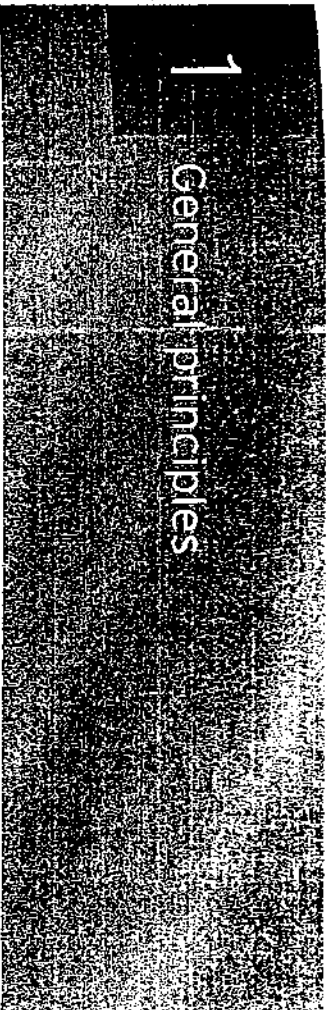


APPENDIX A

Textl by Cooke



MOVE 1 - INTRODUCE THE SUBJECT MATTER

Introduction

This chapter will attempt to explain some of the basic principles which underlie the law of tort. Introductory chapters in textbooks are notoriously difficult for students to understand as they are written by people with a detailed knowledge of the subject for people who are new to it. The author will inevitably assume knowledge which the reader will probably not have. Readers are therefore asked to read the chapter and pick up what they can but not to agonise at this stage over material which appears impenetrable. As you progress through the book you will be able usefully to refer back to the introductory chapter.

M1 S1 -

M1 S2 -

What is a tort?

A tort is a civil wrong in the sense that it is committed against an individual (which includes legal entities such as companies) rather than the state. The gist of tort law is that a person has certain interests which are protected by law. These interests can be protected by a court awarding a sum of money, known as damages, for infringement of a protected interest. Alternatively, by the issuing of an injunction, which is a court order, to the defendant to refrain from doing something. There are increasingly limited circumstances where the victim of a tort may avail himself of self-help. Other branches of law also defend protected interests and the relationship between these and tort law will be discussed later. (See 'The boundaries of tort'.)

M1 S3 -

MOVE 2 - DETAILS AND EXPAND THE SUBJECT MATTER.

Elements of a tort

Tort is a remarkably wide-ranging subject and probably the most difficult of all legal areas to lay down all-embracing principles for. The approach that will be taken at this stage is to lay down a general pattern and then to show some of the main deviations from this pattern.

M2S1

The basic pattern

The paradigm tort consists of an act or omission by the defendant which causes damage to the claimant. The damage must be caused by the fault of the defendant and must be a kind of harm recognised as attracting legal liability.

This model can be represented:

act (or omission) + causation + fault + protected interest + damage = liability.

M2S1 (a) - An illustration of this model can be provided by the occurrence most frequently leading to liability in tort, a motor accident.

Example

A drives his car carelessly with the result that it mounts the pavement and hits B, a pedestrian, causing B personal injuries. The act is A driving the vehicle. This act has caused damage to B. The damage was as a result of A's carelessness, i.e. his fault. The injury suffered by B, personal injury, is recognised by law as attracting liability. A will be liable to B in the tort of negligence and B will be able to recover damages.

Variations

M2S2 - We will be looking at these elements of a tort in more detail shortly. Now we will look at some of the common variations on the basic model. The elements of act (or omission) and causation are common to all torts. There are certain torts which do not require fault. These are known as torts of strict liability.

Example

An Act of Parliament makes it compulsory for employers to ensure that their employees wear safety helmets. The employer may be liable in a tort called breach of statutory duty if the employee does not wear a helmet and is injured as a result. This is the case even if the employer has done all they could to ensure the helmet was worn. (See also 'The mental element in tort'.)

M2S3 - In some cases the act or omission of the defendant may have caused damage to the claimant but the claimant may have no action as the interest affected may not be one protected by law. Lawyers refer to this as *damnum sine injuria* or harm without legal wrong.

Example

A opens a fish and chip shop in the same street as B's fish and chip shop. A reduces his prices with the intention of putting B out of business. A has committed no tort as losses caused by lawful business competition are not actionable in tort.

Just in case you thought this was straightforward, there are also cases where conduct is actionable even though no damage has been caused. This is known as *injuria sine damno* and where a tort is actionable without proof of damage it is said to be actionable *per se*.

Example

If A walks across B's land without B's permission then A will commit the tort of trespass to land, even though he causes no damage to the land.

The interests protected

Personal security

M2S4 - People have an interest in their personal security. This is protected in a number of ways. If one person puts another in fear of being hit, then there may be an action in the tort of assault. If the blow is struck, then the person hit may have an action in the tort of battery. A person whose freedom of movement is restricted unlawfully may be able to sue for *false imprisonment*. If personal injury is caused negligently, then the claimant may have an action in the tort of negligence.

M2S5 (a) - The scope given to the personal security interests expands as society becomes more advanced. Until the last century little attention was paid to the psychiatric damage that can be caused to a person. Someone who witnesses a traumatic event can incur serious mental suffering. The advance of psychiatric medicine and changing views on what is tolerable have led the courts to protect certain aspects of mental suffering, such as nervous shock caused by witnessing a negligently caused accident. This is an area of law which is still being worked out by the courts in the context of disasters, such as the Hillsborough football stadium disaster.

M2S5(b)

In the area of medical treatment, patients have become less willing to accept the word of doctors without question. Litigation in this area has led to the courts having to examine difficult issues such as consent to treatment and the right to life. Here law and morality are inextricably mixed. What, for example, is the legal position if a doctor needs to give a blood transfusion to a patient who will die if they do not receive it, but the patient refuses to have the blood transfusion because of his religious beliefs?

Interest in property

M2S6 - Property in the broad sense of the word is protected by tort law. A person has an interest in their land which is protected by a number of torts such as *nuisance*, *Rylands v Fletcher* and *trespass to land*. Interests in personal property are protected by torts such as *trespass to goods* and *conversion*. Where clothing or a car is damaged in a negligently caused accident, then a person may have an action for damages in negligence.

Economic interests

M2S7 - Tort law will give limited protection to economic interests where the defendant has acted unlawfully and has caused economic loss to the claimant. These are known as the economic torts. Such protection is limited because the common law has been cautious in drawing the line between lawful and unlawful business practice. This is a line which is largely left to statute to draw.

M2S8 - A controversial area, and one which will be dealt with in the chapter on negligence, is the extent of liability for negligently caused economic loss. This is an area where tort and contract intersect. (See 'The boundaries of tort'.)

A distinction is drawn between economic loss which is consequential on physical damage (to the person or to property) and 'pure' economic loss.

Example

A is driving an excavator and negligently severs an electricity cable which leads to a factory. The factory is forced to close down for a day and production is lost as a result. Any production which had been started at the time of the interruption of the supply and is damaged will be classed as damage to property and can be claimed in a negligence action. Any production which has not been started but cannot be carried out and results in loss of profit will be classed as economic loss and will be irrecoverable. Do you think that this distinction makes sense?

M2S9 - Reputation and privacy

Increasingly important are a person's interests in their reputation and privacy. Where a person's reputation is damaged by untrue speech or writing, then they may have an action in the tort of *defamation*. There is no specific tort in English law to defend privacy but there have been some interesting developments in this area which are dealt with in the chapter on privacy.

M2S10 - The role of policy

Lawyers are used to dealing in concepts such as duty of care, remoteness of damage and fault, etc. When cases are analysed in these terms and there is held to be no liability as there was no duty or the damage was too remote, or the defendant was not at fault, this is referred to as formal conceptualism or black letter law. What is frequently concealed in this terminology is the policy reason behind the decision. Although the lawyer must know the relevant rules of law, and these will be the main area of study in this book, a clear picture will not emerge unless the student is aware of the policy issues which have shaped the decision.

Take another look at the example given in the previous section. The court has the choice of allowing the loss to lie on the factory owner by saying that A is not liable, or of shifting the loss to A by holding him liable. The court's decision will be explained by saying, for example, that A owes no duty to the factory owner in terms of certain kinds of loss or that certain kinds of loss are too remote. But the decision

can also be explained in terms of two policy factors. The courts are concerned with opening the floodgates of litigation: for example, if the electricity cable was connected to 50 factories. Closely connected to this is the role of insurance. Most damages in tort are in practice paid by insurance companies. The court's decision will act as a signal to firms as to who will have to insure against this risk. The decision may also be based on who they think is the best insurer.

Traditionally, English judges did not refer to policy when giving decisions but they are now increasingly prepared to state these reasons. The floodgates argument has been prevalent in the development of the law on both nervous shock and the recovery of economic loss in negligence. When you study these sections bear in mind that one of the factors governing the legal rules imposed is the fear of the courts being swamped by a large number of actions and too heavy a burden being placed on the defendant or his insurers.

The role of insurance

M2S11 - Without insurance the tort system would simply cease to operate. Where a claimant is successful in an action, the damages will normally be paid by an insurance company.

In cases of property damage, insurance may take the form of 'loss' or first-party insurance, which covers loss or damage to the property insured from the risks described in the policy, whether or not the loss occurs through the fault of another party. There is also 'liability' or third-party insurance. This is a matter of contract between the insured and the insurer whereby the insurer promises to indemnify the insured against all sums the insured becomes liable to pay as damages to third parties. The third party must establish the insured's liability to them.

Both first- and third-party insurance are also relevant in cases of personal injuries or death. Three types of first-party insurance are relevant. These are life assurance, personal accident insurance and permanent health insurance. An accident victim who recovers tort damages in respect of the accident will not normally have any first-party insurance money received deducted from the damages. Third-party insurance operates in a similar way to cases of property damage.

The operation of the insurance system can be seen in relation to motor accidents.

Example

A has taken out first- and third-party (comprehensive) insurance on his car with B insurance company. C has taken out similar insurance on his vehicle with D insurance company. Due to C's negligent driving, A's car is damaged and A suffers serious personal injuries. If A successfully sues C for negligence, then under the third-party insurance of C, D will become liable to pay A's damages. If C's car was damaged in the accident, then D may be liable to reimburse C for this damage under C's first-party insurance.

If A's negligence action was unsuccessful, then he could claim for the damage to his car from B under his first-party insurance, but unless he carried personal accident insurance (which is relatively rare) he would go uncompensated for the personal injuries.

In practice, most cases do not go to court but are settled by the parties. The largest element in A's claim in the above example is likely to be for his personal injuries. If his lawyers have assessed his claim as £500,000, any action may well be settled if fault is not at issue.

The fact that a party is insured is, strictly speaking, disregarded by the court when liability and quantum of damages are assessed. However, it is suspected that the tort system would be unable to operate without the underpinning of insurance and that the presence of insurance may have shaped some liability rules. Not many people would be able to meet a damages award of £500,000 and, without insurance, it would be likely that many claimants would go uncompensated or receive only partial compensation. The fact that the defendant is insured in certain types of cases means that the court can set the standard of care at a higher level so as to compensate more people. This is particularly the case where insurance is compulsory, such as in motor accident cases. A driver must carry third-party insurance by law. Similarly, an employer must be insured against any damages an employee may recover against him in respect of injury at work.

This advantage has a price in the control which insurance has over the conduct of litigation. The insurer's right of subrogation combined with the terms of insurance policies will give the insurer complete control over the litigation process, although the case will be brought in the insured's name.

Example

A runs into the back of B's car while B is stationary at traffic lights. This causes £1,000 worth of damage to B's car. B is comprehensively insured and the insurer pays for the repairs to the car. Normally, A would allow his insurers to deal with the claim and assuming liability is admitted, either a 'knock for knock' agreement between the insurance companies would operate, or A's insurers would reimburse B's insurers. If A decides not to use his insurance company as he thinks it would badly affect his no-claims discount, then A can be sued for the £1,000 by B's insurers exercising their right of subrogation. The action would be brought in B's name.

The insurance principle can also be seen at work in professional indemnity policies. A solicitor or accountant will carry indemnity insurance in case they are sued for professional negligence. The damages in such actions can be very high and insurance is essential to the operation of the system.

Insurers pay out 94 per cent of tort compensation and in some areas of tort law have a considerable influence on the tort system. This may happen in one of two ways. The first is the impact on legislation and judicial decisions. If legislative change is being contemplated, the impact on insurance will be taken into account by Parliament. Impact on judicial decisions is harder to assess, as few judges acknowledge the effect of insurance on their decisions. (But see *Barker v Corus UK Ltd* [2006] 3 All ER 785.) The second is in the actual operation of the tort system. As the insurance companies are effectively the paymasters, they have a large say in its operation. Insurers determine which cases go to court. Only 1 per cent of all claims made go to court and far fewer go on appeal and appear in the law reports. Which cases are appealed may be determined by the insurer and one factor in their decision not

to appeal may be that they want a point of law to remain uncertain. Other cases are settled by the insurers. For reasons of cost an insurer may wish to settle a case where in strict legal terms the claim might not succeed in court. Conversely, a party might be coerced by the insurer into accepting less on a settlement than they would have received if they had gone to court.

The rules of law as stated in this book may bear little resemblance to the practice of tort law, particularly in the area of personal injuries.

Fault and strict liability

As we saw previously, it may not be sufficient for claimants to prove that the defendant's act or omission caused them damage in order to succeed in an action. It may also be necessary for the claimant to show that the defendant was at fault. Fault in tort means malice, intention or negligence. Where fault does not have to be proved it is said to be a strict liability tort.

The history of fault in tort law is connected to policy and stems from the nineteenth century. At this time the availability of insurance was extremely limited and damages would usually be paid personally by the defendant. In order to protect developing industries, the courts evolved a system of tort that usually required proof of fault in order for an action to succeed. The economic argument in favour of fault was supported by the moral and social arguments that fault-based liability would deter people from anti-social conduct and it was right that bad people should pay. One consequence of this development was that workers in industry who suffered industrial accidents were largely deprived of compensation.

English law has never succeeded in ridding itself of this nineteenth-century legacy and fault remains as the basis of most tort actions. Understanding of the principle is made more difficult as the spread of insurance has meant that the courts have been able to increase the standard of conduct required in certain situations, while retaining the language of moral wrongdoing. It has been shown that many errors by car drivers which are classed as being negligence (fault) are statistically unavoidable. Where this is the case, the moral and deterrent arguments for fault are certainly reduced if not extinguished. Further problems are caused by the fact that a tort judgment is rarely paid by the defendant themselves but by their insurer. What has happened is that fault has often moved away from being a state of mind to being a judicially set standard of conduct which is objectively set for policy reasons.

Example

A was operated on by surgeon B. Something went wrong during the operation and A is now incapable of looking after himself. A sues B for negligence. If the action is successful, then A will be awarded £500,000 damages. The question in the case will be whether B was negligent (at fault). At what level should the court set the standard? In order to compensate as many victims of medical accidents as possible, the standard should obviously be set very high. But if this is done, the damages which are paid out by the health authority will remove money which could otherwise be used for patient treatment. The standard will therefore be set at a level which is dictated by policy.

M2S12

There are three states of mind which a student needs to be aware of in tort law. These are *malice, intention and negligence*. Where a tort does not require any of these it is said to be a tort of strict liability.

Malice

M2S13 - Malice in tort has two meanings. It may be: (a) the intentional doing of some wrongful act without proper excuse; (b) to act with some collateral or improper motive. It is (b) which is usually referred to.

In the sense of (b) above there is a basic principle that malice is irrelevant in tort law. If a person has a right to do something then his motive in doing it is irrelevant.

Bradford Corporation v Pickles [1895] AC 587

The defendant extracted percolating water in undefined channels with the result that the water supply to the plaintiffs' reservoir was reduced. The defendant's motive in doing this was to force the plaintiffs to buy his land at his price. The action failed, as the defendant had a right to extract the water. As he had such a right, his motive, even if malicious, was irrelevant.

There are two groups of exceptions to this basic principle:

- 1 Where malice is an essential ingredient of the tort, for example, in *malicious prosecution*, the claimant must prove not only that the defendant had no grounds for believing that the claimant was probably guilty, but also that the defendant was actuated by malice. The reason for this requirement is that policy in this area favours law enforcement over individual rights. The result of the requirement is that there are few successful cases of malicious prosecution.
- 2 There are also torts where malice may be relevant to liability. For example, in *misance malice* may convert what would have been a reasonable act into an unreasonable one.

Christie v Davey [1893] 1 Ch 316

Plaintiff and defendant lived in adjoining houses. The plaintiff gave music lessons and this annoyed the defendant. In retaliation the defendant banged on the wall and shouted while the lessons were in progress. The plaintiff was held to be entitled to an injunction because of the defendant's malicious behaviour. (See also Chapter 16.)

The distinction between this case and *Bradford Corporation v Pickles* is difficult. *Pickles* was thought to have established a principle that a lawful act does not become unlawful when done with malice. However, this case was concerned with water rights to which special rules apply and was concerned with a prospective, rather than existing, amenity. This is not to suggest that malicious interference with an existing amenity is always actionable.

Also, in defamation cases, malice may destroy a defence of fair comment or qualified privilege and may affect the defence of justification where spent convictions are in issue. (See Chapter 20.)

Intention

M2S14 - The meaning of intention varies according to the context in which it is used. Intention is relevant in three groups of torts:

- 1 Torts derived from the writ of trespass. Here intention means where a person desires to produce a result forbidden by law and where they foresee it and carry on regardless of the consequences. The defendant must intend to do the act, but need not intend harm. For example, if a person has a fit and strikes another person this would not amount to trespass to the person. But the test will catch the practical joker who intends to frighten a person but ends up causing them severe nervous shock.
- 2 In cases of fraud and injurious falsehood. In these torts the defendant must make a statement which they know is untrue.
- 3 In cases of conspiracy. If X and Y combine together and act to cause injury to Z, then Z will have an action provided that they can prove that their primary motive was to cause them damage. If the primary motive of X and Y was to further their own interests, then even if they realised that their act would inevitably damage Z, they will not be liable in conspiracy.

Crofter Hand Woven Harris Tweed Co Ltd v Velich [1942] AC 435

Yarn for making Harris Tweed was spun by mills on Harris. Crofters who made Harris Tweed began importing cheaper yarn from the mainland. The millworkers' union ordered their members at the docks to refuse to handle the imported yarn after the millworkers' employers had refused a pay rise because of competition from the crofters. The crofters' action for conspiracy failed as the union's predominant motive was to advance the interests of its members and not to damage the crofters.

Negligence

M2S15 Negligence in tort has several meanings. It may refer to the *tort of negligence* or it may refer to *careless behaviour*. It is in the latter sense that the word is used here. In this sense it does not refer to a state of mind. When a court finds that a person has been negligent it is making an *ex post* assessment of their conduct. A person who totally disregards the safety of others but does not injure them is not guilty of negligence, although they may be morally reprehensible. On the other hand, the person who tries their best, but falls below the standard set by the court and causes damage, will be liable.

The standard set is an *objective* one. The court will apply the test of what a 'reasonable man' would have done in the defendant's position. One effect of this test is that no account is taken of individual disabilities.

Nettleship v Weston [1971] 2 QB 691

The defendant was a learner driver who was given lessons by the plaintiff. The plaintiff was injured as a result of the defendant's negligent driving. The court held that all drivers, including learner drivers, would be judged by the standards of the average competent driver.

The setting of the standard depends on what the objective of the negligence formula is. If the objective is to compensate the claimant for their loss, then it is clearly in the claimant's interests to set the standard as high as possible. But if the objective is to deter the defendant, then it is counter-productive to set a standard which is too high to be attainable. Research has shown that the standard set for drivers is unattainable, even by safe drivers, with the result that the defendant may have been unable to avoid the accident but is still classed as having been negligent.

Strict liability

M2S16 - Whereas fault is a positive idea, strict liability is a negative one. It means liability without fault. In the last century the emphasis was placed by the courts on fault-based liability, and strict liability was generally frowned on. Some areas of strict liability have survived and Parliament has created others.

No coherent theme links these areas. There are historical relics such as strict liability for trespassing livestock, which harks back to a predominantly agricultural society. The rule in *Rylands v Fletcher* represents a largely failed attempt by the judiciary to deal with the problems created by the Industrial Revolution. The rule that an employer is vicariously liable for the negligence of their employee in the course of their employment, in the absence of any fault on the part of the employer, is a pragmatic response to a particular problem.

In the area of industrial safety, Parliament has passed legislation which imposes strict as opposed to fault-based liability on an employer.

The standard of liability imposed, even within the context of strict liability, varies from tort to tort. There is one example of absolute liability, where no defence is available. This is the Nuclear Installations Act 1965. Most actions, however, permit some defences or exemptions from liability.

What is common to all tort actions is the idea of causation. The claimant must always prove that the defendant caused their injury. There are frequently calls for drug manufacturers to be made strictly liable for injury caused by their products. If this were to occur then the claimant would no longer have to prove negligence but would still be faced with the difficult task of proving that it was that drug which caused their injury. (See the Consumer Protection Act 1987, Chapter 11.)

Objectives of tort

M2S17 - Tort law has two main objectives: compensation and deterrence. It is generally thought that tort law normally has no punitive function and that this job is performed by the criminal law. There are very limited circumstances, though, where *exemplary damages* may be awarded in tort and these do have a punitive function. (See Chapter 27.) The fact that the judiciary has kept the award of this type of damages within such narrow parameters means that they are wary of tort law performing this function.

Deterrence

M2S17(a) Individual deterrence

The theory behind individual deterrence is that the possibility of a civil sanction, such as damages, will cause the defendant to alter their behaviour and avoid inflicting damage.

This theory depends on two factors. First, will the sanction actually affect the defendant? We have seen that most awards of damages are paid out by insurance companies. The only financial effect of an award of damages on an insured defendant may be to increase the premium which they have to pay for their insurance. But reputation is also important to some people. A finding of negligence against a doctor or lawyer may adversely affect their career. The second factor is whether the defendant could have avoided the accident. We have seen that it is impossible for a car driver to avoid committing driving errors which the law will label as negligence. If a person cannot avoid an error then they cannot be said to be deterred by a liability rule.

It is now generally accepted that individual deterrence has little part to play in many tort actions. The legal reason that most people drive as safely as they can is the fear of criminal, not civil, sanctions. Individual deterrence does have a role where a person's professional reputation is at stake, and the reason why most newspapers try to avoid libelling people is the fear of an action for defamation.

General or market deterrence

M2S17(b) - Academic work on the economic effects of tort liability rules has renewed interest in the role of deterrence in tort law. This form of deterrence is not individual deterrence but what is known as market deterrence. The idea behind this is that tort law should aim to reduce the costs of accidents. This is achieved by imposing the costs of accidents on those who participate in accident-causing activities.

Example

If a car manufacturer were to be charged the accident costs of cars in which seat belts were not installed, then the price of cars without seat belts would reflect the accident costs. Rather than impose a law which states that cars must be fitted with seat belts, the market, through the cost of cars without seat belts, would enable people to make a choice between the cheaper cars with seat belts or the more expensive ones without.

Compensation

M2S18 - One of the major aims of tort law is to compensate those who have suffered personal injury. The present system shifts losses from the claimant to the defendant when the defendant has been shown to have been at fault. In recent years this system has come under increasing criticism as being an inefficient method of compensating accident victims.

