsibility was a 'potent factor in favour of the exercise of the putative duty',[140] and provided

> a clear basis for distinguishing the superimposition onto statutory powers of a duty to persons in an indeterminate class of persons, from such a superimposition in the particular case of a plaintiff that has received and acted upon an assumption of responsibility.[141]

This indicates that a duty may not have existed had the Government done nothing to help the applicant. If so, that would not accord with Australia's positive international human rights obligation to assist the applicant in the circumstances.

[135] *ibid* [111].
[136] See, eg, United Nations Human Rights Committee, 'General Comment 36: Art 6 (Right to Life)' (3 September 2019) UN Doc CCPR/C/GC/35 [8].
[137] *Plaintiff S99/2016* (n 133) [216]. See also *Council of the Shire of Sutherland v Heyman* [1985] HCA 41, (1985) 157 CLR 424, 459–60.
[138] *Plaintiff S99/2016* (n 133) [248].
[139] *ibid* [252].
[140] *ibid* [263].
[141] *ibid* [242].

Ultimately, Bromberg J found that there was a real risk that an abortion performed in PNG would be illegal under PNG law, and that the applicant might be prosecuted if it proceeded.[142] He also found that PNG lacked sufficient resources to ensure that any abortion would be performed safely, given the applicant's complex medical conditions.[143] Hence, the Minister could not discharge his duty to the applicant by procuring the abortion in PNG.[144] Bromberg J accordingly made an order compelling the Minister to fulfil the duty by ensuring that the abortion did not take place in a location where it was illegal or where the medical facilities were inadequate.[145] While the Court did not direct that the applicant be brought to Australia, there was no practical alternative.[146] The Commonwealth did not appeal the judgment.

Since *S99*, a number of other interlocutory court decisions have compelled the Commonwealth to provide for medical treatment unavailable on Nauru, which have forced it to bring people from Nauru to Australia for medical treatment. Such cases have concerned psychiatric treatment for suicidal children,[147] and another woman seeking a legal and safe abortion.[148]

B. Harmful Labour Conditions: Australian Asbestos Exposure Cases

Under international human rights law, states are required to protect individuals from harmful human rights impacts by other entities, including their employers. If workers are exposed to poor occupational health and safety standards, or abusive labour practices, states must act to provide remedies against the employer. Failure to do so will breach Article 7(b) ICESCR, the right to safe and healthy working conditions, as well as the right to health. The most severe breaches can give rise to issues regarding the right to life.[149]

The various Australian jurisdictions provide for extensive remedies for workplace injuries under both tort law and the no-fault workers' compensation schemes outlined earlier. Our focus here is on harm caused to workers by exposure to asbestos in the workplace. Asbestos was mined in Australia from 1918 to 1979, and asbestos products were manufactured until the 1980s. Australia had the highest per capita use of asbestos in the world in the 1950s.[150] Yet, asbestos causes deadly cancers: Australia was reported in 2017 as having one of the highest rates of mesothelioma, a cancer caused

[142] *ibid* [304].
[143] *ibid* [387]. For example, the applicant suffered from epilepsy.
[144] *ibid* [405].
[145] *ibid* [500].
[146] *ibid* [270].
[147] *FRX17 as Litigation Representative of FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63, 262 FCR 1; *AYX18 v Minister for Home Affairs* [2018] FCA 283.
[148] *DCQ18 v Minister for Home Affairs* [2018] FCA 918.
[149] See United Nations Committee on Economic, Social and Cultural Rights, 'General Comment 23: On the Right to Just and Favourable Conditions of Work (Art 7)' (7 April 2016) UN Doc E/C.12/GC/23.
[150] John Lawrence O'Meally, 'Asbestos Litigation in New South Wales' (2007) 15(3) *Journal of Law and Policy* 1209, 1209–10.

by asbestos, in the world.[151] These circumstances arguably give rise to a duty under human rights law for Australia to exercise due diligence to protect or provide a remedy for affected people against delinquent asbestos companies.[152] Tort law provides one such avenue.

i. Duty of Care and Causation

Australian courts have been prepared to find that severe harm from asbestos was foreseeable by manufacturers, who breached their duty by failing to warn relevant people, such as employees and consumers, of the risks entailed in asbestos exposure. For example, in *Amaca v Booth*, the Court of Appeal of New South Wales (NSW) held that the appellant companies should have foreseen the possibility of serious harm to the respondent, a mechanic, as a result of his working with their products, brake linings containing asbestos, from as early as 1953.[153] The companies therefore owed a duty to take reasonable steps to prevent the respondent from suffering that foreseeable harm.[154]