There are three systems which provide for accident victims. These are tort law, public insurance (social security) and private insurance. The largest part in

compensation is now played by public insurance. A person who is injured in an accident may become entitled to payments by the state, such as sickness benefit.

Tort damages are distinguished from payments by the state in that the former are payable only on proof that a person caused an injury and was at fault in doing so. The latter are payable on the occurrence of an event and according to need.

The third system is private insurance. This plays a small but growing part in accident compensation. Personal accident insurance or permanent health insurance may be taken out against the possibility of indisposition. This is still relatively expensive in the United Kingdom but is being taken up by employers for their key personnel.

A number of criticisms are levelled at the tort system. It is very expensive to administer in comparison with social security. It has been calculated that the cost of operating the tort system accounts for 85 per cent of the sums which are paid to accident victims. For claimants the system is unpredictable, as they do not know whether they will receive any compensation or not. This results in pressure on claimants to settle actions for less than they would receive if they went to trial. The system is also slow and a claimant may have to wait years before receiving compensation. The more serious the accident then generally the longer the claimant has to wait. Finally, damages are usually paid in a lump sum. This creates difficulties as inflation may erode the value of the award and no account can be taken of improvement or deterioration in the claimant's medical condition.

The civil justice system was subjected to a radical overhaul as a result of the Woolf Report on *Access to Justice* (1996). The reforms were introduced in 1999 with a view to saving costs and speeding up litigation. There are now three 'tracks' for cases. The small claims track is for claims of under £5,000 (or under £1,000 for non-pecuniary damages in personal injury cases). A 'fast track' applies to cases (other than small claims) where the value is under £15,000, the trial is likely to last no more than a day and oral evidence is restricted. The 'multi track' applies to cases not allocated to the other two tracks. Judges are given greater powers in case management in order to attempt to bring down costs and speed up cases.

Alternative systems of compensation

M2S18(a) We have already seen that tort damages are only part of the overall picture of compensation for accidents and are a junior partner to state benefits. The position in England and Wales is complex, with a number of possible avenues of compensation open to an injured person. They may be able to obtain tort damages, be covered by private insurance and be entitled to state benefits. Because of the haphazard and uncoordinated way in which the system has evolved, the victim may end up being over-compensated. On the other hand, a victim may have no insurance cover, not be able to prove fault against a person and may not have a sufficient contribution record to claim contributory state benefits. This victim will only have the safety net of income support benefit at subsistence level to support them.

One other source of compensation which should be mentioned at this point is the Criminal Injuries Compensation Scheme. Payments may be made for injuries

directly attributable to crimes of violence. If the victim goes on to obtain tort damages, then any award made under the scheme must be repaid.

In some countries the role of compensating for accidents has been removed from the tort system. In New Zealand, a comprehensive no-fault accident compensation scheme was set up in 1974 to replace tort damages in personal accident cases. Where a person suffers injury through accident they make a claim through the Accident Compensation Commission. The victim may claim up to 80 per cent of earnings before the accident. Payments are made on a weekly basis and can be adjusted to reflect inflation and the victim's medical condition. The victim does not have to prove fault and a wider range of accidents are therefore covered by the scheme than by tort law. The system of periodical payments avoids problems which are caused by lump sum awards of damages in tort cases. In tort cases it is not generally possible for the court to take into account future inflation or to allow for changes in the victim's medical condition. Under the scheme, a victim may also claim for non-pecuniary losses in the form of an independence allowance for persons who have a permanent disability above 10 per cent. Such awards are low compared with those which would be received under a tort system. The advantage of the scheme is that all accident victims receive some compensation and are not put to the trauma, cost and delay of having to sue someone. The drawbacks which have been discovered from experience of running the scheme are the cost, which is clearer and therefore more political than the tort system, and the possibilities of fraud. A further problem, which is common to most legal compensation systems, is that a distinction is drawn between the covered area of personal injury by accident (including occupational disease) and the uncovered areas of disease and ageing. A number of writers have pointed out that in a no-fault compensation scheme the concentration should not be on the cause of the accident but on the disability itself.

The New Zealand experience has been that a no-fault system that tries to replace tort damages across the board is extremely expensive and the government was forced to reduce the level of benefits available.

In England, the thalidomide tragedy in the 1960s and 1970s aroused interest in the question of compensation. The Pearson Commission (Royal Commission on Civil Liability and Compensation for Personal Injury, Cmd 7054 (1978)) was established and the report proposed a no-fault scheme limited to accidents caused by motor vehicles. Some 188 other proposals were made but it is doubtful whether any reform can be traced directly to these. A no-fault scheme does involve spending money and the implementation of such a scheme depends on the political will to do so. Opponents of such schemes argue that the removal of tort actions will remove an important deterrent to careless conduct.

Despite the political neglect of the Pearson Report, compensation schemes are now back on the political agenda. Disasters such as Zeebrugge, Piper Alpha and the Hillsborough football stadium disaster have given publicity to the plight of victims. The question of taking medical 'accidents' out of the legal system has been discussed for a number of years. The option of a comprehensive no-fault scheme was dismissed in 2003 when the cost was estimated at £4 billion per annum.

The Department of Health has now come up with a proposal for an alternative to tort law in the form of the NHS Redress Bill 2005. The Bill establishes an NHS redress scheme which will enable the settlement of certain low value claims arising after

adverse incidents without the need for court proceedings. The scheme applies only to claims under £20,000 and will apply where the claim is by the estate or dependants of a deceased patient. The objectives are to take the 'heat' out of disputes and remove any financial disadvantage from the patient. (See Chapter 14.) This is not a 'no-fault scheme', as it applies only to claims in tort, but it is anticipated that it will remove the need for patients to go to court in low cost claims.

At least one influential writer in England now favours the abolition of the action for personal injuries and its replacement by private insurance. Professor Atiyah, who was once a strong supporter of state-funded no-fault schemes, has now declared his lack of faith in such schemes and his faith in the market. (1997) *The Damages Lottery*, Hart.) This view is open to the criticism that the poor would be excluded from a market-based system.

A compensation culture?

M2S18(c) There is renewed interest in the personal injury litigation system, partly as a result of claims that England and Wales now have a 'compensation culture' similar to that in the United States. A compensation culture can be loosely defined as a propensity to respond to injury by legal redress. Such claims have been partly driven by changes in the way in which the legal system operates in this area.

Lawyers have become increasingly adept at identifying and developing claims for personal injuries. Increasing specialisation and the foundation of the Association of Personal Injury Lawyers in 1990 has enabled lawyers to coordinate claims and share expertise.

Social awareness of the right to claim has been raised, partially as a result of the ability of lawyers to advertise and the advent of claims management companies who act as intermediaries between the client and lawyers and aggressively advertise the availability of claims.

The availability of conditional fee arrangements (CFAs), which allow lawyers to work for clients on a 'no-win no-fee' basis may also be a factor. CFAs mean that if a claim fails the client does not have to pay his own lawyer's costs. An insurance policy can be taken out to cover the costs of the other side. If the claim is successful, the claimant lawyer's own costs and a 'success fee' can be recovered from the defendant. The financial risks of litigation have therefore been considerably reduced. CFAs became widely available after the implementation in 2000 of the Access to Justice Act 1999. However, such figures as are available do not suggest that claims in accident cases have risen appreciably since then.

One problem with assessing the current position is that there has been no comprehensive empirical study of the system since the Pearson Commission in 1978 and the Oxford Study in 1984. (D. Harris et al. (1984) *Compensation and Support for Illness and Injury*, OUP.) Recent research on the available data suggests that although there has been a threefold rise in claims since 1978, this is not a recent phenomenon and claims for accidents (as opposed to disease) have not risen in the last decade. The total number of claims has risen by 3 per cent in the past five years. However, there has been a 5 per cent fall in the number of accident claims in the same period. Motor claims have remained stable, whereas clinical negligence claims have fallen by 34 per cent

and employer's liability claims by 21 per cent. Motor accident claims account for 70 per cent of the total. What has increased is the total cost of claims, probably as a result of changes to the way damages are calculated and legal costs. (R. Lewis, A. Morris and K. Olliphant, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' (2006) 2 JPIL 87-103.)

The view of the UK government, following the conclusions of its Better Regulation Task Force in *Better Routes to Redress* (Cabinet Office Publications, 2004) is that the compensation culture is a myth but that the public's erroneous belief that it exists results in real and costly burdens. This underlies the rather strange provision of s 1 of the Compensation Act 2006 which, according to the government, simply reiterates the current test for breach of duty in negligence and then establishes a framework for the regulation of claims management companies.

Section 1 of the Act is intended to deal with the effect of negligence on social activities where people might be inhibited from involving themselves or allowing their hand to be used:

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity.

It is difficult to see what this will achieve, as there is stated to be no change to the common law test for breach of duty and the courts are already alert to this problem as is shown in cases such as *Tomlinson v Congleton District Council* [2003] 3 All ER 1122. (See Chapter 7.)

The boundaries of tort

M2S19 For reasons of space, this section will concentrate on the boundary between tort and contract. This is an area which has caused the courts considerable problems in recent years.

A number of distinctions between contract and tort can be offered, but it remains the case that there are still substantial areas of overlap between these two strands of common law liability. At best, it can be said that there are differences between contractual and tortious obligations, but that the two interact and complement each other and in many instances they overlap.

Legally imposed and voluntarily assumed obligations

One of the most commonly offered distinctions is that tortious duties are fixed by law, whereas the contractual obligations of the parties are fixed by the parties themselves. However, like most generalisations, this is apt to mislead. For example, many contractual obligations are legally imposed, not the least of which is the duty not to break a promise which forms the basis for a remedy for breach of contract. In addition, there are a number of contractual duties which can only be described as arising

by operation of law. For example, in the field of product liability, terms are implied in contracts for the supply of goods which owe little to voluntary choice. Sellers have terms of fitness for the purpose and satisfactory quality included in the contract by virtue of the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994).

Likewise, the courts are able to imply terms into contracts so as to make sense of the arrangement. Ostensibly the purpose of such implication is to give effect to the presumed intent of the parties, but one might be forgiven for taking the view that the court is actually legislating by imposing duties upon the parties to the contract. Sometimes, a court may 'create' a contract for the parties. In such cases, the court would appear to have imposed an obligation upon the promisor. Frequently it will be found that the collateral contract device is used to fill a gap which has appeared in the law. For example, it was used to create liability in damages for negligent misrepresentations before the Misrepresentation Act 1967 was passed. It was also used to render liable the supplier of goods under a hire purchase contract for statements made by him during the course of negotiations. An explanation of these cases is that the court used the collateral contract as a means of disapproving of the defendant's conduct by ordering him to compensate the plaintiff for the loss he had suffered. In this way, the court effectively imposed an obligation upon the defendant.

Just as it is misleading to say that contractual obligations are voluntarily assumed, it is also a mistake to ignore the relevance of voluntary choice when considering the issue of tortious liability. Some tortious duties arise out of a relationship which has been voluntarily entered into. For example, the duties owed by an employer to his employees and that owed by an occupier of premises is partly dependent on the relationship between the parties. Moreover, liability for economic loss caused by negligence prepared advice will involve a consideration of the relationship between the adviser, the advisee and any relevant third party and it will be necessary to take account of any contractual undertaking which might have been given. In contract the statement is made voluntarily and must be supported by consideration from the recipient. In tort the maker of the statement must voluntarily assume responsibility for it. The only distinction is that no consideration is required in tort.

While tortious duties are imposed by law, it does not always follow that they are unmovable, since it is possible for such duties to be modified by an agreement between the parties.

Consent

Does the distinction between contract and tort make sense if one approaches this question from the point of view of consent (i.e. that a contractual duty can only be imposed where a party consents, but a tortious duty may be imposed in the absence of consent)? Whether a contractual duty exists or not is determined on the basis of objective criteria, not on the subjective intention of the parties. This means that although consent plays a part in contract, it is not all-important. Conversely, in tort an occupier may play a role. Where a person is injured during a sporting contest, such as football, there may be no action in tort, as the injured person may have consented to the risk of injury by taking part in the contest. Tort law also imposes duties on an occupier of land to a visitor to the land. Whether a person is a visitor or not, and

therefore whether such a duty may be imposed, depends on the consent of the occupier to the presence of that person.

Strict and fault-based liability

M2S19(a)

A further generalisation is that contractual liability is strict whereas tortious liability is fault-based. Although it is true that many contractual duties are strict, there are many that require the defendant to exercise reasonable care and are therefore fault-based. Many tortious duties are said to be fault-based, but the problem is to decide what is meant by fault. It is clear that the word fault has different meanings. For example, very rigorous standards are imposed in areas where liability insurance is compulsory. Furthermore, there are a number of strict liability torts in which it is not necessary to show that the tortfeasor is blameworthy in causing harm to the claimant.

The interest protected when granting a remedy

M2S19(b)

The common law recognises a number of interests which it regards as deserving of protection. Traditionally, the fulfilment of expectations is perceived to be the function of the law of contract with the result that an award of contract damages is supposed to put the claimant in the position he would have occupied had the defendant's undertaking been fulfilled. The claimant's expectations may be protected in other ways, for example where a defaulting buyer is ordered to pay for goods he has agreed to purchase, or if the court grants a decree of specific performance. Compensating a claimant for wrongfully inflicted harm is seen to be the role of the law of tort and requires the claimant to be returned to the position they were in before the defendant's wrong was done. Accordingly, in general terms, tort damages are not supposed to take account of what would have happened to the claimant. Instead, damages are assessed on the 'out of pocket' principle.

Example

If A sold B a motor car for £5,000 which was worth £4,000 but A said it was worth £6,000. B's contract damages would in theory be the difference between what the car was worth and what he had been led to believe it was worth, i.e. £2,000. But B's damages in tort would be the amount required to put him in the position he was in before the tort was committed, i.e. £1,000.

But these distinctions are apt to mislead and it is important not to say that only the law of contract is concerned with expectations, and that only the law of tort is concerned with compensating wrongful harm. In some instances the so-called 'contract measure' is relevant in a tort action. For example where the claimant in a personal injuries case is awarded damages for loss of future earnings or where a solicitor has negligently drafted a will depriving the beneficiaries of their bequest.

The traditional role of tort law has been to protect people against damage to their person and property. This is done by making an award of damages for any loss

incurred by the victim. The problem comes, as in the above example, where tort is used to protect *economic* interests. Some people believe that this should be the role of contract and that tort should have no role to play. Contract law aims to make things better and tort to avoid making things worse. But consider the following case.

Ross v Caunters [1979] 3 All ER 580

The defendant solicitor acted negligently in the execution of a will, with the result that the plaintiff was unable to take a bequest under the will. The testator (person making the will) had a contract with the solicitor but the plaintiff did not, because of the contractual doctrines of consideration and privity. The court decided that the defendant was liable in the tort of negligence and the plaintiff was able to recover the value of his lost bequest from the solicitor. But was this a case of the solicitor making the plaintiff worse off or failing to make him better off? Would it not be easier in these circumstances to alter the law of contract so that there is a contract in favour of a third party (in this case the beneficiary)?

Some writers have pointed out that the extent to which contract protects the expectation interest is in practice limited by the rules which restrict the amount of damages which may be claimed. The two most important are the rules that a claimant may not recover items of loss which are too remote and the claimant must take reasonable steps to mitigate their loss. The effect of these rules is that in many cases a claimant will only be able to recover their reliance or *status quo* loss.

Concurrent liability

M2520 There are situations where a claimant may have a choice between contract and tort. If a person receives private medical treatment and is negligently injured, they may sue the doctor in negligence or for breach of contract. The substance of the action will not differ, as in negligence the doctor must take reasonable care and in contract there is an implied term that the doctor will take reasonable care. It is unlikely that the doctor will have guaranteed a cure, so there is no advantage to the claimant in suing in contract to protect their expectation interest. The damages in either case will be the same.

There are a number of technical distinctions between contract and tort. The limitation period (the time in which the claimant has to start proceedings) is different and there are different rules on when writs may be served outside the jurisdiction.

Change

The dividing line between the two areas is never static and a student can observe the changes from a historical perspective. The rigidity of contract law through the doctrines of consideration and privity may give rise to an expansion in tort law. This can be clearly observed in the law relating to defective buildings. (See Chapter 10.) As a purchaser of a defective building may not have a contract with the builder or a sub-contractor if there is no privity of contract, there may be no breach of contract action against the builder. To compensate for this perceived injustice, tort law developed an action in the tort of negligence against the builder.

However, the senior judiciary turned against this action and it was rejected. This has now led to developments in contract law to create a contract action in the case of sub-contractors.

The position of minors

M2521 As a general principle, anyone may sue in tort. A minor may bring an action through a next friend.

The position of minors as defendants has not been considered very much, probably because they would not normally be able to satisfy a judgment. In principle, there is no reason why a person of any age cannot be sued. In practice, it may be that the courts set the standard of care according to the age of the child (see Chapter 7), although in theory the standard of care in negligence is an objective one.

Damage caused before birth has always posed a problem in tort law. It was one of the principal hurdles that the parents of the thalidomide children had to face in their litigation. Legislation has since improved the position.

The Congenital Disabilities (Civil Liability) Act 1976 gives a child a cause of action where it was born disabled as the result of an occurrence which: affected the ability of either parent to have a normal healthy child; or affected the mother during the pregnancy; or affected the child in the course of its birth; or there was negligence in the selection or handling of an embryo or gametes for the purpose of assisted conception during treatment for infertility. In any of these cases the child must be born with disabilities which it would otherwise not have had.

The child's action is unusual as it is derived from a tortious duty to the parents. The defendant will be liable to the child if he would have been liable to the parent but for the fact there was no actionable injury to the parent.

The child's mother is not liable under the Act unless the injury can be attributed to her negligent driving of a motor vehicle.

Example

Christine became pregnant and suffered badly from nausea. She consulted her doctor, who prescribed a drug to relieve the nausea. Christine gave birth to a daughter who suffered from physical and mental disabilities. Both the doctor and the manufacturer of the drug owed a duty of care to Christine. If the doctor was negligent in prescribing the drug or the drug company in making or marketing it, then all the elements of a negligence action by Christine are present except damage. It is the baby who has suffered the damage and has the action under the Act. The stumbling-block will be causation. It will be necessary to prove that the drug was the cause of the child's disabilities.

Where the disability is a result of a pre-conception event which affected the ability of the parents to have a normal healthy child, the defendant is not responsible if either or both of the parents knew of the risk. If the child's father is the defendant and he knew of the risk but the mother did not, then the father will be answerable to the child.

MOVE 3 - CONCLUSION AND COMPLETE SUBJECT MATTER.

M3S1 -

A further layer of complexity has been introduced to tort law by the passing of the Human Rights Act 1998, which came into force in October 2000.

The United Kingdom was an original signatory to the European Convention on Human Rights, but until the Act the rights contained in the Convention did not form a part of national law. A person who alleged that their rights under the Convention had been infringed by the United Kingdom had to take a case to the Commission and then to the European Court of Human Rights in Strasbourg. If the decision of the Strasbourg court was against the United Kingdom, then national law would be changed to accommodate the judgment.

Under the 1998 Act the Convention applies either directly or indirectly. Most of the rights in the Convention are now directly enforceable against public bodies in English law. A new remedy is created against public authorities which act in a way which is incompatible with the Convention. A public authority is defined by s 6(3) as a court or tribunal or any person certain of whose functions are of a public nature. If proceedings are against a private person or body then the Act may have an indirect effect. A court is in itself a public authority and must therefore ensure compatibility with Convention rights by an appropriate interpretation of the law. As far as legislation is concerned, a court or tribunal must interpret legislation in accordance with the Convention (s 3). A court which is considering any question which has arisen in connection with a Convention right must take account of decisions of the European Commission and the European Court of Human Rights (s 2). It is important to note that a court may find that there has been a breach of a Convention right by a public authority and award compensation. This breach may or may not also amount to a tort. If it does amount to a tort then the claimant cannot be doubly compensated for the same injury.

Example

A landowner suffers a reduction in the value of his property and interference with his peaceful enjoyment of it as a result of low flying aircraft from the Royal Air Force. This may amount to the tort of nuisance and it may also be a breach of Article 8. If the claimant has been compensated for loss of peaceful enjoyment (loss of amenity) in nuisance then he will not be compensated for breach of Article 8 for the same loss.

How this will affect the different parts of tort law is difficult to predict, but in some areas such as defamation and negligence the courts had been working towards compatibility with the Convention in their decisions before the Act came into effect.

Example

Mark is a 10-year-old boy who has been taken into care following allegations that he has been sexually abused by his stepfather. Two years later it is discovered that social workers on Mark's case had been negligent and Mark should not have been taken into care.

As the social workers are employed by the local authority, which is a public authority under the Act, Mark will have a direct action under the Human Rights Act against the local authority for possible breaches of the Convention. He may also have an action in the law of tort for negligence and the court must take into account the jurisprudence of the Convention when determining the action.

Example

A celebrity is photographed leaving a drugs clinic and the photograph is published in a newspaper. The celebrity cannot bring a direct action against the newspaper for breach of a Convention right, as the newspaper is not a public authority. However, in any other action the court must take account of relevant articles of the Convention and any relevant jurisprudence of the European Court of Human Rights. (See Chapter 21.)

More detailed treatment of the relevant parts of the Convention will be given in the appropriate chapters. At this stage of the book an indication will be given of the articles likely to affect tort law and where their impact will be felt.

Convention jurisprudence is different from English law but normally works on the basis of a right being given by an article (such as freedom of speech) and then the state being permitted to make derogations from that right for particular purposes (such as the protection of reputation). In making these derogations the state is allowed a 'margin of appreciation', in the sense that not all national laws need be identical. However, any derogations may be subjected to a test of whether the derogation was 'necessary' for the protection of one of the stated aims. This involves the court performing a balancing act between the harm done by a breach of the right and the harm which will be caused by upholding it. One of the difficulties posed for English law by the new law is that tort law is generally based on the commission of a wrong whereas Strasbourg jurisprudence is based on rights. The tension between these concepts creates problems for courts.

Example

A newspaper wishes to publish a political corruption story about X. They are not able to prove that all their allegations are true. The relevant right is freedom of speech. The newspaper should be free to expose political wrongdoing. However, one of the permitted derogations is the protection of reputation. The question for English law will be whether the existing law of defamation draws the correct balance in the sense that any restriction on the newspaper's freedom to publish is necessary in a democratic society to protect X's reputation.

Article 6

This gives the right to a fair trial. The most serious effect of Article 6 will be in negligence, where the granting of immunity from negligence actions to certain groups of public or quasi-public bodies such as the police and advocates had already come

under scrutiny. The previous system of the defendant having the action 'struck out' at an early stage because the defendant had immunity came under attack from the Strasbourg court. (*Osman v UK* [1999] FLR 193.) This was on the basis of a lack of proportionality, as on a striking out application there was no opportunity of balancing the claimant's interests against the defendant's immunity claim. This decision caused difficulties to the English courts (see *Barrett v Enfield London Borough Council* [2001] 2 AC 550), which had difficulties in determining how an article which appears to be concerned with procedural rights could affect a substantive right as to whether a claimant was entitled to bring a claim in negligence on these facts at all. The Strasbourg court then acknowledged in a later case (*Z v UK* [2001] 2 FLR 612) that their decision in *Osman* had been based on a misunderstanding of the English rules of negligence and the working of the striking out procedure.