Interestingly, in *Booth*, documents demonstrated that one of the respondents:

> was, over many years, concerned that a realistic warning, reflecting the risks perceived, might have a significant, if not dramatic, effect on the market for its products. In considering what was a reasonable response of the company, it was legitimate to take into account those considerations.[155]

It is doubtful that such a concession to commercial imperatives would be acceptable under human rights law as a justification for harms affecting rights to health and life. In any case, the lower court judge was not bound to come to the same assessment as the companies with regard to the reasonableness of its response. He did not: 'His conclusion that the warning was entirely inadequate was open on the material before him'.[156]

The main problem that has undermined the efficacy of tort law for asbestos victims is the difficulty in establishing causation. It can be difficult to ascertain the actual cause of a disease amongst multiple possible causes. If a court takes a strict approach towards causation, it can be very difficult to gain any remedy regardless of how negligent a manufacturer may have been.

[151] Australian Institute of Health and Welfare, 'Mesothelioma in Australia in 2018' (Australian Mesothelioma Registry, August 2019).

[152] The UN Committee on the Rights of the Child has discussed the need for States Parties to control asbestos production and raise awareness of its toxicity: see United Nations Convention on the Rights of the Child, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of the Russian Federation (25 February 2014) UN Doc CRC/C/RUS/CO/4-5 [20]. The existence of the proposed international duty in the Australian context could be frustrated by temporal considerations, given most exposures arose prior to Australia becoming a party to relevant human rights treaties.

[153] *Amaca v Booth* [2010] NSWCA 344 [188].

[154] *ibid* [216].

[155] *ibid* [227].

[156] *ibid.*

In *Amaca v Ellis*,[157] the High Court heard an appeal from asbestos manufacturers concerning their liability for the death of one Paul Cotton from lung cancer. He had been a heavy smoker, and had also been exposed to asbestos during his employment with appellant employers. The lower courts had found that it was more likely than not that the appellants' negligence towards Cotton as an employer had been a significant cause of his cancer. This decision was overturned unanimously by the High Court. It found that it could only be established that asbestos exposure may have caused the cancer, rather than that it was likely to have caused it.[158] In particular, the chances that it was caused, even only in part by asbestos, was lower than the chance that it was caused by smoking alone, according to expert evidence.[159]

The UK courts have dealt with the causation issue by adopting an explicit policy approach. In *Fairchild v Glenhaven Funeral Services*, the House of Lords conceded that mesothelioma might be caused by a single fibre of asbestos.[160] In those circumstances, the Court found that it was almost impossible for a plaintiff to succeed under traditional tests of causation, which effectively reduced the duty of care placed on asbestos manufacturers to a nullity.[161] Hence, the House of Lords adopted a new approach in asbestos cases of deciding that the causation limb could be satisfied if the relevant breach of duty materially increased the risk of harm that ensued. While the Court conceded that its test could result in causation being found where there was none, policy imperatives of fairness and morality lay in favour of avoiding impunity.[162]

Australian courts have not followed *Fairchild*.[163] However, the approach in the High Court appeal in *Amaca v Booth*[164] may yield similar results by a more orthodox route. John Booth was a retired motor mechanic who suffered from malignant mesothelioma. He sued the manufacturers of brake linings which contained asbestos, which he had worked with from 1953 to 1983. He had also briefly come into contact with asbestos on two other occasions, in connection with home renovations in his youth, and in loading a truck in 1959.[165]

The High Court affirmed the lower courts' decisions which had found liability based on a theory that mesothelioma was caused by the 'cumulative effects' of exposure. It had therefore been found more likely than not that Booth's illness was caused by multiple asbestos exposures, of which the defendants were found to be likely to have made a 'material contribution' to the harm in the order of 44 per cent of the disease burden, for which they were liable to pay compensation.[166] The test of 'material contribution to harm' applied in *Booth* is an orthodox basis for proving causation in cases involving disease caused by the cumulative effect of exposure to a hazard. It operates as an alternative to the necessary condition of harm test that ordinarily applies to proof of causation

[157] *Amaca v Teresa Ellis as Executor of the Estate of Paul Steven Cotton* [2010] HCA 5, 240 CLR 111.
[158] *ibid* [14].
[159] *ibid* [30].
[160] *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 [7].
[161] *ibid* [62].
[162] *ibid* [33].
[163] See, eg, *Amaca v Booth* [2011] HCA 53, (2011) 246 CLR 36 [41].
[164] *ibid.*
[165] *ibid* [9].
[166] *ibid* [25].

in negligence.[167] *Booth* moreover demonstrates that under this test, where it applies, all material exposures to asbestos, above those that are trivial or *de minimis*, will be deemed a cause of mesothelioma.

Of particular importance is that the lower court accepted expert evidence which rejected the idea that asbestos could be caused by a single fibre. Hence, the possible medical fact that necessitated the policy-driven decision in the UK in *Fairchild* nine years earlier was not accepted in *Booth*. Findings of causation under traditional tests were therefore more available in *Booth* compared to *Fairchild.*

Booth may be distinguished from *Ellis* by the nature of the relevant disease: mesothelioma is caused by asbestos, whereas lung cancer, at issue in *Ellis*, has multiple known causes. Linking causation to asbestos is obviously harder in the latter instance.[168]

Booth was an appeal from the Dust Diseases Tribunal of NSW. This specialist court was established in 1989 to expedite asbestos matters, given that many plaintiffs were dying before their cases could be heard.[169] A number of innovations within the Tribunal streamline decision-making. For example, there is no limitations provision, which is appropriate as asbestos-related diseases can take many years to manifest.[170] Section 13(6) of the Dust Diseases Tribunal Act 1989 (NSW) enables the Tribunal to reconsider its decisions, which is important as medical understanding of asbestos-related diseases is always improving. Section 25(3) enables evidence in one case to be used in another to save on costs, given the similarity of evidence that has historically been led on matters such as foreseeability and causation. Section 25B enables the Tribunal to prevent the re-litigation of certain general matters without leave. For example, the crucial rejection of the 'single fibre' theory in *Booth* may not be relitigated in a future case without leave. The Tribunal also has extraterritorial jurisdiction with regard to interstate torts, though some of its rules, such as that regarding limitations, only apply to events in NSW.[171] Under section 32, appeals only lie in respect of questions of law rather than fact. This rule facilitated the failure of the *Booth* appeals, as many of the appellants' grounds of appeal were found to concern factual findings which were not open to appeal.

The creation of the Tribunal, the first of its kind in the world,[172] is an example of a measure which has facilitated remedies for victims, ensuring some sort of compensation for harms to their rights to health and life, in many cases by their employer. Some Australian jurisdictions have also sought to facilitate victim redress in dust (and tobacco) disease cases by excluding such claims from the application of civil liability provisions that otherwise impose hurdles on establishing liability, or that limit the quantum of damages in negligence,[173] or via statutory exceptions where causation can be satisfied notwithstanding that a cause cannot be proven to be a necessary condition of harm.[174]

[167] *Allianz Australia Ltd v Sim WorkCover Authority* [2012] NSWCA 68.
[168] *Booth* (n 163) [40].
[169] O'Meally (n 150) 1212.
[170] Dust Diseases Tribunal Act 1989 (NSW), s 12A.
[171] O'Meally (n 150) 1217.
[172] *ibid* 1213.
[173] See, eg, Wrongs Act 1958 (Vic), s 28LC.
[174] See, eg, Civil Liability Act 2002 (NSW), s 5D(2).

ii. Parent Company Liability

A series of asbestos cases in the 1980s and 1990s have also contributed to the development of Australian principles of parent company direct liability for negligent harms caused by subsidiaries.

In *CSR v Wren*,[175] the NSW Court of Appeal upheld a finding that CSR Ltd was liable in negligence to an employee of its wholly owned subsidiary, Asbestos Products Pty Ltd (APPL). The plaintiff was an APPL employee who had contracted mesothelioma from inhaling asbestos fibres at APPL's asbestos cement manufacturing factory, which was poorly ventilated, during the 1950s. The Court upheld the lower court decision that CSR owed a duty of care to staff of its subsidiary, due to the degree of closeness between the parent and its subsidiary, which it described as 'over and above that expected in the case of a holding company'.[176] Relevant facts included that APPL management staff were all CSR staff, who routinely entered the factory work area, and CSR's apparent close control over APPL expenditure. CSR's duty of care was established through the demonstration of foreseeability of harm to the class of plaintiffs, and proximity between APPL employees and CSR (demonstrated through the company's control, assumption of responsibility, knowledge of risk, as well as the employees' reliance). Policy considerations also played a role,[177] including that a duty would not involve indeterminate liability, would not interfere with beneficial commercial activity, and would not overextend the tort of negligence.[178]