Matthews v Ministry of Defence [2003] 1 All ER 689

The claimant brought proceedings for negligence after serving in the Royal Navy and alleging that he had suffered personal injury as a result of exposure to asbestos fibres. At the time of his service the Crown Proceedings Act 1947 s 10(f) precluded certain claims for personal injury against the Crown. The claimant contended that s 10(f) was incompatible with Article 6 of the Convention, which gives the right to a fair trial. The House of Lords ruled that it was compatible as it was a substantive limitation on claims against the Crown, not a procedural bar.

The collision between two different legal systems, the pragmatic English common law and rights-based Strasbourg law will cause tensions and problems for many years. Subtly and gradually it appears likely that some areas of English tort law where there was no duty owed may be affected by the Convention. The courts, for example, now appear more prepared to weigh the various interests in cases involving public authorities and children more carefully. (See Chapter 6.)

Article 2

Article 2 provides a right to life. This is most pertinent to medical law and to date English law has been found to comply with the right. The major right to life decision is that food and water may lawfully be withdrawn from a patient in a permanent vegetative state. (*Alredale NHS Trust v Bland* [1993] 1 All ER 821.) This decision has been held to be compatible with the Convention. (*NHS Trust A v M; NHS Trust B v H* [2001] 2 WLR 942.)

The most interesting area under Article 2 may be where an individual is unable to obtain treatment. Would the courts be prepared to sanction a right to treatment?

One way in which the right to life can be invoked and the principles to be applied by a court is illustrated by *Van Colle v Chief Constable of the Hertfordshire Police* [2006] 3 All ER 963. (See Chapter 3.) A prosecution witness in a criminal case was murdered by the person charged with the offence. An action under the Human Rights Act by his estate and dependants succeeded against the police for neglect of duty leading to loss of life contrary to Article 2. It is important to note that this was not a tort case but a direct action under the human rights legislation.

Article 3

This is the right not to be subjected to degrading treatment. There are instances where a claimant can be prevented from claiming a remedy in tort law for policy reasons. Such a prohibition applied to actions against social workers for negligence in relation to care decisions on children. Even if no tort action exists, it may be possible to claim damages for a breach of Article 3. (See Chapter 6.)

Article 5

Article 5 provides a right to liberty and security. This right is likely to operate in actions for trespass to the person and whether English law provides satisfactory remedies.

Article 10

Article 10 provides a right to freedom of speech. This will be particularly relevant to actions in defamation and privacy.

Article 8

Article 8 provides a right to a family life and privacy. There was previously no direct right to privacy in English law but the courts have had to confront this gap and balance the right to privacy against the right to freedom of speech.

The right to privacy also applies to cases of medical treatment (see Chapter 14) and to nuisance actions (see Chapter 16).

Human rights and tort law

Conflicts inevitably arise between the rights-based human rights regime and the wrongs-based English tort law. These problems will continue to arise for a considerable period of time. One example of the stresses raised was considered by the House of Lords in the following case:

Watkins v Secretary of State for the Home Department [2006] 2 All ER 353

The claimant was a prisoner serving a sentence of life imprisonment. The confidentiality of his legal correspondence was protected by the Prison Rules. The claimant complained that prison staff had breached those rules by opening and reading mail when they were not entitled to do so. He brought an action against the Secretary of State and certain prison officers for damages for misfeasance in public office. The judge found that three of the officers had acted in bad faith but he dismissed the claims against those officers on the ground that misfeasance in public office was not a tort actionable *per se*, and that the claimant had failed to prove actual loss. The Court of Appeal allowed the claimant's appeal, holding that if there was a right which could be identified as a constitutional right, then there could be a cause of action in misfeasance in public office for infringement of that right without proof of damage. They held that

M352

the prison officers had infringed the claimant's constitutional right of unimpeded access to the courts and to legal advice. A nominal award of general damages was made.

The House of Lords held that the tort of misfeasance in public office was never actionable without proof of material damage, which included financial loss, or physical or mental injury and psychiatric illness but not distress, injured feelings, indignation or annoyance. The importance of the claimant's right to enjoyment of his right to confidential legal correspondence did not require or justify the modification of the rule that material damage had to be proved to establish the cause of action. Modification would open the door to argument as to whether other rights less obviously fundamental, basic or constitutional were sufficiently close or analogous to be treated for damage purposes, in the same way and in the absence of a codified constitution the outcome of such argument in other than clear cases would necessarily be uncertain. The lack of a remedy in tort for someone in the position of the claimant, who had suffered a legal wrong but no material damage, did not leave him without a legal remedy. It could reasonably be inferred that Parliament had intended that infringements of the core human and constitutional rights protected by the Human Rights Act 1998 should be remedied under it and not by development of parallel remedies.

The Court of Appeal had made a bold attempt to create something akin to 'constitutional torts' which would have their own rules but the House of Lords were not convinced that the structure of English tort law could be changed in this manner and numerous problems would arise particularly with determining what a constitutional tort was.

Summary

M3S3 - After reading this chapter you should be able to:

- Understand the elements of a tort.
- Explain what interests are protected by the law of tort.
- Understand the roles of policy and insurance in tort law.
- Understand the role played by malice, intention and negligence as states of mind in tort.
- Explain the objectives of tort law and how these objectives can be met by other means.
- Understand the relationship between tort and contract.
- Explain the position of minors in tort law.
- Understand the basic principles played by human rights in tort law.

M3S4 - Further reading

Introductory reading

Fleming, J. G. (1985), *An Introduction to the Law of Torts* (2nd edn), Clarendon.

Williams, G. L. and Hepple, B. A. (1985), *Foundations of the Law of Tort* (2nd edn), Butterworths.

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Conaghan, J. and Mansell, W. (1998), 'From the Permissive to the Dismissive Society' 25 JLS 284.

Genn, H. (1987), *Hard Bargaining*, Clarendon.

Harris, D. et al. (1984), *Compensation and Support for Illness and Injury*, OUP.

Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Report) Cmnd 7054 (1978) Chs 3 and 4.

Civil procedure reforms

Zander, M. (1998), 'The Government's Plan on Civil Justice' 61 MLR 382.

Compensation culture

Better Regulation Task Force (2004), *Better Routes to Redress*, Cabinet Office Publications.

Lewis, R., Morris, A. and Oliphant, K. (2006), 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' 2 JPIL 87.

The Human Rights Act 1998

Buxton, R. (2000), 'The Human Rights Act and Private Law' 116 LOR 48.

Damages under the Human Rights Act 1998, Law Commission Report No 266 (2000).

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Wade, W. (2000), 'Horizons of Horizontality' 116 LOR 217.

CHAPTER 1

AN OVERVIEW OF THE LAW OF TORT

APPENDIX B

Text 2 by Harpwood.

MOVE 1 - INTRODUCE AND ESTABLISH THE SUBJECT MATTER

The aim of this chapter is to consider the definition, objectives and scope of the law of tort, and to take an overview of the subject. Tort law has developed over many centuries and has its origins in an agricultural society. As this area of law has developed it has proved to be infinitely adaptable, but it has not developed in isolation. Other areas of law have evolved alongside tort.

1.1 WHAT IS TORT?

MIS2 The word 'tort' is derived from the Latin *torvus*, meaning 'twisted'. It came to mean 'wrong' and it is still so used in French: '*Tai tort*'; 'I am wrong'. In English, the word 'tort' has a purely technical legal meaning - a legal wrong for which the law provides a remedy.

MIS3 Academics have attempted to define the law of tort, but a glance at all the leading textbooks on the subject will quickly reveal that it is extremely difficult to arrive at a satisfactory, all-embracing definition. Each writer has a different formulation, and each states that the definition is unsatisfactory.

MIS4 In order to understand what tort law involves, it is necessary to distinguish tort from other branches of the law, and in so doing to discover how the aims of tort differ from the aims of other areas of law such as contract law or criminal law. The main emphasis in this chapter will be on the distinction between tort and contract, as these two subjects are closely related. Criminal law will be dealt with separately below.

1.2 TORT AND CONTRACT

MOVE 2 - DETAILS AND EXPAND ON THE SUBJECT MATTER.

M2S1 The scope and objectives of tort as compared with contract are often discussed in the context of duties fixed by law and people to whom the duties are owed. The two subjects are frequently studied alongside each other.

1.2.1 Duties fixed by law

M2S1 (a) Many duties in tort arise by virtue of the law alone and are not fixed by the parties. The law imposes a duty in tort not to libel people, not to trespass on their land, and so on. By contrast, the law of contract is based notionally on agreements, the terms of which are fixed by the parties.

M2S1 (b) However, in modern law, it is unrealistic to suppose that contract and tort are so very different from each other in this respect. Terms of contracts are now imposed upon the parties by numerous statutes, quite independently of any agreement and, indeed, the notion of true agreement has long been discredited in many contractual situations, since few individual consumers have real bargaining power. Moreover, it is possible for the parties in contract to arrive at agreement to vary the tortious duties which the law imposes.

M2S1 (c)

1.2.2 The relationship between the parties

As duties in tort are fixed by law, the parties usually have no contact before the tort is committed. The pedestrian who is injured by a negligent motorist will probably never have met the defendant until the accident which gives rise to the legal action. Of contract, it is often said that the parties will, through negotiation or by the very act of contracting, have had some contact and be fully aware of their legal duties before any breach of contract occurs.

This is too simplistic a view. Contracting parties often have little or no contact and many of the terms of the contract may be implied by the operation of various statutes. In tort, the parties may well know one another before the tort is committed, as for example the doctor who negligently injures a patient who has been receiving a course of treatment, or the neighbour who allows fumes to pour over adjoining property, causing a nuisance. The distinction between the branches of law is again blurred.

Although the absence of a contract does not prevent a claim in tort, for a long time a claim for breach of a contract could only be brought by one of the contracting parties. However, the Contracts (Rights of Third Parties) Act 1999 now allows third parties to enforce contractual terms in certain circumstances.

The notion of relationship or proximity between the parties has been given much greater prominence in tort in recent cases than ever before. This draws the two branches of the law even closer.

The relationship between the parties is the basis for distinguishing between tort and contract when dealing with the notion of remoteness of damage. Here the courts consider the question: 'for how much of the damage suffered in a case should the defendant be held responsible?' The rules of contract require a closer relationship than the rules of tort in dealing with this issue.

1.2.3 Choosing tort or contract

M2S2 The remedy for breach of duty in tort is usually a claim for damages, though equitable remedies are also available in appropriate cases. The main aim of tort is said to be compensation for harm suffered as a result of the breach of a duty fixed by law. Tort seems to place greater emphasis on wrongs of commission rather than wrongs of omission. Another important aim of tort is to deter behaviour which is likely to cause harm.

The main aim of contract on the other hand is to support and enforce contractual promises, and to deter breaches of contract. Contract, then, has no difficulty compensating for wrongs of omission. The doctrine of consideration, based on mutual promises, is all important in the law of contract, and failure by omission to keep the terms of a promise is a breach of contract which the law will seek to amend.

M2S2(a) The distinction in practice is less clear, as many fact situations could give rise to an action in both contract (if there is a contract in existence) and tort. Numerous examples of this are to be found in cases of professional negligence, for example, where the parties may also have a contractual relationship (doctors, surveyors, architects, etc). In such cases, it again becomes necessary to decide whether to sue in

M2S2 (b)

contract or in tort. However, it often makes little difference to the outcome which branch of the law is chosen (see *Johnstone v Bloomsbury AHA* [1991] 2 All ER 293).

The considerations which may be relevant to the choice of contract or tort are that there may be more generous limitation periods (time limits) within which to bring an action in tort rather than in contract; the need to prove fault is not always present in contract, whereas it is frequently necessary to do so in tort; and the range of remedies and amount of damages which are available in tort may be greater than in contract. The courts now take the view that where professionals owe duties to their clients in both tort and contract, the claimant has a free choice as to which remedy to pursue. The extent of this concurrent liability was confirmed by the House of Lords in *Henderson v McEntyre Syndicates Ltd* [1994] 3 All ER 506. In that case, it was held that the duty of care which was owed in tort to Lloyd's 'names' by their managing agents was not precluded by the existence of a contract between the same parties. In a later case in which the choice between contract and tort was relevant, *Holt and Another v Payne Stirlington (A Firm) and Another* [1996] PNLR 179, the Court of Appeal held that where a duty of care in tort arose between the parties to a contract, wider obligations could be imposed by the duty in tort than those which arise under the contract. In the earlier case of *Tai Hing Cotton Mill Ltd v Lai Chong Hing Bank Ltd* [1996] 2 All ER 947, the Privy Council had held that, in commercial situations, if a contract exists between the parties, the proper action lies in contract rather than in tort. In *Holt*, however, the arguments raised in the *Tai Hing Cotton* case were rejected by the Court of Appeal. The defendants contended that if, as here, there is a contract in existence, the duties of the parties in contract and tort are to be defined according to the express and implied terms of the contract, and would, if necessary, be limited by those terms. Accordingly, it was argued, there could be no expansion of liability by means of a duty of care in tort. However, the Court of Appeal accepted the claimant's arguments that a consideration of the facts of each individual case would determine whether a duty of care in tort existed which was wider than any duties imposed by contractual terms. Such a tortious duty, if it arose, was imposed by the general law and would not arise out of the common intention of the parties to any contract. The matter was also discussed in *Spryng v Guardian Assurance* [1992] IRLR 173 in connection with the existence of a possible implied term in contracts of employment requiring employers to exercise care in writing references. Further examples of cases which highlight the advantages of one action over another will be encountered throughout this book.

M2S2(c)

In recent years, the distinction between tort and contract has been blurred by new departures, and the differing aims of the two areas of law have become less clear. The development of the doctrine of promissory estoppel in contract suggests that contract may be moving closer to tort. When conditions allow that doctrine to apply it may be possible to side-step the doctrine of consideration.

M2S3

Developments in tort in the 1980s, in particular the case of *Jinnor Books Ltd v Vetchi Co Ltd* [1983] AC 520, now discredited and confined to its own particular facts, gave rise to the view that the tort of negligence was being used in what should have been contractual situations. This will be considered in detail later (see Chapter 5).

M2S4

Since the rise of the tort of negligence, the law of tort places great emphasis on the need to prove fault. The aim here is to compensate for wrongs suffered through the fault of another person. Damages will usually only be awarded in tort if the claimant can establish fault. The system requires that someone be blamed for the injury sustained.

M2S5

Contract on the other hand has been less concerned with fault as a basis of liability and it is often unnecessary to prove fault in order to be compensated for a breach of contract. All that is necessary to prove is that the act which caused the loss was committed. This is known as strict liability and is a feature of much of the law relating to sale of goods.

M2S5(b)

However, there are established areas of strict liability in tort such as libel and trespass. One important distinction between contract and tort which has been emphasised in recent cases (for example, *Murphy v Brentwood* [1990] 2 All ER 908) is that, in the case of compensation for defective products, tort is concerned only with unsafe products, but contract will provide compensation for shoddy products too.

1.2.4 Unliquidated damages

M2S6 The aim of tort damages is to restore the claimant, in so far as money can do so, to his or her pre-incident position, and this purpose underlies the assessment of damages. Tort compensates both for tangible losses and for factors which are enormously difficult to quantify, such as loss of amenity and pain and suffering, nervous shock, and other intangible losses. Tort damages are therefore said to be 'unliquidated'. The claimant is not claiming a fixed amount of compensation.

M2S7 The aim of the award of damages in contract is to place the claimant in the position he or she would have been in if the contract had been performed. Thus tort is concerned with restoring the status quo, while contract is concerned with loss of expectation (see Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, 2000, Oxford: Hart). Contract is less willing to contemplate awarding damages for such nebulous factors as injury to feelings. The damages are described as 'liquidated'. The claimant has assessed exactly how much the breach of contract has cost and claims that fixed amount.

However, recent years have seen a willingness on the part of the courts to award damages for 'disappointment' in contract in some unusual cases, indicating that contract is willing to recognise and compensate certain intangible losses (*Jarvis v Swans Tours* [1972] 1 All ER 71).

Tort will not only provide a remedy in the form of money compensation but will, like contract, grant an equitable remedy in appropriate circumstances. For example, an injunction may be awarded to prevent repeated acts of trespass. Numerous equitable remedies are provided in the law of contract but these are often difficult to obtain, as it is necessary to prove that money would not be the real answer to the claimant's problem. In tort, the situation which calls for an injunction will usually be very clear and there will be fewer obstacles in the way of obtaining that remedy than in contract.

M2S8 Specialist texts provide a detailed analysis of these matters, and it will be evident that the distinction between contract and tort is blurred. The two subjects were classified as separate topics by the early textbook writers when law began to be treated as a suitable subject for academic study. It is not surprising that some writers call for a different approach to these common law subjects by sweeping aside the dichotomy and dealing with the 'common law of obligations' as a whole. This approach would do away with some of the problems of definition. Despite the divergence between tort and contract, as is confirmed in *Spring v Guardian Assurance* (see 5.1.8, below), some important distinctions remain and for practical purposes should be understood.

1.3 TORT AND CRIMINAL LAW

M2S9 The same fact situation, for example, a road accident, may give rise both to criminal prosecutions and to tort actions. Tort, as part of civil law, is concerned with claims by private individuals against other individuals or legal persons. Criminal law is concerned with prosecutions brought on behalf of the state for breaches of duties imposed upon individuals for the protection of society. Criminal prosecutions are dealt with by criminal courts and the standard of proof is more stringent than in civil cases. The consequences of a finding of criminal guilt may be regarded as more serious for the individual concerned than the consequences of civil liability.

M2S9(a) Both areas of law are concerned with the breach of duties imposed by law, but the criminal law has different priorities. It is concerned with the protection of society by deterring wrongful behaviour. It is also concerned with the punishment of criminals. These concerns may also be found in tort, but are secondary to the main objective of compensation. A motorist who is speeding is far more likely to be worried about being caught by the police than being sued by a person whom he may happen to injure if he is negligent. Nevertheless, tort does have some deterrent value. For example, motorists who have been negligent have to pay higher insurance premiums. To complicate matters, criminal law does make provision for compensating victims in some cases by compensation orders or through the Criminal Injuries Compensation Board, but this is not the main objective of the criminal law.

M2S10 Similarities and differences may be found between tort and criminal law, and at the very least, Winfield's definition at 1.1, above, should have made clear that tort is a branch of civil law to be distinguished from criminal law.

There are some instances in which people have brought civil claims in an effort to encourage prosecutions in criminal law. For example, the family of a woman who was killed by her former boyfriend succeeded in having him branded as a killer in a successful civil claim for assault and battery heard in the High Court in 1998 (*Francisco v Diehrich* (1998) *The Times*, 13 April). The Crown Prosecution Service had decided not to prosecute.

Some aspects of the meaning of tort have been considered here. Deeper analysis should reveal more similarities and differences between tort and contract law, tort and criminal law, and tort and other areas of law. The simple fact is that the boundaries of the subject are not easily defined.

1.4 INSURANCE AND THE LAW OF TORT

M2S11 Underpinning the modern tort system is the system of insurance which provides payment of compensation in most tort cases. Indeed, it is usually not worth the trouble and expense of claiming in tort unless the defendant is insured (or is very wealthy). It is possible to insure against liability in tort in relation to many different activities. Motorists are compelled by statute to insure against liability for injuries to third parties and passengers (see the Road Traffic Act 1988), and manufacturers insure against harm caused by their products. Employers (see Employers' Liability (Compulsory Insurance) Act 1969) and occupiers take out insurance policies to cover the cost of accidents. Insurance is also important in relation to sporting and educational activities, and clubs and schools are covered by insurance policies. Many

large public bodies carry insurance but some act as their own insurers, taking upon themselves the risk of paying damages if they are found liable. First party insurance should not be overlooked. This type of insurance allows individuals to buy policies that will compensate them if they are injured, regardless of the fault of others.

To some extent, insurance can influence the way in which people behave. Thus, motorists are aware that their insurance premiums will be higher if they are found negligent and may be encouraged to take fewer risks. Some motorists have to pay higher premiums because they fall into a high risk category. Figures published in 1999 by the Office for National Statistics indicate that young men under the age of 25 years are three times more likely to die in a road accident than women of the same age group, and are much more likely to be involved in accidents than older motorists. To allow for this, young men pay higher premiums than other motorists.

In the field of healthcare in England, the Clinical Negligence Scheme for Trusts, and an equivalent body in Wales, which provide insurance cover for medical negligence claims against NHS Trusts, offers lower premiums to Trusts that can demonstrate that they have sound risk management procedures. However, such incentives do not always have the desired effect and some writers believe that defensive medicine has developed which is regarded as counter-productive to the provision of good services. Defensive medicine is practised when doctors undertake procedures such as X-rays in order to avoid being sued rather than for clinical reasons. However, there is little hard evidence that defensive medicine is practised widely in the UK.

There is, of course, a counter-argument concerning insurance – that people who are aware that they are insured are likely to be less careful because they can be confident that their insurance company will compensate any victims of their wrongful activity. Insurance can also create problems of waste because it is impossible to predict when liability will arise and people may over-insure. It has also been claimed that in some cases insurance motivates the law of tort, so that in road accident cases, judges may be more willing to find in favour of the claimant because they know that there will be a source of compensation available to support him through insurance. A judge may find the defendant legally to blame though morally he should not be responsible (see *Natlaship v Weston* [1971] 2 QB 691). Despite this, there are several cases in which judges have stated that the insurance positions of the parties should be ignored when determining liability (*Morgans v Lanchbury* [1973] AC 127). Nevertheless, insurance is a useful way of spreading the cost of compensation for people who suffer injury as a result of negligence. Insurance allows people to recover damages for negligent driving from close relatives, so easing the burden of caring within families.

M2S16 1.6 AN OVERVIEW OF THE LAW OF TORT

In order to understand tort, it may be helpful to withdraw for a moment from the problems of definition and take an overview of the subject to consider the nature of the duties which are imposed and the interests which are protected by this branch of the civil law.

Tort has been used for many centuries to protect personal interests in property. Some of the earliest actions known to English law are those concerned with protecting interests in land. These include the torts of nuisance and trespass to land.

Tort has also been concerned with protecting people from intentional interference, through actions for assault and battery and false imprisonment, and the reputation, through the torts of libel, slander, malicious prosecution and injurious falsehood. Purely financial interests, economic and trading interests have more recently been brought within the province of tort and their scope is still unclear but personal property has been protected by tort for hundreds of years.

The evolution of the law of tort has been somewhat haphazard and it is an area of law which is still developing. The process of evolution is in part a response to changes in social and economic conditions and social values. This is acknowledged by the judges as they develop the law. For example, in *Chester v Aysler* [2004] UKHL, Lord Steyn said:

I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. The result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision ... reflects the reasonable expectations of the public in contemporary society.

Only since 1932, when the tort of negligence was first officially recognised by the House of Lords as a separate tort, has negligence been of central importance. However, the vast majority of tort claims today are for negligence, and negligence has proved the most appropriate claim in modern living conditions, especially since the development of the motor car.