In *James Hardie Pty Ltd v Hall*,[179] the plaintiff had developed mesothelioma from exposure to asbestos dust in the 1940s while handling asbestos cement products at his New Zealand workplace. He sought damages against two related Australian companies that supplied and exported the asbestos products, one of which was a 95 per cent shareholder in the New Zealand employer company. The trial judge found a duty of care on the basis that the totality of the relationship between the three companies showed that they formed a single enterprise.[180] That finding was overturned on appeal. The Appellate Court held that control of the parent over the subsidiary was an insufficient basis to pierce the corporate veil; more was needed to demonstrate that the subsidiary's separate legal identify was a 'mere façade'.[181] *Wren* was differentiated on factual grounds, emphasising the earlier case's overlapping staff and their management of relevant day to day operations.[182]

In *CSR & Anor v Young*,[183] the NSW Court of Appeal confirmed that CSR Ltd had a duty of care to the plaintiff who had contracted mesothelioma in the 1950s through exposure to asbestos tailings as a result of living near asbestos mines managed by CSR's subsidiary, Australia Blue Asbestos (ABA). CSR's close relationship with its subsidiary,

[175] *CSR v Wren* (1997) 44 NSWLR 463.
[176] *ibid* 470.
[177] *ibid* 484–86.
[178] *ibid* 480.
[179] *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554.
[180] *ibid* 560–65 (summarising findings of the trial court).
[181] *ibid* 584.
[182] *ibid* 583.
[183] *CSR & Anor v Young* (1998) Aust Torts Reports 81–468 (Supreme Court of New South Wales).

pursuant to management agreements, led Giles J to describe the subsidiary as 'in truth "merely a conduit for the parent"'.[184] Relevantly, CSR had accepted a duty to ABA employees but had challenged its extension to those living near ABA's mines. The Court held that CSR's duties to the local residents were co-extensive with ABA's.[185]

While two of the cases above were successful, the principles of parent company direct liability they establish is narrower than those developed in the UK in recent years.[186] The restrictive approach of the Australian cases poses challenges to the prospects of Australian tort law to address human rights abuses associated with Australian corporate business activity. This is a significant issue in the contemporary global economy, given the well documented governance gap that pertains to transnational corporate human rights abuses. While often identified as a question of 'piercing the corporate veil', direct parent company liability to those harmed by subsidiaries is a doctrinally distinct way in which the limited liability of legally separate companies in a corporate group can be overcome in relation to victims of corporate torts. The Australian jurisprudence that tends to collapse those issues can be criticised and the UK approach preferred.[187] It remains to be seen whether Australian courts will be influenced by recent UK jurisprudence. While *Wren* was decided when proximity was still a touchstone in determinations of duty of care under Australian common law, as Warren notes, the case is 'not wedded to the proximity analysis',[188] and demonstrates a synergy with the contemporary salient features approach. It thus may retain cogence in the contemporary Australian tort law landscape.

V. Conclusion

Numerous human rights are unenforceable in Australia due to the failure of most Australian jurisdictions to incorporate international human rights standards into domestic law. A potential avenue for the indirect enforcement of human rights lies through tort law. Overlaps between human rights and tort principles are evident in the torts of trespass, and the indirect torts of negligence and nuisance.

Examples of the use of tort law for the enforcement of human rights have arisen with regard to the health of asylum-seekers in detention, as well as against the manufacturers of asbestos products. With regard to the former, courts have been willing to identify novel duties of care to uphold claims. With regard to the latter, special courts such as the NSW Dust Diseases Tribunal have been created to expedite and facilitate claims, and courts have been prepared, at least in the *Booth* circumstances, to modify strict rules of causation to enable claims.

[184] *ibid* 64, 953.
[185] *ibid*.
[186] See, eg, Ryan J Turner, 'Revisiting the Direct Liability of Parent Entities Following *Chandler v Cape plc*' (2015) 33(1) *Company and Securities Law Journal* 45; Stefan HC Lo, 'A Parent Company's Tort Liability to Employees of a Subsidiary' (2014) 1 *Journal of International and Comparative Law* 117.
[187] Lo, *ibid*, 123–24.
[188] Marilyn Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2016) 40 *Modern University Law Review* 657, 684.

Unsurprisingly, tort law provides no remedy when a human rights abuse is authorised by statute. Furthermore, Australian courts have exhibited a distinct conservatism, for example regarding parent company liability, which limits the capacity of tort law to provide remedies for human rights breaches. That conservatism may reflect the comparative lack of a human rights culture in Australia. Australian tort law in the hands of the Australian judiciary is unlikely to evolve into a potent human rights remedial weapon in the absence of a greater domestic commitment to human rights on the parts of Australian legislatures and executive governments.