The continued development of tort can be seen in the tort of breach of confidence which some authorities claim is not a tort at all, contending that it belongs to equity. The Court of Appeal has recently referred to the equitable origins of this action in *R v Department of Health ex p Source Informatics* [2001] QB 424. The issue under consideration concerned the passing of anonymised patient information by pharmacists, for a fee, to the appellants, Source Informatics.

Source Informatics sought a declaration to the effect that there was no breach of confidence involved in passing on anonymous information about patients. The Court of Appeal considered the classic statement of the prerequisites of a successful claim for breach of confidence by Lord Greave in *Seddon Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 (Note) and the legal basis of the doctrine of confidentiality. Whilst recognising that the action for breach of confidence lies in the law of tort, the Court of Appeal also reviewed the cases which had been decided on equitable principles. The conclusion of the court was that in a case involving personal confidences, confidence was not breached where the identity of the confider was protected. The reasoning of the Court of Appeal in this case appears to merge the tort of breach of confidence with principles of equity, which lie at the heart of the development of the law in this area.

The implementation of the Human Rights Act 1998 has facilitated and accelerated evolutionary changes in Tort (see par 1.10) as can be seen in the development of something akin to privacy law – *Campbell v Mirror Group Newspaper Ltd* [2004] UKHL 22 (see chapter 18).

M2S18 Occasionally, it is possible to observe the dynamic nature of tort in the development of little used, rather obscure torts in modern conditions. For example, in *Three Rivers DC and Others v Bank of England (No 3)* [2000] 3 All ER 1, HL, the unusual tort of 'misfeasance in public office' was revived in an attempt to provide remedies for those who suffered losses in the BCCI incident. The Court of Appeal held that, in order to succeed in a claim for this tort, it had to be proved that there had been a deliberate and dishonest abuse of power. The official concerned must have known that the claimant would suffer loss as a result, or must have been reckless or indifferent as to that result. The House of Lords dismissed the appeal in this case, ruling that a public officer would be liable for the tort of misfeasance in public office only if he or she acted knowingly or with reckless disregard to the likelihood of causing injury to either the claimant or a person who was a member of the class to which the claimant belonged.

M2S18(a) In *Docker v Chief Constable of West Midlands Police* [2001] 1 AC 435, the House of Lords held that the police are not immune from action by former defendants alleging conspiracy to injure and misfeasance in public office.

The tort was further clarified in *Watkins v Secretary of State for the Home Department* [2004] EWCA Civ 966. The Court of Appeal held that the tort was only actionable *per se* if a constitutional right of the claimant had been infringed.

M2S18(b) If a claim for misfeasance in public office is successful exemplary damages may be payable (*Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29). For further consideration of the scope of this tort, see *Iqbal v Legal Commission Services*, QBD, 6 August 2004.

M2S19 Not every wrongful act is actionable as a tort. There are some activities which cause harm but are not treated as torts. The case of *Bradford Corp v Pickles* [1895] AC 587 is an example of this. Here, the defendant had prevented underground streams flowing through his land from reaching the claimant's land, to force them to buy his property at a much inflated price. The House of Lords held that the defendant could not be liable because every landowner has a right to take water from his own land even if it means that neighbouring properties are deprived of water altogether. This is an illustration of a principle known as *damnum sine injuria* (a wrong without a legal remedy).

M2S20 This has recently been confirmed in *Arscoff v The Coal Authority* [2004] EWCA Civ 892, in which the Court of Appeal held that the so-called 'common enemy rule' did not contravene Art 8 European Convention of Human Rights (see 11.10.3 for the details of this case).

The opposite side of the same principle, *injuria sine damno*, is present in cases where no damage is suffered but a tort action is available because the interest to be protected is regarded as being of vital importance. The tort of trespass to land is an example of this. To obtain an injunction to prevent further acts of trespass, it is enough to prove that the defendant has walked onto the claimant's land, and there is no need for any damage to have been caused.

conditions. It is important to appreciate that many of the decisions have been influenced by judicial policy founded on pragmatic considerations and notions of social justice, such as loss distribution based on the extended use of insurance. The Human Rights Act 1998 has added a new dimension to judicial decision making in tort cases.

Some tort decisions appear to conflict and judges may seem to be doing one thing when saying another. It may appear that the judge decided at the outset on the outcome of a case and found reasons later to support that decision. However, as will be seen, in the great landmark cases like *Donoghue v Stevenson* [1932] AC 562 the policy behind the decisions is discussed openly and in depth by the judges. All these factors may cause confusion to students first embarking on the study of tort.

M2S21(b) It is only towards the end of the study of the law of tort that it will be possible to form a complete picture of the subject. It is worth returning to this first chapter at the end of the entire book to put the subject into perspective.

M2S22 1.7 OTHER SYSTEMS OF COMPENSATION

Tort is not the only means whereby a person who suffers as a result of a wrongful act may receive compensation. Indeed, tort is the least efficient system of compensation. Other sources include the social security system, the industrial injuries scheme, the criminal injuries compensation system, charitable gifts, and first party insurance.

M2S22 (a) 1.8 TORTS OF STRICT LIABILITY

Although the vast majority of tort actions are for negligence, which requires proof of fault, there are some torts in which it is not necessary to prove fault. All that needs to be proved is that the defendant committed the act complained of, and that the damage was the result of that act. These are termed torts of 'strict liability'.

However, the term 'strict liability' covers a wide variety of circumstances and does not itself withstand strict scrutiny, as it is so indeterminate. It is, therefore, an easy label to attach but remains conceptually awkward. To some extent, strict liability appears to occupy a continuum with complete absence of concern for any mental element on the part of the defendant at the one end, to the other end where the rules are sufficiently relaxed to allow some consideration of voluntariness, as in the tort of trespass.

Some strict liability is of very ancient origin, whereas other examples, such as the instances of strict liability introduced by the Consumer Protection Act 1987, are fairly recent. However, all have in common the fact that the society in which they originated demanded particular protection for potential claimants, and the emphasis tends to be on the type of activity rather than the defendant's conduct in carrying it out. There may be no obvious reason for such emphasis, and some authorities suggest that strict liability is merely a form of loss distribution (see Atiyah (1999), Chapter 4). Another argument is that, because many of the torts of strict liability are concerned with particularly hazardous activities, the defendant bears some initial blame for being prepared to impose hazards on others, and it would offend justice and morality to impose the requirement of proving fault in such circumstances.

However, instances of strict liability are often haphazard and it seems strange that

M2S21 1.6 CASE LAW

Although there are some statutory developments, tort is essentially a common law subject developed by the judges, often in response to changes in social and economic

driving, arguably one of the most hazardous activities in modern life, does not attract strict liability. Many instances in which strict liability has been imposed are the responses by judges to the particular circumstances of the cases before them, as in *Rylands v Fletcher* (1868) 100 SJ 659; (1868) LR 3 HL 330; (1866) LR 1 Ex 265, or by Parliament to the demands of the EU or pressure groups, as in the Consumer Protection Act 1987 and the Vaccine Damage Payments Act 1979.

M2S23:

The conclusion must be that there is no general underlying rationale, but a series of ad hoc adjustments prompted more by pragmatism than principle.

- Strict liability is imposed to varying degrees in the following circumstances:
- liability for dangerous wild animals;
 - liability for livestock straying onto neighbouring land;
 - liability for defective products under the Consumer Protection Act 1987;
 - liability under the rule in *Rylands v Fletcher*;
 - liability for breach of statutory duty, if the statute in question imposes strict liability. This will be a matter of statutory interpretation in each case;
 - liability for defamation;
 - liability for man made objects causing damage on the highway.

In almost all of these instances strict liability is subject to exceptions and defences. Indeed, in some cases, there are so many avenues of escape from strict liability that the term hardly seems appropriate to describe the particular tort (see sections on the Consumer Protection Act 1987, Chapter 15 and *Rylands v Fletcher*, Chapter 11). Moreover, absolute liability, which does not admit of any defence at all, is almost never to be found outside the criminal law.

On the other hand, in the law of negligence, there are certain circumstances where in effect there is strict liability, as in the case of learner drivers (*Nettlehip v Weston*), the egg-shell skull cases in remoteness of damage, and in many of the cases in which the defendant was insured, in which judges have mysteriously found in favour of the claimant.

This further supports the view that tort suffers from internal contradictions and inconsistencies derived in part from haphazard decisions and judicial policy making, and that, therefore, the search for some grand design giving coherence to different areas of tort is misguided and naive.

Details of the torts of strict liability will be covered in course of this book.

M2S24

1.9 HUMAN RIGHTS ACT 1998

For several years, UK judges have been hearing arguments about the European Convention on Human Rights, and taking it into account when considering issues in tort, with a view to promoting consistency between the common law and the Convention. This position has been formalised by the coming into force of the Human Rights Act 1998 in October 2000. This Act provides that, wherever possible, UK legislation must be interpreted in such a way as to be compatible with the European Convention on Human Rights. Although the Human Rights Act 1998 has no effect on the continued validity of a statute or statutory instrument, the higher

legislation is incompatible with the Convention. This is intended to alert Parliament to the need to change the law, but it does not have any effect on the position of the parties to the litigation that led to the declaration. It is up to Parliament to decide how to respond and there are fast track procedures to amend incompatible legislation if it is decided that this is necessary.

M2S24(a)

Certain statutes have been subjected to scrutiny – for example, the Police and Criminal Evidence Act 1984, as amended, breaches of which can in certain circumstances give rise to civil claims for damages for assault, battery and false imprisonment, and the Mental Health Act 1983. The Human Rights Act 1998 makes it unlawful for public authorities (including courts and tribunals) to act in a way which is incompatible with a Convention right if the alleged tortfeasor is a private individual rather than a public authority. Art 6 of the Convention might assist a claimant who qualifies as a ‘victim’ as defined by the Act. It provides that everyone is entitled to a fair trial in the determination of his or her civil rights and obligations. If there is no existing tort remedy equivalent to a Convention right, the judges are required, by Art 6, to develop one.

M2S24(b)

The bulk of the law of tort has been developed by judges. The effect of the 1998 Act is that when hearing tort cases the judges are required to ensure that the common law is not incompatible with Convention rights. There is already a well established place within the law of tort for considering many of the matters that are contained within Convention rights. For example, the tort of trespass to the person has for many years protected individuals from inhuman and degrading treatment and torture. The Convention, in Art 3, protects the same rights. In claims for assault and battery, the courts are now required to take into account Art 3 and the jurisprudence of the European Court of Human Rights (ECtHR) on the subject. It will, therefore, be unusual for a person to base a claim solely on an infringement of a Convention right as there are already tort actions which can be used. Arguments based on the infringement of Convention rights will usually simply be added to the contentions of claimants. However, in the case of claims involving less highly developed torts, such as those concerning alleged infringements of privacy, claims may be based purely on the Convention.

It could be argued that a new cause of action is created by the Human Rights Act 1998, taking the form of a new action for Breach of Statutory Duty (see Chapter 5), in which the award of damages is discretionary (at common law, tort damages are available as of right) (Law Commission, *Damages Under the Human Rights Act 1998*, Law Com 266, London: HMSO, para 4.20).

1.9.1 The future of human rights and tort law

The Convention rights that are likely to be prominent as far as tort is concerned are: the prohibition of inhuman or degrading treatment or punishment (Art 3); the right to liberty and security (Art 5); the right to a fair trial (Art 6); the right to respect for privacy, family life, home and correspondence (Art 8); the right to freedom of expression (Art 10); and the right to freedom of assembly and association (Art 11). Some of these have already been scrutinised by the courts and such cases are discussed in the relevant sections of this book. Students of tort law need to be familiar with the large body of case law that has already been developed by the ECtHR.

1.10 A SUMMARY OF THE OBJECTIVES OF TORT MOVE 3 - CONCLUDE AND COMPLETE THE SUBJECT MATTER.

M3S1

The objectives of the law of tort can be summarised as follows:

- **Compensation**
The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.
- **Protection of interests**
The law of tort protects a person's interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person's use of enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.
- **Deterrence**

It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies. The deterrent effect of tort is less obvious in relation to motoring, though the incentives to be more careful are present in the insurance premium rating system.

Retribution
An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.

Vindication
Tort provides the means whereby a person who regards him or herself as innocent in a dispute can be vindicated by being declared publicly to be 'in the right' by a court. However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

Loss distribution
Tort is frequently recognised, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expense which is reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and courts, and practical difficulties such as the

funding of claims which may mean that many who deserve compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.

- **Punishment of wrongful conduct**

Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

M3S2 1.10.1 An illustration of the operation of the tort system

The issues raised by the road traffic accident described below illustrate some facets of the objectives of tort and its relationship with other systems of compensation.

M3S3

1.10.2 The scenario

A, a man aged 27, had consumed five pints of beer in a public house one Sunday lunchtime. He left for home on foot in the early afternoon when road and weather conditions were good. His route took him across a busy main road close to the centre of a city, but as this was a quiet Sunday he decided to take a chance and cross the road some distance from the traffic lights and adjoining pedestrian crossing. He looked to the right and noticed that the lights were red and that there were two cars just approaching the traffic lights. Then he looked to the left and began to cross the road. As he reached the centre of the first carriageway, he realised that the cars were now approaching at speed and that he might not be able to reach the central reservation. He dithered for a moment and the next thing he knew he was hit by the car driven by B. A was taken to hospital and detained there for 10 weeks suffering from multiple injuries. After leaving hospital, A slowly recovered, but still suffers from mild post-traumatic stress disorder and has pain in his legs which were operated on immediately after the accident. A will always walk with a slight limp and he may develop arthritis at some distant future date as a result of the accident. He also has numerous scars on his face and arms, and will require cosmetic dental treatment to replace damaged teeth. He is paying for private dental treatment and hopes to recover the cost of this from B. The estimated speed of the car which hit A was 45 mph in a 30 mph limit and he is lucky to have survived at all. A has at last managed to find another job as a lorry driver earning a comparable salary to that which he had before the accident. B was convicted by magistrates of driving without due care and attention, and was fined £150 and given nine penalty points.

A is now seeking compensation from B by means of a tort action. He is still angry about having been injured by B and would like to see B suffer by being brought before a civil court because he believes that B 'got off much too lightly' in the magistrates' court. A is also hoping to receive a large sum by way of compensation for the pain he has suffered.

A will need to consider how he can pay for legal advice and representation. He has received a large sum in state benefits during the recovery period and before he could find a new job. He is surprised to learn that this will be deducted from any award of damages which he will receive. He is also surprised to discover that

because he has made such a good recovery he will not receive a particularly high award, especially as he has found a job. In addition, A is amazed that he is likely to be found at least 25% contributorily negligent because he told the doctor who admitted him to hospital that he had drunk about five pints of beer just before the accident. This is recorded on his medical notes, though A has no recollection of having told the doctor this. Witnesses have stated that they thought he took a chance in trying to cross the road when he did.

In the event, the case never reaches court. A is told that a sum of £10,000 has been paid into court by lawyers acting for B's insurance company. He is advised to accept this, because if the judge makes a lower award he will have to pay the costs of the other side from the date of paying in. His barrister is concerned that there may be a finding of a high percentage of contributory negligence (up to 40%). The case is finally settled three years after the accident for £12,000. The legal costs involved, solicitors' fees, the advice of a barrister, including a case conference and expert medical examinations and reports, total £5,000.

B is now having to pay very much higher motor insurance premiums and is worried about losing his licence if he is prosecuted for another driving offence in the near future. A does not know about this.

1.10.3 Are the objectives of tort met in this case?

M334

If one considers whether all the objectives of tort have been met in this situation, it is apparent almost immediately that they have not. To take the picture from A's perspective: the tort system has protected A's interests through the negligence claim. However, A does not feel that he has had his revenge. He has not had the opportunity of seeing B cross-examined in court, and he does not even know about B's fears for his driving licence, a criminal law matter in any event. He has had the support of the NHS and state benefits during the most crucial period of his hospitalisation and recovery, but feels that he has had to wait much too long to obtain his tort damages.

He is disappointed that he will only receive part of the compensation which he thought he deserved because the case is to be settled out of court, and he had never even heard about contributory negligence before this happened to him. He feels that he will go on suffering for a long time because of the injuries which he received. However, he is more fortunate than many pedestrians who are injured. At least he could afford to pursue his claim through his conditional fee agreement. Those without such financial support frequently give up as soon as they discover the cost of litigation.

As far as B is concerned, tort has had some deterrent effect because he will now probably drive more carefully, at least for a while, to avoid having to go on paying higher insurance premiums, as these will gradually be reduced if he has no more accidents. He has probably had some sleepless nights worrying about what will happen, but he is reassured that the insurance company will pay any compensation. He has been more concerned about the criminal prosecution, as he wanted to avoid publicity because he was a married man and was in the car with a girlfriend on the day of the accident. He is also worried about committing another driving offence and losing his licence, and he will consciously drive more carefully. To that extent, he has been more concerned about criminal law matters than about tort.

From the point of view of society, as a whole, tort has ensured that A is compensated. The insurance system has to some extent been driven by tort, and B's original insurance cover which provided the compensation was compulsory under the Road Traffic Act 1988 (usually regarded as a criminal law statute). Compulsory insurance for motorists means that all motorists help to pay compensation to people who are injured like A. This has achieved a form of loss distribution. The general deterrent effect of contributory negligence is minimal. A had never even heard of the rule and there are many road users who have not. The law has allowed recovery of the costs of A's financial support from B's insurance company but the NHS and the state benefit system have proved quicker and more efficient than the tort system in providing medical care and money to A at the very time he needed it.

This commonplace accident raises doubts about some of the claims which are made for tort and lead us to question seriously how far the present system really fulfils its objectives. It is clear that the state has provided better and more efficient support for A at the most crucial time and at a lower cost than tort. This has been a simple case in which there was sufficient evidence that B was at fault because there are witness statements and a police report as well as a criminal conviction. Also, A's injuries, although unpleasant, will have no serious lasting effect on him. However, there are many cases which are far more complex and where the issuing of proceedings is a real gamble. For example, suppose no one had witnessed the accident and A had no recollection of what happened. It might be difficult to prove that B was actually at fault, especially if he states that A had run out unexpectedly into his path. There could be complex issues concerning causation of the injuries, and the issue of quantum is often much more complicated than in this case. Suppose A could find no solicitor willing to act for him on a conditional fee (no win, no fee) basis. It would be very likely that A would bring no legal action at all in such circumstances and the legal system would have failed him.

It is worth returning to this scenario when considering the criticisms of tort in Chapter 21 at the end of the book.

AN OVERVIEW OF THE LAW OF TORT

PROBLEMS OF DEFINITION

Tort is difficult to define. Problems of definition are best dealt with by comparing the scope and objectives of tort with those of other law subjects such as contract and criminal law.

Even the attempt to achieve a comparison is a rather naive over-simplification of the position in modern law, when tort and contract have been drawn together at various times and pulled apart by the vagaries of judicial policy. The classification is a matter of convenience for academic writers, but is often self-defeating and masks the underlying purposes of the law.

PROTECTION OF INTERESTS

Tort protects a variety of different interests and imposes corresponding duties on people in general. Not every damaging act will be legally actionable, and even people who have undoubtedly suffered wrongs which have been committed maliciously may be without a remedy in certain circumstances (*Bradford Corpn v Pickles*).

Most of the law of tort in practice is concerned with the tort of negligence and, in particular, from the point of view of a practising solicitor, with motor accidents and work accidents.

INSURANCE AND TORT

The relationship between tort and insurance is complex. Insurance provides a means of distributing losses and underpins much of the law of tort.

STRICT LIABILITY

There are some torts which are described as torts of 'strict liability'. This label is misleading. The term covers a wide spectrum of the law of tort and the 'strictness' varies in degree, though there is no absolute liability.

Note the circumstances in which varying forms of strict liability apply:

- dangerous wild animals;
- livestock straying onto adjoining land;
- defective products – the Consumer Protection Act 1987;
- *Rylands v Fletcher*;
- some breaches of statutory duty;

- man made objects falling onto highways;
- false imprisonment.

OTHER SYSTEMS OF COMPENSATION

Tort should not be considered in isolation. The full picture of compensation for injury can only be understood in the light of other sources of financial support which are available to people who suffer injury.

HUMAN RIGHTS AND TORT

The Human Rights Act 1998 is proving important in the development of the law of tort. The important Convention rights in relation to tort are to be found in Arts 3, 5, 6, 8 and 11 of the European Convention on Human Rights.

OBJECTIVES OF TORT

These can be summarised as follows:

- compensation;
- deterrence;
- vindication;
- loss distribution;
- punishment.

CONCLUSION

Tort suffers throughout from many internal inconsistencies as a result of haphazard decisions and judicial policy. It must be concluded that the search for a grand design which gives the law of tort internal coherence is naive and is likely to prove inconclusive.

1

OVERVIEW OF THE LAW
OF TORTS
MOVE 1 - INTRODUCE THE SUBJECT MATTER

SECTION 1 WHAT IS A TORT?

MIS1

The very word tort may pose a conundrum for the novice law student. Crime and contract will be terms with which he or she is already familiar, but what does tort mean? What is the law of torts about? Much ink has been spilt in attempts to define tort with only limited success; at least for the student new to the subject Winfield's classic definition declared:

MIS1(a)

Tortious liability arises from the breach of a duty primarily fixed by law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages.¹

A more recent definition, offered by Peter Birks, suggests that a tort is:

[T]he breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a representative of society as a whole.²

Yet the first of these definitions does little more than point towards one kind of remedy that is available in tort and towards certain distinctions between tort and other branches of the law,³ while the second may be unhelpfully vague to the newcomer to tort. As we shall see at the end of this chapter, even those distinctions between tort and other branches of law are sometimes blurred.⁴ Partly for this reason, a satisfactory definition of tort remains largely elusive. Perhaps the best working explanation that can be offered at this stage is this:

Tort is that branch of the civil law relating to obligations imposed by operation of law on all natural and artificial persons. It concerns the basic duties one person owes to another outside of a contract or the obligations triggered by an unjust enrichment. It enables the person to

MIS2

¹ Winfield, *Province of the Law of Tort* (1931) p 92.
² Birks, 'The Concept of a Civil Wrong' in Owen (ed), *Philosophical Foundations of Tort Law* (1995) p 51.
³ For a fuller account of the distinction between tort and other branches of the civil law, see Fleming, *The Law of Torts* (1998) pp 3-5 and Cane, *The Anatomy of Tort Law* (1997) pp 182-196.
⁴ See generally, Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003).

whom the duty is owed to pursue a remedy on his own behalf where breach of one of those duties infringes his interests to a degree recognized by the law as such an infringement.

MOVE 2

M2S1

EXPAND THE DETAILS OF

M2S1(a)

No further attempt at defining tort will be made here. It is the functions and purposes of the law of torts that are of greater importance, and these are matters that can be explained in comparatively simple terms. Tort law defines the obligations imposed on one member of society to his or her fellows and provides a range of remedies for harms caused by breach of those obligations. Tort is often described as centrally concerned with corrective justice – that is, loss-adjustment from the person initially wronged to the wrongdoer.⁵ In consequence, the law of torts is often judged by its success or otherwise as a compensation system. In simple terms, since most tort actions have as their objective monetary compensation for a loss inflicted on the claimant by the defendant, the question that most of us arises is 'who should bear the relevant cost? Should it be where it falls on the unfortunate claimant, or is the conduct of the defendant such that the law should shift the loss to him? In the tort of negligence, as well as many other torts later in this book, loss adjustment is a core issue. Tort's success in these areas must therefore be judged at least in part by its efficacy as a compensation system.

M2S1(b)

But compensation is not tort's only concern, and monetary damages are not the only available remedy. Tort is also designed to protect fundamental human interests. Here, 'interests' may be defined as the kinds of claims, wants or desires that people seek to satisfy in life, and which a civilized society ought to recognise as theirs as of right. Tort therefore serves to determine which of the many human (and related) interests are so fundamental that the law should impose duties upon us all that are designed primarily to protect those interests and, secondarily, to provide a remedy when those interests are wrongfully violated by others.

M2S2

In the first edition of this work, Street's emphasis on the claimant's interests as opposed to the defendant's wrongdoing was perceived as radical, even bizarre. While I have elected to abandon the hierarchical interest-based structure that characterized previous editions in favour of one that maps more neatly onto the kinds of tort syllabuses that nowadays exist in most leading law schools in this country, it is nonetheless worth making clear that there is still a great deal to be said for an interest-based approach⁶ (albeit that it has its imperfections and some notable inconsistencies⁷). Certainly, no claim in tort can succeed, however morally reprehensible the defendant's conduct, unless the court first recognises some form of harm suffered by the claimant that involves a violation of an interest sufficient to confer on the claimant a legal right to protection of that interest.⁸ It is still useful, therefore, to consider the various rights and interests which the law of tort protects.

M2S4

M2S4(a)

There is now a voluminous literature on tort law and corrective justice, but especially good, if a little difficult, is Weinrib, 'Understanding Tort Law' (1999) 23 *Vanderbilt LJ Rev* 485. See also Wright, 'Right, Justice and Tort Law' in Owen (ed), *Philosophical Foundations of Tort Law* (1999) p 51.

⁵ See, e.g., *The Anatomy of Tort Law* (1997).

⁶ See Murphy, 'Formalism and Tort Law' [1999] *Additive LJ Rev* 115.

⁷ See, e.g., *Rogers v Repando Dist* (1963) 25 JP 3, *Bradford Corp v Pickles* (1895) AC 587, *Pickering v Liverpool Daily Post and Echo Newspapers plc* (1991) 2 AC 570. For academic explanations of this, see Goldberg and Zipursky, 'Unrelied Torts' (2002) 88 *Virginia LJ Rev* 1625; Perry, 'Risk, Harm and Responsibility' in Owen (ed),

SECTION 2 PROTECTED RIGHTS

AND INTERESTS

(A) HUMAN RIGHTS

Tort law has always protected certain human rights, albeit in a somewhat piecemeal and unsystematic way. However, the enactment of the Human Rights Act 1998 significantly enhanced this protection. Indeed, its passing prompted academics and judges almost immediately to rethink the boundaries and substance of tort law,⁹ and the full effects of the Act on the law of torts are, no doubt, yet to emerge. To understand the various ways in which the Act was significant for tort law, it is necessary to say a little about the workings of that Act.

Contrary to what is often said, the Human Rights Act did not incorporate the European Convention on Human Rights into English law. Rather, the Act provides (1) that, wherever possible, primary and subordinate legislation must be interpreted in a way that is compatible with 'Convention rights';¹⁰ and (2) that it is unlawful for any public authority (including a court of law,¹¹ but excluding the legislature¹²) to act in a way that is incompatible with a 'Convention right'.¹³ 'Convention rights' are the fundamental rights and freedoms set out in Articles 2 to 12 and Article 14 of the Convention, as well as Articles 1 to 3 of the First Protocol (concerning rights to property, education and free elections) and Articles 1 and 2 of the Sixth Protocol (abolishing the death penalty).¹⁴ Section 11 of the Human Rights Act 1998 makes it clear that 'Convention rights' exist in addition to, not in substitution for, rights and freedoms already endorsed at common law. Thus, reference to various of these Articles and Protocols will be made from time to time throughout this book.

⁹ *Philosophical Foundations of Tort Law* (1995); Ripstein, *Equity, Responsibility, and the Law* (1999) p 75. For a nuanced argument to the effect that the harm threshold ought sometimes to be lower see Handfield and Pigozzi, 'Is the Risk-Liability Theory Compatible with Negligence Law?' (2006) 13 *Legal Theory* (forthcoming) and McCarthy, 'Liability and Risk' (1996) 25 *Philosophy and Public Affairs* 238. See also the analysis of the decision in *Barker v Corus UK Ltd* [2006] UKHL 20 in ch. 4.

¹⁰ For comprehensive treatment, see Wright, *Tort Law and Human Rights* (2001). And for a useful introductory account see Burton, 'The Human Rights Act and Private Law' (2000) 116 *LOJ* 48.

¹¹ Human Rights Act 1998, s 3. For an introductory account of the Act, see Bowling, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79.

¹² Human Rights Act 1998, s 6(3)(b).

¹³ Human Rights Act 1998, s 6(1). For these purposes, acts include failures to act – e.g. failures to fulfil the several positive obligations that exist under the Convention. See, e.g. *Z v United Kingdom* (2002) 34 EHRR 97 where local authorities failed to take all reasonable steps to avoid a real and imminent risk of ill-treatment of children of whom they had actual or imputed knowledge. See also *Acquieva v Southwark LBC* [2004] QB 1124 and Murphy, 'Children in Need: The Limits of Local Authority Accountability' [2003] *Legal Studies* 102. Note, however, that under s 6(6) a failure to introduce a proposal for legislation does not amount to an unlawful act for these purposes.

¹⁴ Human Rights Act 1998, s 1.

M2S7(a)

It may at first glance seem odd that no express provision of the Act appears to require that the judges develop the common law in a manner consistent with 'Convention rights'. Two factors explain that apparent omission. First, for some years now, English judges have wherever possible sought to ensure that the common law is consistent with such rights.¹⁵ Secondly, and more importantly, section 6 of the Act makes it unlawful, as we have already seen, for any public authority, including a court, to act in a way that is incompatible with 'Convention rights'. As such, a judge adjudicating on a claim in tort must develop the common law compatibly with 'Convention rights' with a view to ensuring consistency between common law and 'Convention rights'.¹⁶

Apart from these general points, the most crucial element of the Act for a tort lawyer is the provision that 'Convention rights are directly enforceable against public authorities, thus permitting an individual who considers his rights to have been violated to sue for damages'.¹⁷ However, recourse to such damages under the Act may not be the only option available in response to such violations. This is because the self-same rights conferred by the Convention may already be protected by the law of torts. For example, Article 5 provides for a right to liberty and security and protects the citizen against arbitrary detention. But the ancient tort of false imprisonment does likewise. Equally, a person alleging unlawful arrest by the police will not need to claim a breach of Article 5. He, too, can perfectly well sue in false imprisonment and, indeed, may well prefer to do so.¹⁸

Even so, in determining whether that arrest was lawful, the court will be mindful of the provisions of Article 5 and the jurisprudence of the European Court of Human Rights.¹⁹ But what if a 'Convention right' is not so well established in domestic law? Privacy is such a case.²⁰ The claimant might then elect to bring his claim under the Act alleging breach of Article 8 (which requires respect for private and family life).²¹ If he elects for a Convention remedy, the claimant can sue under the Act so long as the defendant is a public authority. The question of what constitutes a public authority would then, possibly, arise. If I were to discover that the Home Office is bugging my office, suing a government department as a public authority should be straightforward. But, if a tabloid newspaper invades my home life, splashing my private business all over its front page, what then? It is arguable that the newspaper, too, may be classified as a public authority, for section 6(3)(b) classifies as a public authority 'any person certain of whose functions are functions of a public nature'. State schools and universities thus

M2S8

whose functions are functions of a public nature. State schools and universities thus

M2S8(a)

15 See, e.g., *Kamran v Mirror Group Newspapers* [1993] 4 All ER 575; *Olara v Home Office* [1997] 1 WLR 329; *R v Chief Constable of North Wales Police*, ex p *AJ* [1998] 3 WLR 7.

16 Otherwise the court itself acts unlawfully under the Human Rights Act 1998, s. 6. But note that s. 6 does not require the courts to create brand new rights that mirror those in the Convention.

17 Human Rights Act 1998, s. 7-8.

18 Generally, tort damages are intended to return the claimant to the position he was in prior to the commission of the tort. But in respect of this tort, exemplary damages might be available. Not only would exemplary damages not be available under the Act, it is by no means clear that C would even be restored to his or her *ex ante* position since under the Act, in considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public. *Ambridge v Southwark LBC* [2004] QB 1124, at [56] per Wood J. The Law Commission has suggested a range of factors that would be relevant in this context: *Law Com No 266*, para 4.44; see also *McGregor on Damages* (2003) p 1549 at 149.

19 As is already the case, well illustrated in the judgments of the Court of Appeal in *Olara v Home Office* [1997] 1 WLR 328.

20 For the limited extent to which tort law protects privacy, see ch 15.

clearly qualify as public bodies, as do charities such as the NSPCC. But the status of other bodies remains unclear for the present.²¹

Next let us consider the situation where the wrongdoer is an entirely private individual – let us say, a colleague who invades my privacy by persistently peering through my window and monitoring my private correspondence. Some common law remedy may often be found in such circumstances. The snooper who peers through windows and opens mail could be liable for harassment²² or trespass to goods.²³ But if the facts of the case do not lend themselves to the invocation of an existing common law action, the position is not entirely clear. This is important because, despite a marked move in the direction of allowing an invasion of privacy to be treated as a full-blown tort (as it is in the USA and New Zealand), English tort law has gone no further than to allow a claimant to sue in respect of the misuse of private personal information.²⁴ There is full discussion of the protection of privacy in chapter 15 of this book. But for now it suffices to note that the English courts seem generally to be moving towards a convergence of common law and Convention rights in this area. On the other hand, the obligation to develop the common law in a manner consistent with the Convention does not empower the courts to engage in free-and-easy judicial legislation, especially in an area so politically charged as privacy rights.²⁵ Article 6 (which grants a right to a fair trial) cannot be invoked to chivy the courts along in this respect, for Article 6 does not carry with it any substantive civil law rights; it merely provides a procedural guarantee.²⁶

Finally, in the context of Human Rights, we must note that in relation to primary legislation the courts' role remains limited by the doctrine of Parliamentary sovereignty. As such, section 3 of the Act (which requires the judges to interpret domestic statutes consistently with 'Convention rights' so far as it is possible so to do) does not give the courts the power to strike down legislation that contradicts Convention rights. In such cases, there is merely a power for the higher courts to issue a declaration of incompatibility.²⁷

(B) OTHER INTERESTS PROTECTED BY THE LAW OF TORTS²⁸

One important issue that must be identified here is that it is not uncommon for the central question in a tort claim to be how the law must reconcile competing interests.

²¹ But see *Sunkin*, 'Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act' [2004] PL 643 and *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (Railtrack was held not to be a public authority for the purposes of maintaining railway standards).

²² See ch 9.

²³ See *Campbell v MGN* [2004] 2 AC 457; *Douglas v Hello! Ltd* (No 6) [2006] QB 125.

²⁴ In *Wainwright v Home Office* [2003] 3 WLR 1137 Lord Hoffmann expressed the view (at [31]–[32]) that that matter was one that would require an Act of Parliament.

²⁵ See the twin decisions of the European Court of Human Rights, in *Z v United Kingdom* (2002) 34 EHRR 97 and *T and U v United Kingdom* (2002) 34 EHRR 42. See also Gearty, 'Oman Unravels' (2002) 65 MLR 87 and id., 'Unravelling Oman' (2001) 64 MLR 159.

²⁶ Human Rights Act 1998, s. 4.

²⁷ *Cane* has supplied a snapshot to the one provided here. It covers broadly the same ground, but differs in emphasis. He suggests that tort law protects (i) interests in the person, (ii) property interests, (iii) contractual interests, (iv) non-contractual expectations, (v) trade values and (vi) wealth; see *Cane, The Anatomy of Tort Law* (1997), pp 66–89.

M2S11

M2S11

M2S11

M2S13

A classic example concerns the fact that every citizen can assert both a right to free speech as well as a right to freedom from the deliberate publication of words injurious to his or her reputation. Thus, protecting As compelling interest in the latter may involve restricting B's right to the former. Hence, certain defences that justify what would otherwise constitute defamation may be of crucial importance. We look now at the kinds of interests that tort law protects.

M2S13(a)

(1) INTENTIONAL INVASION OF PERSONAL AND PROPRIETARY INTERESTS

The protection of the person from deliberately inflicted physical harm, restrictions on freedom of movement, and the protection of interests in tangible property – especially the right to non-interference with land and goods – were originally the most important contents of the law of torts. The relevant modern torts include interference with goods and trespass in its various forms. It is these torts which provide the foundation of the protection of 'Convention rights' to life (Article 2), freedom from torture or degrading treatment (Article 3), freedom from slavery (Article 4), liberty (Article 5) and peaceful possession of property (First Protocol, Article 1).

M2S13(b)

M2S13(c)

(2) INTERESTS IN ECONOMIC RELATIONS, BUSINESS AND TRADE INTERESTS²⁹

The extensive protection afforded to individuals' interests in freedom from physical harm and in their property is not mirrored by similar protection of interests in economic and business activities. The economic torts presently remain somewhat unclear in their scope (even though there are signs that they may well give way to a fairly simplistic, general principle of liability in the non-too-distant future³⁰). Furthermore, very real difficulties exist in reconciling protection of one individual's economic interests with another's right to engage in free competition in a market economy. In addition to the classic economic torts of interference with contractual relations, conspiracy and intimidation, other torts of significance in this context are passing off and deceit.

M2S13(d)

(3) INTERESTS IN INTELLECTUAL PROPERTY

Interests in tangible property, land and goods are, as we shall see, well protected by the common law. By contrast, intellectual property in confidential information, copyright, and patents presents greater problems. Much of the law in this field is statutory, and interests in intellectual property generally overlap with interests in economic relations. But this is not invariably so. For example, the emerging tort based on the misuse of private personal information may soon embrace both a patient's right to confidentiality from his doctor and a multinational company's right to protection of their trade secrets.

M2S13(e)

M2S13(f)

²⁹ For thoroughgoing consideration see *Carry, An Analysis of the Economic Torts* (2001). See also chs 12–14, 17. See further ch 14.

(4) NEGLIGENT INTERFERENCE WITH PERSONAL, PROPRIETARY AND ECONOMIC INTERESTS

M2S14

If tort law's protection of persons and property were limited only to deliberately inflicted harm, it would be manifestly inadequate in our complex and overcrowded world. Nor would such limited protection reflect the requirements of the Human Rights Act 1998 insofar as it seeks to safeguard and protect life and bodily security. Since the landmark decision in *Donoghue v Stevenson*,³¹ however, the courts have developed the tort of negligence to provide further protection to personal safety (including, within limits, mental integrity), property and economic interests. But for a variety of reasons, including the absence of any requirement that harm be inflicted 'directly' in the tort of negligence, the judges have adopted a cautious approach to protecting economic interests from negligently inflicted harm.

(5) FURTHER PROTECTION OF PERSONAL AND PROPRIETARY INTERESTS

M2S14(a)

Personal and proprietary interests rank so highly within the hierarchy of protected interests in tort law, and within the hierarchy of 'Convention rights', that further torts have emerged offering protection for those interests against conduct which is not necessarily, or cannot be proved to be, either intentional or negligent. There are, for example, torts of ancient origin – such as nuisance – as well as others of more recent vintage – such as the rule in *Bylands v Fletcher* (developed during the height of the industrial revolution when a new range of threats to private property were born almost overnight³²) – which protect these interests. The former highlights the (arguably perverse³³) degree of importance vested by the common law in the landowner's interest in his property.

M2S14(b)

The action for breach of statutory duty represents the common law's response to comparatively recent welfare legislation, usually designed to improve standards of public health and personal safety. But in addition, albeit at the behest of the European Community, Parliament has also introduced a regime of strict liability for injuries caused by defective products.³⁴

(6) REPUTATION

M2S15

Tort law has long protected an individual's interest in his reputation via the torts of libel and slander. But these torts are of limited scope and fall a long way short of providing comprehensive protection to an individual's privacy interests, as we shall see in chapter 15. In addition, they are also subject to a wide range of partial and complete defences which further circumscribe their import.³⁵

³¹ [1932] AC 562.

³² For the significance of the industrial revolution in grounding this rule, see *Murphy, The Merits of *Bylands v Fletcher** (2004) 24 OJLS 643.

³³ For the argument that, for the purposes of injunctive relief, property is treated more highly than the interest in bodily integrity, see *Murphy, Reinforcing Injunctions in Tort* (forthcoming).

³⁴ See, eg, the defences available in defamation discussed in ch 22.

³⁵ See ch 16.

(7) JURE PROGRESS

M2S16
A right to protection from malicious abuse of the judicial process is recognised in the tort of malicious prosecution and its ancillary tort of abuse of process. Now it seems that a tort to prevent abuse of the administrative process is also in its early infancy and Article 6 of the European Convention on Human Rights may well contribute significantly to its development.³⁶

M2S16(a)
(8) MISCELLANEOUS INTERESTS: 'CONVENTION RIGHTS' AND EUROPEAN COMMUNITY LAW RIGHTS

The antiquity and somewhat piecemeal development of torts means that there are a number of residual torts that defy classification. More importantly, however, a question now arises as to whether the principles developed by the common law offer adequate coverage of 'Convention rights'. Does the European Convention recognise interests unknown to the common law? The most obvious example of a possible lacuna in the law of tort has already been noted: the protection of privacy guaranteed in the ECHR by Article 8. However, privacy is also an excellent example of how dangerous it may be to look at any alleged human right in isolation: Article 10 establishes a right to freedom of expression, to hold opinions and disseminate information. The media and others fear that a right to privacy, if developed without proper safeguards, could undermine that latter right. Inscrupulous individuals whose conduct adversely affects others' interests would seek to use Article 8 to prevent public knowledge of their own activities. But Article 8 would permit the publication and dissemination of such information so long as it could be shown to be necessary within the specific terms mentioned in Article 8(2).³⁷

Turning to European Community Law rights, it has for some time been recognised by the English courts that directly applicable European Community Law can create obligations the breach of which entitle affected persons to sue for the harm thereby caused.³⁸ But as originally understood, these 'Eurotorts'³⁹ were strictly limited to instances in which the European legislation in question imposed obligations on private individuals. Thus, in one case where the United Kingdom was in breach of its obligations and imposed an unlawful ban on the import of turkeys from France,⁴⁰ it was held that no private law right of action arose and that only public law redress by way of judicial review was available. Since then, however, the European Court of Justice has recognised a much wider principle of state liability that undermines the

reasoning in this case.⁴¹ In *Francovich v Italian Republic*,⁴² for example, the European Court held that failure by a member state to implement a directive from the Community designed to create rights on the part of particular individuals would give rise to a claim in damages on the part of those individuals. What was perhaps most significant and remarkable about the decision in *Francovich* was that the Community legislation in question was not directly effective (which meant that, in the absence of an action against the state, there would have been no-one against whom an action could have been brought). But it has now been made clear by the European court that the *Francovich* principle applies equally where the legislation is of direct effect,⁴³ where the breach of Community law entails a legislative act (not merely an omission),⁴⁴ and in respect of administrative decisions.⁴⁵

The conditions that must be satisfied in order to sue according to this 'Eurotort' principle were set out by Lord Slynn in *R v Secretary of State for Transport, ex p Factorame Ltd*. He said:

Before a member state can be held liable, a national court must find that

- (i) the relevant rule of Community law is one which is intended to confer rights on individuals;
- (ii) the breach must be sufficiently serious;
- (iii) there must be a direct causal link between the breach and the loss complained of.⁴⁶

The similarity between the first requirement and the test adopted in relation to an action for breach of (domestic) statutory duty is immediately striking.⁴⁷ Furthermore, it is clear that this requirement can be invoked to restrict the operation of the *Francovich* principle. Thus, in *Three Rivers District Council v Bank of England (No 3)*,⁴⁸ the House of Lords held that a failure to comply with a banking directive concerning the regulation of credit institutions was fundamentally concerned with harmonizing banking practice, and not with protecting depositors. As such, the Community legislation in question was not viewed as intended to confer rights on individuals, and the 'Eurotort' action in that case failed at the first stage.

It has since been explained in relation to the second limb, that the pivotal phrase 'sufficiently serious' does not necessarily require negligence or fault (although fault may

³⁶ The House of Lords also doubted its correctness in *Kirkstall Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227.

³⁷ [1995] 2 CMLR 66. See Craig, 'Once More unto the Breach: the Community, the State and Damages Liability' (1997) 113 IQR 67.

³⁸ *Basserie du Pêcheur SA v Federal Republic of Germany* (Case C-46/93) [1996] ECR I-1029.

³⁹ *R v Secretary of State for Transport, ex p Factorame Ltd* (Case C-48/93).

⁴⁰ *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland)* (Case C5/94) [1996] ECR I-3253.

⁴¹ [1996] 4 All ER 906, at 916. These conditions derive directly from the decision of the European Court of Justice in *Basserie du Pêcheur SA v Federal Republic of Germany* (Case C-46/93) [1996] ECR I-1029, at [74].

⁴² See ch 20. ⁴³ [2000] 2 WLR 1220.

³⁶ It has already been raised on a number of occasions in connection with the striking out of negligence claims: see, eg, *Z v United Kingdom* (2002) 34 EHRR 97 and *TP and KY v United Kingdom* (2002) 34 EHRR 42. See also *Gearty v Osman Unwashed* (2002) 65 MLR 87.

³⁷ See *Campbell v MGN* [2004] 2 AC 457.

³⁸ *Garden Cottage Food Ltd v Milk Marketing Board* [1984] AC 130.

³⁹ It has been contended that an action for a breach of Community legislation is of the same order as an action for breach of statutory duty and that therefore the action is one in tort: see *R v Secretary of State for Transport, ex p Factorame* (No 7) [2001] 1 WLR 942.

⁴⁰ *Burgoyne SA v Ministry of Agriculture* [1986] QB 715.

be a material consideration), and that the seriousness of the breach must be judged in the context of the clarity of the community rule breached and, where appropriate, the legislative discretion afforded to the member state.⁴⁹

M2S17 SECTION 3 THEORETICAL PERSPECTIVES ON TORT LAW

In recent decades there has been much theorizing about the proper parameters of tort law,⁵⁰ about the bases of tortious liability,⁵¹ and about whether tort law should serve individual or collective goals.⁵² In this section, some of these perspectives are considered in order to supply readers with a wider theoretical context in which to set the remaining chapters.

(A) A LAW OF TORT OR A LAW OF TORTS?

It is sometimes said that it makes more sense to talk in terms of a law of torts than simply the law of tort, given the various bases of liability that apply to different torts, given the range of interests that these torts protect, and given the peculiar historical genesis of the various nominate torts.⁵³ There is doubtless something in this, but it is largely an academic point. When considering the vast body of authorities, it is clear that in *practical terms* it counts for little to contend that the infliction of unjustifiable harm is always a tort,⁵⁴ or that there is a fixed catalogue of circumstances which alone, and for all time, mark the limit of what are torts.⁵⁵ There is no problem peculiar to the law of torts here. Certain situations have been held to involve torts and will continue to do so in the absence of statutory repeal. Similarly, others have been held not to be tortious, and the courts upon which those decisions are binding will likewise continue to follow them.⁵⁶ These fundamental points are also often camouflaged behind the Latin maxims

damnum sine injuria and *injuria sine damno*, which (not because of their aid to understanding, but because the student may meet them elsewhere) must be shortly explained. *Damnum sine injuria* – harm without (recognized) injury – merely means that one may have suffered harm and yet have no action for damages in tort; in short, that the damage of which he complains is not an interest protected by the law of tort.⁵⁷ *Injuria sine damno* – (recognized) injury without harm – is a shorthand version of the rule that some interests are so important that their violation is an actionable tort without proof of tangible damage. Battery is a classic example of a tort that adopts this principle.

(B) WRONGFULNESS IN TORT LAW

The relationship within tort law between rights and wrongs must very briefly be addressed. It is not enough merely to identify the kinds of interests that tort protects. The kinds of wrongdoing considered sufficient to violate those interests must also be identified.⁵⁸ The deliberate invasion of an interest can easily be classified in terms that demand that the law should intervene to require the defendant to compensate for the harm he has caused the claimant. Certain interests, however, may be so crucial to the claimant, and so vulnerable to accidental harm, that negligence on the part of the defendant suffices to engage his liability in tort. Exceptionally, the relationship of the claimant and the defendant, or the nature of the defendant's conduct will give rise to strict liability. In such instances, the law requires the defendant to bear a greater (but not absolute) responsibility for protecting the claimant's interests.

It is not, however, necessary to dwell here on the importance of motive or malice. It follows from what has already been said that an act, even though it is malicious, will not incur tortious liability unless the interest that it violates is protected by an extant tort.⁵⁹ On the other hand, the interest interfered with is occasionally rated so low in the hierarchy of protected interests that only malicious invasions are forbidden.⁶⁰ Which these interests are, the reader will discover as he or she progresses through the remaining chapters of this book.

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M2S17(a)

⁴⁹ *R v Secretary of State for Transport, ex p. Patersons Ltd* (No 3) [1999] 4 All ER 960.

⁵⁰ See, eg, Weir, 'Understanding Tort Law' (1989) 23 *Widening U.L.Rev.* 483, id. *The Idea of Private Law* (1995).

⁵¹ See, eg, Coleman, *Risks and Wrongs* (1992). Cf. Abel, 'A Socialist Approach to Risk' (1982) *Maryland L.Rev.* 695.

⁵² See, eg, Weir, 'Understanding Tort Law' (1989) 23 *Widening U.L.Rev.* 485. Cf. Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1997) 75 *Tex. L. Rev.* 1801 and Waldron, 'Moments of Carelessness and Massive Loss' in Owen (ed.), *Philosophical Foundations of Tort Law* (1995).

⁵³ See Ibbetson, *A Historical Introduction to the Law of Obligations* (1999).

⁵⁴ An especially good example is the action for breach of confidential information which may be thought of either (as is common) in terms of a breach of an equitable duty or in terms of a tortious breach of duty (see, eg, *Campbell v MGN Ltd* [2004] 2 AC 457, at [4], per Lord Nicholls).

⁵⁵ See further Murphy, 'Formalism and Tort Law' [1999] *Academe L.Rev.* 115.

⁵⁶ This is not to say that the superior courts will not, on occasion, part company with the past; see, eg, *Campbell v MGN* [2004] 2 AC 457 in which Lord Nicholls (at [14]) seemed to want to break free of the shackles

of the action in equity for breach of confidentiality in order to give the protection of tort law to the misuse of private information.

⁵⁷ For the argument that *damnum sine injuria* should support a claim for injunctive relief, even though it would not ground an action for damages in certain circumstances, see Murphy, 'Rethinking Injunctions in Tort' (forthcoming). For more general discussion of what amounts to recognized harm see Trettenborn, 'What is a Loss?' in Neyers (ed.), *Emerging Issues in Tort Law* (2007).

⁵⁸ See Cane, *The Anatomy of Tort Law* (1997).

⁵⁹ Eject competition that damages one's business interests and is prompted by malice, for example, will not by itself usually suffice to invoke the protection afforded by the economic torts. There must normally also be some illegal act on the part of D.

⁶⁰ The fact that tort law rates certain interests higher than others should not be assumed to be either logically coherent or able to withstand detailed scrutiny; see Murphy, 'Formalism and Tort Law' (1999) *Academe L.Rev.* 115.

M2S19

M2S19(a)

M2S20 (C) GHOSTS FROM THE PAST: FORMS OF ACTION⁶¹

Until the passing of the Common Law Procedure Act 1852 and the Judicature Act 1875, a claimant could only sue in tort if he brought his cause of action within a recognised form of action – that is, one for which some particular writ of summons was available. Although the forms of action have now been abolished, many old cases cannot be understood without some knowledge of what they were.⁶² Moreover, classifications of torts derive from the various writs grounding suit, so that rules worked out under them have necessarily been the starting point for any growth in the law of torts which has taken place since. Many seemingly arbitrary divisions today between one tort and another are explained only by reference to the forms of action. Thus, the writ of trespass lay only for direct injuries, while the form of action known as ‘action on the case’ developed separately for indirect injuries. And it will be seen in due course that, even now, trespass is not committed where the injury is indirect.⁶³

A claimant does not have to plead the tort of negligence, trespass or whatever; he merely sets out the relevant facts. Yet torts can overlap so that on any given facts a claimant may succeed by contending at trial that the facts satisfied the requirements of either of two (or more) torts. On the other hand, the claimant may fail where he relies on, say, the rule in *Rylands v Fletcher* rather than private nuisance if he argues only that the facts proved satisfy all the requirements of *Rylands v Fletcher* (but they in fact do not) and he could have advanced further facts (but did not) which would have satisfied the tort of nuisance. The claimant’s error will be one of oral argument, not of pleading, except when he fails to plead an allegation of fact which, although not material in one tort, would have been a prerequisite of the other. Strictly speaking, a judge could find for the claimant merely by holding that, on the facts proved, there was a tort. But, given the splitting up into compartments of the law of torts, the judge will ordinarily decide that the claimant wins because the defendant has committed some specific tort. The law does not say that intentionally and carelessly inflicted harm will be tortious in certain circumstances. Instead, it defines the limits of each tort and says to the claimant: ‘You win if you establish facts which satisfy the definitions of any one of those torts.’ With regard to any particular decided case, the tort student is thus concerned to know, not only that the claimant has succeeded on certain facts, but also which tort has been committed. In short, it is important to know both the ingredients of each particular tort as well as the general principles of tortious liability.⁶⁴

(D) CONFLICT BETWEEN CERTAINTY AND JUSTICE

M2S23

The conflict between the demands of certainty and justice is a recurrent theme in case law. The claims of certainty are less pressing in the case of the law of torts than in some other branches of the law – for example, the law of property. The purchaser of land must be assured that the law on the faith of which he acquires a good title is not liable to change; it is less important that the law should settle precisely and for all time, say, the limits of liability of doctors for harm caused to their patients. On the other hand, the development of some torts has been seriously affected by the judicial urge for that certainty which is believed by many to result from making rigid categories. The courts, for example, once thought fit to divide entrants on to land into three rigid categories – invitees, licensees and trespassers – in order to determine the duty of occupiers to them in respect of their personal safety, with the result that in 1957 the Occupiers’ Liability Act was passed in order to clear up the confusion that this method had brought about.⁶⁵

M2S23(a)

A significant measure of difficulty in this context stems from the fact that there are profoundly competing accounts of what justice entails. Such disagreement over the appropriate conception of justice – corrective, distributive, or even retributive – bedevils the debate about the appropriate balance between justice and certainty.⁶⁶ To some extent, then, the fact that common agreement on the justice of any given case is likely to be elusive perhaps explains why the courts sometimes emphasize certainty,⁶⁷ even though the need for certainty within the law of torts is not of paramount importance.

(E) LOSS DISTRIBUTION, DETERRENCE AND ECONOMIC ANALYSIS

M2S24

The traditional approach of the law of torts has been to ask whether a loss that B has suffered should be shifted to A. If A were at fault, the answer would usually be to shift that loss from innocent victim B to wrongdoer A.⁶⁸ There is, however, another view. By spreading the loss from an individual victim to the many that benefit from an activity that has caused it, the loss is more easily and more fairly borne.⁶⁹ The employer whose

⁶¹ See ch. 7.

⁶² See, e.g., Coleman ‘The Practice of Corrective Justice’ in Owen (ed.), *Philosophical Foundations of Tort Law* (1995).

⁶³ On the other hand, the judiciary in recent years have made explicit their pursuit of justice within tort law, especially in the twin areas of liability for pure economic loss and for psychiatric harm: see, e.g., *White v Jones* [1995] 1 All ER 69 (discussed in Murphy, ‘Expectation Losses, Negligent Omissions and the Tortious Duty of Care’ [1996] CLJ 45) and *White v Chief Constable of South Yorkshire*, [1991] 2 AC 413.

⁶⁴ Loosely, this account may be termed corrective justice, and it is based on the conception of torts as being based exclusively on bi-polar relations: see Weinrib, ‘Understanding “on” Law’ (1989) 23 *Volgarzko UL Rev* 485.

⁶⁵ This is what is meant by the term ‘distributive justice’. For other arguments against simplistic loss shifting see Cane, *Atiyah’s Accidents Compensation and the Law* (2006).

⁶¹ See Mulholland, *The Forms of Action at Common Law* (1999).

⁶² For an accessible account, see Williams and Hepple, *Foundations of the Law of Tort* (1984) ch. 2.

⁶³ See chs 8, 9 and 10.

⁶⁴ See Cane, ‘General and Special Tort Law: Uses and Abuses of Theory’ in Meyers (ed.), *Emerging Issues in Tort Law* (2007).

workman is injured can spread the loss through raising the price of his product. The same argument applies where his product injures a consumer. This principle of loss distribution is sometimes, for example, advanced as a justification for the vicarious liability principle which makes an employer answerable for the torts committed by those who work for him.⁷⁶ Equally, loss distribution is reinforced by widespread insurance.⁷⁷ The vehicle owner can readily insure – and is indeed required by law to do so – against the risk of his negligently inflicting harm on third parties. His premium (and the premium of other drivers) falls short of the amount payable in damages for a typical road accident. Yet in this way the aggregate cost of all car accidents is distributed among all properly insured car drivers. Some judges even acknowledge that they are the reader to find negligence, or to make high compensatory awards, when they know that the damages will be paid by an insurance company (and thus, in turn, premium payers).⁷⁸

M2S24(b) But while loss distribution via insurance can better guarantee tort victims that there will be money available to pay them the damages they are awarded in court, it also has the capacity to undermine another of tort law's goals: deterrence. The imposition of tort liability operates not only to transfer the relevant loss from the victim to the tortfeasor, but also (especially where the tort requires intentional wrongdoing or malice) to deter tortious conduct from the outset. Put at its simplest, the more a person commits a tort, the more he will have to pay in damages. Accordingly, he will generally endeavour not to commit such torts in the first place.⁷⁹ Good examples include the imposition of strict liability for breaches of statutory duty by employers, and on manufacturers of defective products who are encouraged to maintain high standards of safety in their goods in order to avoid liability.

However, the role of deterrence within tort law should not be overestimated, nor is it without other problems. To begin with, there are many instances in which the tortfeasor's conduct is in no sense deliberately harmful or even what might be termed 'calculated negligence'.⁸⁰ In such cases, where his conduct is at worst inadvertent, it is difficult to see how the tortfeasor could have been deterred. Secondly, for the courts to ensure in other areas that 'tort does not pay', recourse to exemplary damages is sometimes thought to be necessary.⁸¹ This is problematic because punishment is not generally taken to be one of tort law's functions; it is, instead, seen as the role of the criminal law. Thirdly, judges are sometimes cautious in general terms about invoking principles of deterrence, fearful that it will lead to over-cautious, defensive conduct. This concern is

M2S25

particularly evident in connection with medical litigation despite the fact that there is scant evidence of defensive medicine. Finally, we should note in this context that much academic work has been done on the economic analysis of tort law.⁸² According to this school of thought, the law is criticised and evaluated according to the criterion of economic efficiency. Thus, in the present context, the crucial issue becomes whether the rule governing a particular tort is cost effective.⁸³ Perhaps the classic example is the test for negligent conduct propounded by Learned Hand, J. in *United States v Carroll Towing Co.*⁸⁴ It runs as follows: 'if the probability be called P, the injury, L, and the burden, B, liability [in negligence] depends on whether B is less than L multiplied P. In other words, the test operates by permitting and requiring the defendant to assess the probability and costs of accidents, and then to compare them with the cost of precautions. The defendant is not negligent if his conduct is vindicated according to this test, for the objective is not to eliminate all damage, but rather to deter conduct that results in damage where the cost of preventing the accident is less than the cost (in damages) of the accident occurring. On such criteria, any change from fault-based liability to strict liability would have to depend on proof that the total additional costs to the potential defendants – additional precautions, insurance and so on – did not exceed the total cost to individuals of the risk created by the enterprise. Normal concepts of fairness and justice can be relevant only if susceptible to being assigned economic value.'⁸⁵

Economic analysis is a useful tool to attain an understanding of the operation of certain torts, in particular negligence, nuisance and product liability; it offers a measure by which our often confused system of compensation law may be judged and found wanting. However, economic analysis can never be an all-embracing explanation of the objectives of tort law; it fails to account, for example, for broader considerations of justice. As two of the leading lawyer-economists in England have pointed out, '[e]fficiency is, of course, not the only guideline to the right [legal] principles; thus, efficiency must 'at some points yield before, and at other points compromise with, other guidelines, notably those of justice and fairness.'⁸⁶ Not surprisingly, then, English judges are often wary of relying on academic expositions of economic analysis when deciding cases.⁸⁷ Quite apart from its limitations, economic analysis has its powerful detractors, foremost among whom is a prominent Canadian private lawyer, Ernest Weinrib.⁸⁸

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⁷⁶ For a general introduction to economic analysis see Burrows and Veljanowski, *Readings in the Economics of Law and Regulation* (1984).

⁷⁷ Calabresi, *The Cost of Accidents* (1970); Posner, *The Economic Analysis of Law* (6th ed. 2003).

⁷⁸ 159 F.2d 169 (2d Cir. 1947) at 173.

⁷⁹ Some lawyer-economists, of course, contend that an economic approach to tort law is a fair one precisely because it can be justified in accordance with objective, economic criteria. But this argument presupposes that the objective economic criteria are themselves fair.

⁸⁰ Ogus and Richardson, 'Economics and the Environment: A Study of Private Nuisance' [1977] CLJ 284 at 284.

⁸¹ Although they do take economic efficiency into account in determining the limits of liability for negligence on occasion: see, eg, *Savin v Wiser* [1996] AC 923.

⁸² See eg, Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso U L Rev* 485. And for a highly accessible account of the various arguments for (and against), and the prospects of, economic analysis, see Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 21 OJLS 203.

M2S27

⁸³ For a critique of this as a complete justification for vicarious liability, see Neyers, 'A Theory of Vicarious Liability' (2005) *Albion L Rev* 1 and Murphy, 'Juridical Foundations of Common Law Non-Delegable Duties in Negligence: Emerging Issues in Tort Law' (2007).

⁸⁴ See Cane, *The Anatomy of Tort Law* (1997), ch. 9; Stapleton 'Tort, Insurance and Ideology' (1995) 58 MLR 520.

⁸⁵ See Murphy v Brentwood District Council [1990] 2 All ER 963, at 923, per Lord Keith. See also *Netherlands v Wosten* [1971] 2 Qd 691.

⁸⁶ This deterrent effect is not entirely absent in contexts where there is compulsory insurance, since repeated car accidents, for example, will lead to the tortfeasor having to pay higher and higher insurance premiums.

⁸⁷ The driver who takes the odd chance with amber traffic lights might appropriately be described thus.

⁸⁸ See, eg, *Canwell & Co v Browne* [1972] AC 1027 (D published defamatory material concerning C in the expectation that profits would outweigh an award of compensatory damages). See further Law Commission Report, *Exemplary, Aggravated and Restitutory Damages*, Law Com No 247 (1997).

M2SS30

(F) THE JUDGES AND LAISSEZ-FAIRE

Much of the law relating to economic transactions is only understood if the implied judicial acceptance of laissez-faire is considered. This is merely one facet of the individualism of the law of torts, especially prominent during the nineteenth century. It is an influence which still persists, although less pervasively, in the face of the modern tendency towards welfarism.⁸³

MOVE 3 M3S1

(G) LIMITS ON THE EFFECTIVENESS OF TORT LAW

CONCLUDE AND COMPLETE THE

Although there is much theorizing about what should and should not be actionable in tort,⁸⁴ the law of torts remains essentially practical. Judges have little patience with trivial claims. For example, they may deny a remedy by way of trespass to the person for mere touching.⁸⁵ They recognize the limits of the wrongs that the law is capable of redressing, however morally reprehensible they may be. For example, avarice, brutal words and ingratitude cannot form the basis of an action in tort law. Along with this is a judicial dread of a flood of actions. It is often avowedly for this reason that the courts have so far been reluctant to allow claims for negligently inflicted pure economic loss where the range of claimants as a result of one incident might be large.⁸⁶ The courts also display a marked caution in the context of awarding damages for non-material harms.

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Another problem is that damages in many torts cannot be fixed with mathematical precision. For example, the calculation of damages in, say, the tort of false imprisonment cannot be conducted in the same way as damages for breach of a contract based on failure to fulfil a sale of goods agreement. For this reason, the courts have rightly been on their guard to restrain gold-digging actions. Nonetheless, it is apparent that they have sometimes been excessively wary; and later courts have had to overrule earlier decisions. The cases on the negligent infliction of psychiatric harm illustrate this point.⁸⁷

M3S1(b)

For some writers, the juridical divisions between torts and other areas of the common law – principally the law of contract and the law of unjust enrichment – have become so

blurred that they prefer not to talk of three separate branches of the civil law but, instead, of a general law of obligations.⁸⁸ Historically, contract law alone was concerned with the obligation to fulfil undertakings voluntarily made (so long as good consideration had been provided). By contrast, as we have seen, the obligations underlying torts require us to refrain from violating another's non-contractual legally recognised rights and interests. Finally, with its roots in Roman law, the law of unjust enrichment concerns the obligation to reverse unjust and unjustifiable gains.⁸⁹ However, while obligations lawyers recognize that it is broadly possible to distinguish these three areas of law in this way, they nonetheless contend that these divisions are imperfect. They believe that there are too many areas of overlap (in terms of the bases of damages awarded and the sources of the obligations) for this tripartite classification to be worthwhile. For example, the burgeoning tort law associated with voluntary assumptions of responsibility stemming from the decision in *Hedley Byrne & Co v Heller & Partners Ltd*,⁹⁰ is seen by some to undermine the cardinal principles that only contractual obligations are created by the parties themselves, and that tortious obligations are imposed by rules of law.⁹¹

Similarly, contract and tort are connected by the fact that they both generally concern awards of damages for harm done (whether broken promises or broken legs).⁹² But this is not exclusively the case. For example, contractual remedies may be assessed in the light of benefits acquired by the other party – and herein lies a point of connection with the law of unjust enrichment.⁹³ While at the same time, both tort and unjust enrichment can be linked in that their obligations derive from rules of law rather than reciprocal undertakings.⁹⁴

In the light of these juridical connections, the argument in favour of reconceptualizing the common law in terms of a law of obligations is not without some force. Certainly, the divisions between tort, contract and unjust enrichment law are far from perfect.⁹⁵

⁸⁴ For some of the debate see *Cane, The Anatomy of Tort Law* (1997), pp 182–196, and (more thoroughly) *Waddams, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003).

⁸⁵ See *Giglio*, 'A Systematic Approach to "Unjust" and "Unjustified" Enrichment' (2003) 23 OJLS 455.

⁸⁶ [1964] AC 465. See also *White v Jones* [1995] 1 All ER 69; *Henderson v Merritt Syndicate* [1994] 3 All ER 506.

⁸⁷ For a particularly trenchant attack on the language of assessor responsibility in this context, see *Barker, Unstable Assumptions in the Modern Law of Negligence* (1993) 109 LQR 461.

⁸⁸ Furthermore, while the measure of damages in contract was once distinctively that of expectation loss, this has begun to feature also in the law of tort: see *White v Jones* [1995] 1 All ER 69. See also *Murphy, Expectation Losses, Negligent Omissions and the Tortious Duty of Care* [1996] CLJ 43.

⁸⁹ In contract, if A builds B a fence for which B fails to pay, B is in breach of contract. If the benefit is conferred extra-contractually, however, the action will lie in unjust enrichment (eg, *Greenwood v Bennett* [1973] QB 195; A, believing the car he bought from a thief to be his own, effected several improvements upon it; B, the true owner, to whom the car had to be returned, was liable to A in respect of his unjust enrichment in the form of those car improvements).

⁹⁰ Occasionally, contractual obligations are imposed by rules of law – eg, the duty to perform a service with reasonable care imposed by the Supply of Goods and Services Act 1982, s 13. But these obligations are imposed only within the pre-existing framework of reciprocal, voluntary obligations.

⁹¹ See *Waddams, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003).

M3S3

M3S2

SECTION 4 TORT AND OTHER BRANCHES OF COMMON LAW

For some writers, the juridical divisions between torts and other areas of the common law – principally the law of contract and the law of unjust enrichment – have become so

⁸³ See generally *Cane, Tort Law and Economic Interests* (1996).

⁸⁴ And, indeed, what might properly be taken to constitute tort law: see, *McDermid and Bagshaw, Tort Law* (2005), pp 36–35 and 727–788.

⁸⁵ See *Ch 3*. See also *Barker, Economic Loss and the Duty of Care: A Study in the Exercise of Legal Justification* (forthcoming).

⁸⁶ As in *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1. For rigorous analysis of the legitimacy of the courts' stance in this context see *Murphy, Negligently Inflicted Psychiatric Harm – A Re-appraisal* (1995) 15 *Legal Studies* 415.

M3S4

On the other hand, it is submitted that the clearest grasp of the principles, aims and objectives of tort law – together with an appreciation of its distinctiveness in terms of the range of interests protected – may best be derived from its exposition in isolation from the law of contract and the law of unjust enrichment.

M3S5

Finally, it should be noted that certain types of conduct may simultaneously constitute both a crime and a tort. Thus, it is that the thief who steals your watch commits both the crime of theft and the tort of conversion. This overlap can be explained on the basis that whereas it is the function of criminal law to protect the interest of the public at large (or the state), it is primarily the law of torts that protects the interests of individuals (hence sanctioning compensation and injunctions rather than fines or imprisonment).

FURTHER READING

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APPENDIX D

Text 4 by Quinn

Tort law: an introduction

MOVE 1 - TO INTRODUCE THE SUBJECT MATTER.

M1S1

The law of tort covers a wide range of situations, including such diverse claims as those of a passenger injured in a road accident, a patient injured by a negligent doctor, a pop star libelled by a newspaper, a citizen wrongfully arrested by the police, and a landowner whose land has been trespassed on. As a result, it is difficult to pin down a definition of a tort; but, in broad terms, a tort occurs where there is breach of a general duty fixed by civil law.

When a tort is committed, the law allows the victim to claim money, known as damages, to compensate for the commission of the tort. This is paid by the person who committed the tort (known as the tortfeasor). Other remedies may be available as well.

M1S2(a)

In some cases, the victims will only be able to claim damages if they can prove that the tort caused some harm, but in others, which are described as actionable per se, they only need to prove that the relevant tort has been committed. For example, landowners can claim damages in tort from someone trespassing on their land, even though no harm has been done by the trespasser.

M1S2(b)

COMPARING TORT WITH OTHER LEGAL WRONGS

Torts and crimes

M1S3

A crime is a wrong which is punished by the state; in most cases, the parties in the case are the wrongdoer and the state (called the Crown for these purposes), and the primary aim is to punish the wrongdoer. By contrast, a tort action is between the wrongdoer and the victim, and the aim is to compensate the victim for the harm done. It is therefore incorrect to say that someone has been prosecuted for negligence, or found guilty of libel, as these terms relate to the criminal law. Journalists frequently make this kind of mistake, but law students should not!

There are, however, some areas in which the distinctions are blurred. In some tort cases, damages may be set at a high rate in order to punish the wrongdoer, while in criminal cases, the range of punishments now includes provision for the wrongdoer to compensate the victim financially (though this is still not the primary aim of criminal proceedings, and the awards are usually a great deal lower than would be ordered in a tort action).

M1S4

There are cases in which the same incident may give rise to both criminal and tortious proceedings. An example would be a car accident, in which the driver might be prosecuted by the state for dangerous driving, and sued by the victim for the injuries caused.

Torts and breaches of contract

M1SS

A tort involves breach of a duty which is fixed by the law, while breach of contract is a breach of a duty which the party has voluntarily agreed to assume. For example, we are all under a duty not to trespass on other people's land, whether we like it or not, and breach of that duty is a tort. But if I refuse to dig your garden, I can only be in breach of a legal duty if I had already agreed to do so by means of a contract.

In contract, duties are usually only owed to the other contracting party, whereas in tort, they are usually owed to people in general. While the main aim of tort proceedings is to compensate for harm suffered, contract aims primarily to enforce promises.

M1S6

Again, there are areas where these distinctions blur. In some cases liability in tort is clarified by the presence of agreement – for example, the duty owed by an occupier of land to someone who visits the land is greater if the occupier has agreed to the visitor's presence, than if the 'visitor' is actually a trespasser. Equally, many contractual duties are fixed by law, and not by agreement; the parties must have agreed to make a contract, but once that has been done, certain terms will be imposed on them by law.

M1S7

A defendant can be liable in both contract and tort. For example, if a householder is injured by building work done on their home, it may be possible to sue in tort for negligence and for breach of a contractual term to take reasonable care.

MOVE 2 - TO EXPAND ON DETAILS OF SUBJECT MATTER.

THE ROLE OF POLICY

M2S1

Like any other area of law, tort has its own set of principles on which cases should be decided, but clearly it is an area where policy can be seen to be behind many decisions. For example, in many tort cases the parties will, in practice, be two insurance companies – cases involving car accidents are an obvious example. The results of such cases may have implications for the cost and availability of insurance to others; if certain activities are seen as a bad risk, the price of insurance for those activities will go up, and in some cases insurance may even be refused. This fact is often taken into account when tort cases are decided.

M2S2

In terms of simple justice, it may seem desirable that everybody who has suffered harm, however small, should find it easy to make a claim. In practical terms, however, the tort process is expensive and it is difficult to justify its use for very minor sums. The courts therefore have to strike a balance between allowing parties who have suffered harm to get redress, and establishing precedents that make it too easy to get redress so that people make claims for very minor harms. The English courts have often been resistant to upholding claims that would 'open the floodgates' for a large number of similar cases to pour into the courts.

M2S2(a)

M2S2(b)

There are other practical concerns too: it has been suggested, for example, that in the USA, where ordinary individuals are much more likely to sue than here, medical professions are inclined to avoid new techniques, or to cover themselves by ordering costly and often unnecessary tests, because of the danger of legal action. While it is clearly a good thing that dangerous techniques should not be used, medical science has always had to take certain risks in order to make new discoveries, and it may be that fear of litigation can stunt this process.

These are difficult issues to weigh up, and traditionally English judges avoided the problem by behaving as though such considerations played no part in their decisions, referring only to established principles. However, in recent years they have been more willing to make clear the policy implications behind their decisions: certainly the 'floodgates' argument mentioned above has been overtly referred to in the case law on both nervous shock and the recovery of economic loss in negligence.

The Compensation Act 2006 now gives judges specific permission to address one particular aspect of policy when deciding cases involving negligence or breach of statutory duty. Section 1 of the Act states that when considering whether a defendant should have taken particular steps to meet a standard of care, a court

M2S3

may... have regard to whether a requirement to take such steps might –
(a) prevent a desirable activity from being undertaken at all, to a particular extent, or in a particular way, or
(b) discourage persons from undertaking functions in connection with a desirable activity.

law: an introduction

The clause was a response to claims that Britain has developed a 'compensation culture' in which people are too ready to sue over trivial events. It has been claimed, by the media and also some politicians, that fear of being sued is putting people off from becoming involved in socially desirable activities: it was widely reported in the media, for example, that voluntary associations such as the Scouts were facing a shortage of adult volunteers for this reason, and that teachers were becoming reluctant to take pupils on trips and excursions. However, when the government set up a task force to investigate the 'compensation culture', its report, *Better Routes to Redress* (see Reading on the Internet, p. 15), found that personal injury litigation has actually been decreasing in recent years, and there was no statistical evidence to suggest that the 'compensation culture' criticised by the media actually exists.

M2S4

M2S5

TORT AND THE REQUIREMENT OF FAULT

In addition to proving that the defendant has committed the relevant act or omission (and, where necessary, that damage has been caused as a result), it is sometimes necessary to prove a particular state of mind on the part of the defendant. This is described as a tort requiring an element of fault, and depending on the tort in question, the required state of mind may be intention, negligence or malice. Most torts require some element of fault; the few that do not are described as torts of strict liability.

M2S6

M2S6(a)

Intention

M2S7 'Intention' has various meanings depending on the context, but it essentially involves deliberate, knowing behaviour. So for example, if I throw a ball at a window deliberately, knowing the glass will probably break, I can be said to intend to break the window. If on the other hand, I threw the ball at a wall, unaware that there was a window in the wall, then I would not be said to intend to break the window. Trespass is an example of a tort in which the required state of mind is intention.

M2S8

Negligence

As a state of mind, negligence essentially means carelessness – doing something without intending to cause damage, for example, but not taking care to ensure that it does not. In the example above, when I threw the ball at the wall, then I may have been negligent. The term 'negligence' also describes a particular tort.

M2S9

Malice

In tort, to act maliciously means acting with a bad motive. Normally, malice – and motive in general – is irrelevant in tort law. If what you do is lawful, it remains lawful whatever your reason for doing it. Similarly, if your act is unlawful, doing it with a good motive will not usually make it lawful. This was the approach taken by the House of Lords in the leading case of **Bradford Corporation v Pickles** (1895). The Bradford Corporation owned a reservoir on property adjoining Pickles's land. Water naturally flowed under Pickles's land and into the reservoir. Pickles wanted to force the corporation to buy his land at a high price. With this aim in mind, he dug up some of his land, in order to stop the natural flow into the reservoir. It was already settled law that it was not a tort for a landowner to interfere with the flow of underground water, but the corporation argued that although Pickles's action would normally have been lawful, his malice made it unlawful. The House of Lords rejected this argument.

However, there are a few torts for which malice is relevant. In defamation, certain defences will be unavailable if the defendant has acted maliciously, and in nuisance, malice can render what would have been a reasonable act an unreasonable one. For example, in **Hollywood Silver Fox Farm Ltd v Emmett** (1936) the defendant and claimant owned farms near each other. After a dispute between them, the defendant arranged for guns to be fired on a part of his own land which was near the claimant's land, with the intention of interfering with the breeding of the claimant's foxes. The firing did have this effect, and so the claimant sued for nuisance. The action was successful, because of the malicious motive with which the defendant acted.

Malice may also be relevant to the calculation of damages, making them higher than they would be if the same act was committed without malice.

Strict liability

A strict liability tort is committed simply by performing the relevant act or omission, without having to prove any additional state of mind at the time. The tort under **Rylands v Fletcher** (see p. 288) is an example of a tort of strict liability. Where the duty breached is a statutory one, proof of a state of mind such as negligence is not normally required, so an Act simply states that something should be done, not doing it will in itself establish liability. The Consumer Protection Act 1987 has brought another area within the fold of strict liability, namely damage caused by defective products. It should be noted that while liability may be strict, it is not necessarily absolute as in many cases defences will be available.

M2S10

REASONS FOR A REQUIREMENT OF FAULT

M2S11

In practice the majority of torts do require some proof of fault, and there are several reasons why this has traditionally been thought desirable, including the following.

Control of tort actions

The fact that a claimant must usually prove fault limits the number of tort actions brought, and prevents the courts from being overloaded.

Laissez faire policy

The modern tort system arose in the nineteenth century, when the doctrine of *laissez faire* was prominent. This argued that individuals should be responsible for their own actions, with as little intervention from the state as possible. People were not required actively to look after each other, only to avoid doing each other harm, and they would only be expected to make amends for such harm as they could reasonably have avoided doing – in other words, not for harm caused when they were not at fault. The state would provide a framework of rules so that people could plan their affairs, but would intervene in those affairs as little as possible.

Deterrence

The requirement of fault is said to promote careful behaviour, on the basis that people can take steps to avoid liability, whereas under strict liability it would be beyond their control, leaving little incentive to take care.

Wider liability would merely shift the burden

Compensation is designed to shift the burden of harm from the person who originally suffered the harm to the person who pays the compensation. If moves, rather than cancels out, the loss. As a result, it can be argued that it is better to let the loss lie where it

Arguments against a requirement of fault

falls unless some other purpose can be served by providing compensation. A fault requirement adds an additional purpose, that of punishing the wrongdoer.

Accountability

The requirement of fault is a way of making people pay for what they have done wrong, which appears to be a deep-seated social need – even though in many cases it is actually an insurance company which pays, and not the person responsible.

Strict liability merely reverses the burden of proving fault

Almost all strict liability torts allow the defendant to plead the contributory fault of the claimant as a defence, or a factor which should reduce damages. In practice therefore, strict liability often amounts to nothing more than a reversal of the burden of proof.

M2S12

ARGUMENTS AGAINST A REQUIREMENT OF FAULT

Unjust distinctions

The result of the fault principle is that two people who have suffered exactly the same injuries may receive very different levels of compensation. For example, John and Jim both lose the use of their legs in separate car accidents; in Jim's case the driver is proved to be at fault, in John's, the driver is not. They both suffer the same degree of pain, they both end up with the same disability, and the same problems. Yet Jim may win thousands of pounds in damages to help him cope with those problems, while the most John can hope to receive are benefits provided by the social security system. As we shall see further on, some countries have partially replaced tort law with no-fault compensation schemes aimed at dealing with this problem. A no-fault scheme could compensate not only accidents, but also hereditary and other disabilities and illnesses, on the basis that the problems are the same, regardless of cause.

Illogical distinctions

Even if it is admitted that the potentially huge number of tort actions has to be limited in some way, proof of fault is not the only grounds by which this could be done, nor a particularly logical choice. It appears to be the result of a policy decision that it is sometimes just to reward defendants who have been careful, by protecting them from liability for the consequences of their actions. Quite apart from the fact that fault is difficult to prove, and failure to prove fault does not mean that fault did not occur, it is difficult to see the logic of this approach when the wrongdoer is insured, and would not personally lose anything by paying damages.

Lack of deterrence

The practical deterrent effect of fault liability is debatable. First, the generalised duty to take care is too vague to influence behaviour much. Secondly, in many cases the tortfeasor

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Arguments against a requirement of fault

will be well aware that damages will be paid by their insurance company. Motorists are obliged by law to take out insurance against accidents, as are most employers, and many professional organisations run negligence insurance schemes for their members. It can be argued that defendants also know that a claim may result in higher premiums, but it is debatable whether this is actually much of a deterrent, especially in business situations where the cost can simply be passed on to consumers in higher prices.

Of course, cost may not be the only deterrent; bad publicity can be equally powerful, if not more so. However, large corporations with good lawyers can largely avoid such publicity by negotiating an out-of-court settlement. In such a case, claimants' chances of recovery seem to depend not on fault, but on the amount of pre-trial publicity they can drum up.

Tort should compensate and not punish

It can be argued that it is not the job of tort to punish wrongdoers; that function properly belongs to the criminal law.

Damages can be disproportionate to fault

As we will see when we look at negligence, there are cases in which a very minor level of fault can result in very serious consequences. There can be a huge disproportion between defendants' negligence (such as a momentary lapse in concentration) and the high damages that they subsequently have to pay.

Expense

The need to prove fault increases the length, and so the cost, of tort cases. This increases the proportion of money that is spent on operating the tort system rather than compensating claimants.

Unpredictability

The fault principle adds to the unpredictability of tort cases, and increases anxiety and pressure on both sides. The practical result is that claimants may feel pressurised into accepting settlements worth much less than they could have won if they had gone to court.

Problems with the objective standard

Fault is judged by reference to an objective standard of behaviour, which ignores the knowledge or capacity of the individual; this can mean that someone is legally at fault, when we would not consider that they were at fault morally, or at least not to the degree suggested by the law. For example, the law requires an objective standard of care from drivers, and it expects this equally after 20 years of driving, or 20 minutes.

7

ALTERNATIVE METHODS OF COMPENSATION FOR PERSONAL INJURY

MZS13

A hundred years ago, the law of tort, with all its flaws, was almost the only way of gaining compensation for accidental injury, but its role has declined with the development of insurance and social security. For these the issue of fault is usually irrelevant.

The social security system

The vast majority of accident victims who need financial support get it not from the tort system, but through social security benefits. This is because most accident victims do not sue anybody, either because the accident was not (or cannot be proved to be) someone else's fault, or because they do not realise they could sue, or because for some reason (often cost) they decide not to. They may be unable to work for a long period or even permanently, and unless they have insurance, state benefits will be their only means of financial support. Benefits vary depending on the person's needs, and how much they have paid into the system while working, but are unlikely to provide for more than the bare essentials of life – unlike tort compensation, which is designed as far as possible to give an accident victim back the standard of living he or she enjoyed before the accident.

The social security system tends to provide support for injury victims more quickly, and with less uncertainty than the tort system, but its drawbacks are the very low levels of support, and the continuing stigma attached to accepting state benefits – tabloid newspapers, for example, routinely refer to benefits as 'handouts', when the recipients may in fact have been paying into the social security system for years through tax and national insurance.

Insurance

A whole range of policies provide insurance cover in many potentially dangerous situations. Two of the most important sources of accidents are road traffic and industry, and statute makes it a criminal offence for either vehicle users or employers to be without adequate insurance (under the Road Traffic Act 1988 and the Employers' Liability (Compulsory Insurance) Act 1969 respectively). In addition, the Motor Insurers' Bureau, an organisation set up by the insurance industry, gives money to traffic victims where the driver is either uninsured, or unidentified (as in the case of a 'hit and run' accident).

Many people take out household insurance, which usually covers occupier's liability. Three main types of policy provide compensation where accidental death or injury occurs: life assurance, personal accident insurance and permanent health insurance.

In many cases, employers provide a variety of benefits which may also be of use to accident victims. There may be lump sums payable under occupational pension schemes where death or injury lead to premature retirement. Some employers offer sick pay at higher rates and for longer periods than the statutory scheme, though this rarely exceeds six months on full pay.

Compensation for victims of crime

There are additional sources of financial help for those who are injured as a result of crime. The Criminal Injuries Compensation Scheme compensates victims of violent crime, and those injured while trying to prevent crime, for pain and suffering and loss of amenity (meaning loss of the ability to lead a full life through injury).

The sums paid are based on a tariff, with around £1,000 awarded for relatively minor injuries such as fractured bones, and at the upper end, £250,000 for serious brain damage. In several high-profile cases, most of the tariff awards are roughly comparable to the sums that would be awarded by a court for the same kinds of injury, but the amounts awarded to victims of crimes that have caused very serious injury are considerably higher than those that are likely to be awarded by a court. The scheme also compensates victims of crime for loss of earnings and expenses, but no compensation is paid for the first 28 weeks' loss of earnings, and the total amount of compensation for loss of earnings is limited to one-and-a-half times the average gross industrial wage (currently around £29,000 a year). In practice the scheme provides a remedy where a person's rights in tort are useless because the assailant has not been identified, or would be unable to pay substantial damages if sued.

A second source of compensation for crime victims is the compensation order, which courts can make against those convicted of crimes, in order to pay for any damage they have done in committing the crime. The orders can cover compensation for personal injury, or loss of or damage to property; in practice most are for theft, handling stolen goods and criminal damage.

The NHS complaints system

Since the mid-1990s, claims against the NHS for medical negligence have been increasing, and at the time of going to press, were costing the NHS around £500m a year in compensation and legal fees. As a result, in 2001, the National Audit Office looked into the issue of negligence claims against the NHS, and concluded that money could be saved, and complaints dealt with more efficiently, if a new system specifically for NHS complaints was created.

The Commission pointed out that research showed that in many cases, financial compensation was not the patient's main aim. Often, they were more interested in getting a genuine explanation of what had gone wrong, an apology, and some kind of reassurance that action would be taken to prevent other people being injured by the same sort of mistake. It was when the NHS failed to meet these needs that attitudes tended to harden, leading people to sue for compensation. The Commission concluded that if measures were put in place to address these issues, fewer legal cases might be brought.

A further report was produced in 2003 by the Chief Medical Officer, Liam Donaldson. In *Making Amends*, he too recommended the creation of a new scheme for NHS complaints, which would make it easier to get not just compensation, but also acknowledgement of mistakes, and care and rehabilitation to deal with the results of the medical negligence. The

emphasis in the report was on creating a system in which, instead of the patient having to prove fault, and the NHS attempting to fight claims, NHS staff would be encouraged to admit mistakes, and the organisation would take responsibility for improving practice by learning from such mistakes.

The government's response to *Making Amends* was the NHS Redress Act 2006. It allows the creation of an NHS Redress Scheme which, the explanatory notes to the Act state, will 'provide investigations when things go wrong, remedial treatment, rehabilitation and care where needed, explanations and apologies, and financial compensation in certain circumstances' without the need to go to court. Only cases worth less than £20,000 will be handled by the scheme, and patients who accept redress offered under the scheme will have to waive their right to take legal action.

The Act is what is known as an enabling Act, which sets out a broad framework for the scheme and then permits the detailed rules to be put in place by means of secondary legislation. It was passed in November 2006, and the government then began consulting with interested parties before deciding on the details of how the scheme will work. At the time of going to press these details were still the subject of debate, but the scheme was expected to be in place by the middle of 2007.

Special funds

Highly publicised accidents involving large numbers of victims, such as the sinking of the *Herald of Free Enterprise* ferry off Zeebrugge and the Kings Cross underground fire, sometimes result in the setting up of special funds to compensate the victims.

No-fault systems

The social security and insurance arrangements 'un alongside the tort system in England. However, in some countries, tort liability in particular fields has been completely replaced by a general no-fault scheme of compensation. The main benefits of this are that similar levels of harm receive similar levels of compensation, regardless of whether fault can be proved, and that the money spent on administering the tort system, and providing legal aid in tort cases, can instead be spent in compensating those who have suffered harm. It should be pointed out here that tort is a notoriously uneconomical way of delivering benefits to those who need them: the 2001 survey of medical negligence claims by the National Audit Office found that in nearly half the cases studied, the costs of the case would be higher than the damages awarded to the claimant. In cases where the claim was for more than £500,000, 65 per cent cost more than the eventual damages.

The most notable no-fault scheme is that which was created in New Zealand in 1972. Their scheme covered personal injuries caused by accidents, which included occupational diseases, and was financed by a levy on employers, the self-employed, vehicle owners, health care providers and through general taxation. Tort actions for personal injury were abolished, and instead injured parties claimed through the Accident Compensation Commission.

Victims unable to work as a result of their accidents could claim weekly payments of up to 80 per cent of their pre-accident earnings, up to a statutory maximum. Those who

were still able to work, but at a lower rate of pay than before, could claim 80 per cent of the difference between old earnings and new. Payments could be adjusted to reflect inflation and improvement or deterioration in the victim's medical condition. The system also allowed for lump-sum payments to compensate for pain and suffering (known as non-pecuniary loss, as it is difficult to put a price on it). However, during the late 1980s and early 1990s, the political climate in New Zealand turned against high spending on any kind of welfare and social benefits. As a result, the no-fault scheme has been dismantled and the tort system brought back into operation.

In the USA, approximately half of all the states have established no-fault schemes for victims of road accidents, though there is considerable variation between these schemes and their effect on any potential tort claim. In most of these states, motorists have to buy no-fault insurance cover up to the limit imposed by their state, and the driver and anyone else injured by the vehicle can make a claim. Non-pecuniary loss such as pain and suffering is still covered by the tort system and in some states, claims for non-pecuniary loss can only be brought if the case is particularly serious.

The US schemes seem to have led to a lowering in the cost of motor insurance, and the award of compensation to many victims who would have received no compensation under the old system.

In the Australian state of New South Wales, tort liability for transport accidents has been replaced by a scheme which only pays compensation if the accident was caused by the fault of someone, and for these purposes the victim's fault is not sufficient. The practical effect of this has simply been that cases which would in the past have been dealt with as tort cases in the civil courts are now being heard by administrative tribunals; and because statute imposes limits on the payments that can be made under the scheme, there has been a decrease in the amount of compensation for the serious cases.

Although most no-fault schemes have been created in the context of transport accidents, in Sweden there is a no-fault scheme for victims of medical accidents.

Alternative methods of making wrongdoers accountable

There are also alternatives to the tort system in terms of holding wrongdoers to account for what they have done. The criminal law is an obvious example, though it does not cover all activities which would lead to redress in tort. Highly publicised accidents often result in public inquiries, such as the thalidomide tragedy, the sinking of the *Herald of Free Enterprise* and the Kings Cross fire.

REFORM OF THE TORT SYSTEM

In the 1970s, the then government put in place a Royal Commission to study the various systems for compensating personal injury. The Royal Commission on Civil Liability and Compensation for Personal Injury, known as the Pearson Commission, reported in 1978, and remains the last large-scale examination of personal injury compensation. It considered several alternative recommendations for reform, including a no-fault scheme, and the abolition of fault-based tort liability, to be replaced by a system which would

place responsibility on the party best placed to insure against the risk. Where, for example, a pedestrian is knocked down by a car, it is obviously much more practical for the motorist to insure against such an accident than for the pedestrian to do so. Equally, it is easier for an employer to take out one insurance policy covering the whole workforce than for each employee to buy their own accident insurance. However, there would be cases where it might be reasonable to expect the victim to insure themselves against the risk, and in this case an uninsured victim would have to bear the loss.

The Commission concluded that given the social security system in England, it was unnecessary to establish a full no-fault compensation system. It recommended that the tort system should still provide accident compensation, alongside the benefits provided by the social security system, but that there should be a shift in the balance between the two towards increased social security benefits. In particular, the report advocated that there should be improved benefits for the victims of industrial injuries, and that a dedicated scheme should be set up for injuries caused by motor vehicles, as these were by far the largest category of accidental injury studied by the Commission and were also likely to be serious. The scheme would be financed by a levy on petrol.

The Commission considered the idea of no-fault schemes for other particular types of accident, but given the possible difficulties in defining the scope of such schemes, and in financing them, felt there were too many practical problems to make these a sound proposition.

The idea of a general compulsory insurance was also rejected, on the grounds that it would be difficult to enforce, that some might find it unaffordable, and that it was not desirable to expect people to insure themselves against harm caused by others. Such a system would retain the high operational costs of the tort system, yet lose the advantage of making wrongdoers pay for the harm they cause.

The Commission recommended that the tort system should be kept because of its deterrent effect and because '[t]here is an elementary justice in the principle of the tort action that he who has by his fault injured his neighbour should make reparation' (Pearson Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054, 1978, paras 245-63). It envisaged, however, that many small tort cases would no longer be brought if its recommendations on social security benefits were put into action.

The Commission also suggested that two measures be taken to reduce tort damages. Non-pecuniary damages would be available only in the most serious cases, and the value of any social security benefits obtained as a result of injury should be offset against the damages awarded. This, it was suggested, was justified by the fact that both social security benefits and tort damages were ultimately derived from society at large, and should not be paid twice.

The Pearson Commission was not a success, and its proposals were heavily criticised. The suggestion for a road accident compensation scheme, for example, was criticised as creating yet another *ad hoc* category in an already complex and fragmented system, when in fact road accident victims appeared to be one of the categories best served by the tort system. Shortly after the Pearson Commission reported, a Conservative government was elected, and rather than increase social security benefits as the Commission

had suggested, it set about cutting them, so there was no real opportunity for the social security system to play a larger role in accident compensation as the Commission had envisaged. By the late 1980s, it was generally assumed in the majority of Western industrialised countries that social security spending should be curtailed, and despite a change of government in the UK, controlling expenditure on welfare benefits is still seen as a priority; against this background, the Commission's overall approach is obviously not going to be adopted. Only one significant move has been made in their direction, with the advent of legislation to allow the value of social security benefits received by accident victims to be claimed back by the state from tortfeasors (see p. 380).

ANSWERING QUESTIONS

How satisfactory is the present system whereby compensation for personal injuries arising from a negligent action depends on proof of fault? Are there any alternatives? OCR

To answer this question, you will need to have studied negligence, as well as the issues raised in this chapter. A good way to start this essay would be to look at what we mean when we say that compensation for personal injuries caused by negligence depends on fault. Explain the ways in which the law of negligence judges fault: relevant issues here would be the Caparo test, the standard of reasonableness, and the rules on causation and remoteness of damage, all of which are designed to ensure that a defendant will only be liable for damage which can be said to be their fault.

In order to decide whether dependence on fault creates a satisfactory system, you should work through the reasons why fault might be thought desirable, as explained in this chapter, and explain how those factors contribute to the system we have. You could then work through the disadvantages of the fault principle, as explained on p. 6, again relating them to their practical impact on the tort system. Other useful material can be found on p. 127, specifically relating to the strengths and weaknesses of the law on negligence. Remember though that you are only being asked about personal injury claims, so the material on economic loss is not relevant here.

You should then look at the alternatives to a fault-based system, which are covered in this chapter, and give an assessment of their strengths and weaknesses. Finally, you should offer a conclusion which, based on the arguments you have put forward, states whether you think a fault-based system is the best option, or whether it should be replaced by an alternative, either completely or in certain types of case.

MOVE 3 - TO CONCLUDE AND COMPLETE THE SUBJECT MATTER.

SUMMARY OF CHAPTER 1

M3S1

Tort law covers breaches of a duty owed under civil law, and usually allows the victim to claim financial compensation.

Tort and other legal wrongs

- 1 Tort and crime: crimes are punished by the state; torts are a dispute between the person committing the tort, and the victim
- 2 Tort and breach of contract: torts involve breach of a duty fixed by law; breach of contract involves breaching a duty agreed between the parties.

The role of tort law

Policy can be seen to be behind many tort law decisions, because the rules made can have important effects on social issues such as the availability of insurance, or the willingness of doctors to try new techniques.

The requirements of fault

There are three forms of fault in tort:

- 1 Intention
- 2 Negligence
- 3 Malice.

A small number of torts impose strict liability

Reasons for a fault requirement:

- 1 control of tort actions;
- 2 laissez faire policy;
- 3 deterrence;
- 4 wider liability merely shifts costs;
- 5 accountability;
- 6 strict liability only reverses the burden of proof.

Arguments against a fault requirement:

- 1 unjust distinctions;
- 2 illogical distinctions;
- 3 lack of deterrence;
- 4 tort should compensate, not punish;
- 5 damages disproportionate to fault;
- 6 expense;
- 7 unpredictability;
- 8 problems with an objective standard.

Alternative methods of personal injury compensation

Other systems include:

- 1 social security;
- 2 compensation for crime victims;

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Reading on the Internet

- the NHS complaints system;
- insurance;
- special funds;
- no-fault systems in other countries.

Reform of the tort system

The Pearson Commission recommended a shift towards better compensation through social security for accident victims, but was not followed.

Reading list

- Jacobs, J (2006) 'Reforming personal injury compensation', *Solicitors Journal* 586
Parker, A (2006) 'Changing the claims culture', *New Law Journal* 702
Slapper, C (2005) 'Compensation culture' 46 *Student Law Review* 28
Towler, A (2005) 'Time to redress' *Solicitors Journal* 652

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Reading on the Internet

- The NHS Redress Act, and its explanatory notes, can be read at:
<http://www.opsi.gov.uk/acts/en2006/2006en44.htm>
The report, *Better Routes to Redress*, into the alleged compensation culture, can be read at:
<http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf>
The government's response to *Better Routes to Redress* can be read at:
<http://www.dca.gov.uk/ma/rep/betterroutes/better-fair-force.pdf>
The Chief Medical Officer's report *Making Amends* can be read at:
http://www.dh.gov.uk/Consultations/ClosedConsultation/ClosedConsultationsArticle/fs/en?CONTENT_ID=40723631&ch=9&V=2K5

For further resources and updates please go to the Companion Website accompanying this book at: www.my.lawchamber.co.uk/slitotquntort

M3S3

Production

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APPENDIX E
Text 5 by Heuston

INTRODUCTORY
CHAPTER 1
MOVE 1 - TO INTRODUCE THE SUBJECT MATTER.
§ 1.1. THE FORMS OF ACTION

In the fourteenth century remedies for wrongs were dependent upon writs. No one could bring an action in the king's common law courts without the king's writ and the number of writs available was very limited. Where there was no writ there was no right. One of Sir Henry Maine's most famous generalisations explains our early law: "So great is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." Every plaintiff had to bring his cause of action within a recognised form of action, and "the key-note of the form of action is struck by the original writ, the writ whereby the action is begun." ¹ Although modern research is inclined to minimise the importance of the writ system, it can be said that for five hundred years the writ determined the right. After some preliminary amendments of the law in 1832 and 1833, the Common Law Procedure Act 1852, s.3, provided that "it shall not be necessary to mention any form or cause of action in any writ of summons." ² Yet the most recent version of the Rules of Court ³ has been interpreted to mean that even if it is not necessary to state the cause of action in the writ it is very desirable to do so. "Today" a cause of action means a factual situation which entitles one person to obtain a remedy from another person in the courts. ⁴ So that it is unnecessary to attach a specific label such as "conversion" or "trespass," if the pleaded facts sufficiently support either claim. ⁵ It is sufficient for the pleader to state the material facts: he need not state the result. ⁶ Today the fundamental principle is that whenever a person has a right the law should give a remedy. ⁷ "This principle enables us to step over the tripwires of previous cases and to bring the law into accord with the needs of to-day." ⁸ The absence of a remedy is evidence, ⁹ but no more than evidence, that no right exists. ¹⁰ Finally, it is interesting to	MIS1
	MIS1(a)
	MIS1(b)
	MIS2
	MIS2(a)
	MIS3

¹ *Early Law and Custom*, p. 389.
² *Maitland, Forms of Action*, p. 299. For 800 years the writ contained a command by His Majesty to enter an appearance; this was dignified but was, perhaps, obscure and perplexing to persons abroad; it has now been omitted. Note to Ord. 6, c. 1 in *Supreme Court Practice* (1985).
³ Ord. 18, r. 15(2).
⁴ *Sternman v. E. W. and W. J. Moore Ltd.* [1970] 1 Q.B. 569, 603-604.
⁵ *Leung v. Cooper* (1965) 1 Q.B. 232, 242-243.
⁶ *Hesperides Hotels v. Agassan Turkish Holdings Ltd.* [1979] A.C. 508, 538.
⁷ *Metal and Rohstoff A.G. v. Donaldson Lytle and Jennette Inc.* (1990) 1 Q.B. 391, 436.
⁸ *Leung v. Cooper* (1965) 1 Q.B. 232, 239. But see the criticism of this case below, § 25.4.
⁹ *Hill v. Parsons (C.A.) & Co. Ltd.* [1972] Ch. 305, 316, *per Lord Denning, M.R.*
¹⁰ *Dier v. British and International Miling Corporation* [1939] 1 K.B. 724, 738-739; *Siles Affiliates Ltd. v. Le Fan* [1947] Ch. 295, 305; *Nelson v. Larholt* [1948] 1 K.B. 339, 343; *Abbott v. Sutcliffe* [1957] 1 K.B. 189, 200.

note that it is exceptional for a writ to lead to a contested judicial hearing. The annual Civil Judicial Statistics show that judgment by default is given in over 90 per cent. of actions begun by writ.

The forms of action

"An English lawsuit is not a moot or a debate, but an attempt to arrive at a result on the facts before the court: broad academic arguments are quite unsuited to the processes of the English law."¹¹ So it is still necessary to know something of the nature and scope of the forms of action. "The forms of action," said Maitland at the beginning of this century,¹² "we have buried, but they still rule us from their graves"—perhaps less imperiously today than when Maitland wrote, for Lord Alkin said¹³ that "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred." A knowledge of the forms of action is necessary for the following three reasons.

First, to one who is wholly ignorant of the old learning many of the older authorities on liability for civil injuries are unintelligible, especially those which deal with the difference between trespass and case.

Secondly, questions as to the existence, nature, and extent of liability depend even yet in some instances on the particular kind of writ or remedy that would have been available for the plaintiff under the old practice.¹⁴ An illustration is *Esso Petroleum Co. Ltd. v. Southport Corporation*.¹⁵ The defendants' oil tanker *Inverpool* ran aground on a revetment wall in the Ribble estuary. There was a danger that she might break her back, with the probable loss of the ship herself and the lives of her crew. In order to prevent this the master decided to lighten the ship by jettisoning some of her cargo. The 400 tons of oil so discharged were carried by the action of the wind and tide on to the premises of the Southport Corporation. "Gratitude for deliverance, apart from other instincts, might have inspired a desire to reimburse the Corporation of Southport the amount of the expense to which they were put in cleaning the oil which came unwanted and unwelcome to their shore and to their lake."¹⁶ Esso Petroleum took a different view. As events turned out they were legally justified in doing so. For although the plaintiffs alleged that the deposit of oil on the foreshore gave rise to three distinct causes of action—trespass, nuisance, and negligence—the trial judge decided each one of these allegations adversely to them and his judgment was approved by the House of Lords. A second illustration is the litigation arising out of another escape of oil at sea, this time from the *Wagon Mound* in Sydney Harbour. In one action the owners of a damaged

wharf failed to recover,¹⁷ but in another action, differently framed, the owners of ships moored to that wharf did recover.¹⁸ Again as the same facts may support an action either in tort or in contract, and as there are different periods of limitation for tort and contract, the choice of remedy may be of great practical importance.¹⁹

Thirdly, as Maitland pointed out, a lawyer can still "do his client a great deal of harm by advising a bad or inappropriate course of procedure, though it is true he cannot bring about a total shipwreck of a good cause so easily as he might have done some years ago."²⁰ The *Esso Petroleum* case again provides an example. The plaintiffs' case before and at the trial was that the defendants were vicariously responsible for the negligent conduct of the master of the *Inverpool* in his navigation of the vessel. As the master was acquitted of negligence it logically followed that the defendants also went free. The House of Lords (reversing the Court of Appeal) held that it was not then open to the Southport Corporation to allege that *Esso Petroleum* must discharge the onus of showing that they had not negligently sent the vessel to sea in an unseaworthy condition. Adherence to the pleadings is not "pedantry" or mere formalism.²¹ It is bad law and bad practice to shrug off a criticism as "a mere pleading point."²² These statements are of particular importance today, when the expansion of the tort of negligence, with its emphasis on the foresight of the hypothetical reasonable man, has tended to emphasise vagueness, informality and imprecision in the law. So it has been necessary to state that "the tort of negligence has not yet subsumed all torts and did not supplant the principles of equity, or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights."²⁴ To put it in another way, the structured principles of an established tort such as defamation²⁵ or malicious prosecution²⁶ cannot be eroded by suing in negligence.

M2S1(E) MOVE 2 - DETAILS AND EXPAND ON THE LAW

Justice according to law "The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not willingly to depart and no light is shed upon a given case by large

¹¹ [1961] A.C. 388.

¹² [1967] L.A.C. 617.

¹³ See below, § 2.1, and § 2.5.4.

¹⁴ *Forms of Action*, p. 303.

¹⁵ It should be remembered that a plea may be right: *The Merak* [1965] P. 223, 260.

¹⁶ [1956] A.C. 218, 241, per Lord Radcliffe. In general it is not possible to raise on appeal a point not taken in the court below: *Perovskii v. Wellington Corporation* [1959] A.C. 53.

¹⁷ *Yet in Carmarthenshire C.C. v. Lewis* [1955] A.C. 549 the House of Lords appears to have allowed the appeal on a ground which was not argued at the trial.

¹⁸ *Erroll v. Secretary of State* [1980] 1 W.L.R. 172, 180.

¹⁹ *Chim & South Sea Bank Ltd. v. Tan* [1990] 1 A.C. 536, 543, per Lord Templeman.

²⁰ *Bell-Booth Group Ltd. v. Air-Gen.* [1989] 3 N.Z.L.R. 148. But see below, § 9.7 n. 39 and cases there cited.

²¹ *McDonagh v. Metropolitan Police Commissioner* [1991] C.L.Y. 4315.

²² *McDonagh v. Metropolitan Police Commissioner* [1991] C.L.Y. 4315.

²³ *McDonagh v. Metropolitan Police Commissioner* [1991] C.L.Y. 4315.

²⁴ *McDonagh v. Metropolitan Police Commissioner* [1991] C.L.Y. 4315.

²⁵ *McDonagh v. Metropolitan Police Commissioner* [1991] C.L.Y. 4315.

²⁶ *McDonagh v. Metropolitan Police Commissioner* [1991] C.L.Y. 4315.

M1S5

¹¹ *Duple Motor Bodies v. J.R.C.* [1960] 1 W.L.R. 510, 526, per Harman L.J.
¹² *Forms of Action*, p. 296. See [1905] 21 L.Q.R. 43 for similar remarks by Salmon L.J.
¹³ *United Australia Ltd. v. Barclays Bank* [1941] A.C. 1, 29.
¹⁴ *Sutton, Personal Actions*, pp. 58-62, gives some practical illustrations.
¹⁵ [1956] A.C. 218 (H.L.).
¹⁶ [1954] 2 Q.B. 182, 203, per Morris L.J.

generalisations about them.²⁷ It is better that the law should be clear than that it should be clever.²⁸ As it was put in an American case, rather than add to the already existing confusion by the formulation of a new rule, we conclude that the wisest approach is to return to the traditional principles, theories and standards of tort law.²⁹ For it must always be borne in mind that justice according to law is the common law ideal.³⁰ The qualities that saved English law when the day of trial

M2S1(b) came in the Tudor age were not vulgar common sense and the reflection of the layman's unanalysed instincts: rather they were strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries.³¹ Sentiment is a poor guide to decision. So when in 1401 the defendant was about to be held liable for the escape of his fire, his counsel argued that he would be "undone and impoverished all his days if this action is to be maintained against him; for then twenty other such suits will be brought against him," but was met with the reply: "What is that to us? It is better that he should be utterly undone than that the law should be changed for him."³² The same answer would be given today. So it is not open to a modern judge to create a new remedy, and accordingly a new right, simply on the grounds of economy or convenience,³³ although sympathy for a morally meritorious plaintiff is sometimes judicially expressed, especially when he is a workman injured in the course of his employment.³⁴ On the other hand, a court should try not to be influenced against the plaintiff by the fact that he is a disagreeable person standing on his legal rights,³⁵ and adopting a "dog in the manger" attitude,³⁶ or has made a grossly exaggerated claim.³⁶

M2S3

M2S4

§ 1.2. TRESPASS AND CASE³⁷

M2S5

The term "trespass" has been used by lawyers and laymen in three senses of varying degrees of generality: (1) In its widest and original

²⁷ *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479, 505, per Dixon J.
²⁸ *Parsons v. R.N.M. Laboratories Ltd.* [1964] 1 Q.B. 91, 102.
²⁹ *Hansley v. Great S. S. P.* (2d) 1096, 1102 (1976).
³⁰ Maitland, *Selden Society*, Vol. 17, p. xviii. After several decades of so-called realism, it is worth noting that in the 1970s, "Comprehensive, abstract, generalised theory has reappeared in tort literature" (G. Edward White, *Tort Law in America* (1980), p. 155).
³¹ *Beaulieu v. Finglam* (1401) Y.B. 2 Hen. IV. f. 18, pl. 6 (reprinted in Baker and Milson, *Sources*, p. 589).
³² *Re Wykeham Terrace* [1971] 1 Ch. 204, 213.
³³ *Chopman v. Oakleigh Animal Products Ltd.* (1970) 8 K.I.R. 1063, 1067.
³⁴ As in *Withers v. Perry Chain Co. Ltd.* [1961] 1 W.L.R. 1314, 316, or in some of the leading cases of wrongful imprisonment (see below, § 7.2).
³⁵ As in *Anchor Brewhouse Developments Ltd. v. Berkley House Ltd.* [1987] 2 E.G.L.R. 173.
³⁶ "Parties who open their mouths far too wide may still be entitled to a cut-off the joint, even if they are clearly not entitled to the joint itself." R. v. *Take-Over Panel*, *ex p. Guinness plc*, per Lord Donaldson M.R. [1990] 1 Q.B. 116, 180.

See Winfield and Goodhart, "Trespass and Negligence" (1933) 49 L.Q.R. 359; Frichard, "Trespass, Care, and the Rule in *Williams v. Holmdale*" [1964] C.L.J. 234; Trindade, "Some Criticisms of Negligent Trespass to the Person" (1971) 201 C.L.Q. 706; Fridman, "Trespass or Negligence" (1971) 9 Alberta L.Rev. 250.

signification it includes any wrongful act—any infringement or transgression of the rule of right. This use is common in the Authorised Version of the Bible and was presumably familiar when that version was first published. But it never obtained recognition in the technical language of the law,³⁸ and is now archaic even in popular speech. (2) In a second and narrower signification—its true legal sense—the term means any legal wrong for which the appropriate remedy was a writ of trespass—*viz.* any direct and forcible injury to person, land or chattels. (3) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense—*viz.* the tort of trespass to land (trespass *quare clausum fregit*).

Under the old practice the remedies for torts were in general two in number—namely, the action of trespass and that of trespass on the case³⁹ (commonly called by way of abbreviation "case" simply). Trespass—"that fertile mother of actions"⁴⁰—was the remedy for all forcible and direct injuries, whether to person, land or chattels. Case, on the other hand, provided for all injuries not amounting to trespasses—that is to say, for all injuries which were either not forcible, or not direct, but merely consequential.⁴¹ An injury is an actionable wrong, in contrast to damage which means loss or harm occurring in fact, whether actionable as an injury or not.⁴¹

"Forcible"

The term "forcible" is used in a wide and somewhat unnatural sense to include any act of physical interference with the person or property of another. To lay one's finger on another person without lawful justification is as much a forcible injury in the eye of the law, and therefore a trespass, as to beat him with a stick. To walk peacefully across another man's land is a forcible injury and a trespass, no less than to break into his house *vi et armis*. So also it is probably a trespass deliberately to put a matter where natural forces will take it on to the plaintiff's land.⁴² But when there is no physical interference there is no trespass and the proper remedy is case: as, for example, in libel, malicious prosecution or deceit.

M2S7

M2S8

³⁸ But Professor Milson has contended ((1958) 74 L.Q.R. 407) that "had there been a medieval *Salmond* or Winfield trespass would have been the title, not of a chapter, but of the book."

³⁹ The action on the case (*supra casum*), so called because the particular circumstances of the case are set out in the writ, goes back at least to the thirteenth century. For its relation to the Statute of Westminster II—a controversial matter—see Plucknett, *Concise History*, pp. 372-373.

⁴⁰ Maitland, *Forms of Action*, p. 342. The importance of the distinction was that in trespass if the plaintiff recovered less than 40 shillings he was entitled to no more costs than damages, whereas nominal damages in case carried costs with them.

⁴¹ See the authoritative statement by Viscount Simon L.C. in *Cr/Her Handover Harris Towel Co. Ltd. v. Vitch* [1942] A.C. 435, 442.

⁴² See below, § 4.1.

M2S8(a)

"Direct"

To constitute a trespass, however, it is not enough that the injury should be foreseeable; it must also be direct and not merely consequential.

M2S8(b)

An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act; it is consequential, on the other hand, when, by reason of some obvious and visible intervening cause, it is regarded, not as part of the defendant's act, but merely as a consequence of it. In direct injuries the defendant is changed in an action of trespass with having done the thing complained of; in consequential injuries he is charged in an action of case with having done something else, by reason of which (*per quod*) the damage complained of has come about.⁴³ And the distinction is well instanced by the example put⁴⁴ of a man throwing a log into the highway: if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it was it lies there, it is case. Neither does the degree of violence with which the act is done make any difference: for if the log were put down in the most quiet way upon a man's foot it is trespass; but if thrown into the road with whatever violence, and one afterwards falls over it, it is case and not trespass.⁴⁵

M2S9

This distinction between direct and consequential injury is not identical with that between intentional and accidental or negligent injury. These are cross-divisions. Trespass lies for all direct injuries, whether willful or merely negligent. Case is the appropriate remedy for all consequential injuries. This was settled by *Leame v. Bray*,⁴⁶ in which it was held that the act of the defendant in negligently driving his carriage so as to bring it into collision with that of the plaintiff was actionable in trespass. In trespass the defendant's state of mind is irrelevant: the law looks only to the results of his conduct. Willfulness is not necessary to constitute trespass. But if it is sought to make a master vicariously liable for the acts of his servant, case and not trespass is the proper form of remedy—unless, indeed, the particular act complained of is done by the command of the principal.⁴⁷

M2S9 (a)

"Damage"

M2S10(a)

In case, damage is the gist of the action, and the plaintiff will fail if he cannot prove it. But in trespass it is not necessary to prove actual damage. Trespass is actionable *per se*. This may be important when a remedy is sought for the infringement of personal liberty⁴⁸ or privacy.⁴⁹

M2S10(b)

⁴³ *Hutchins v. Maugham* [1947] V.L.R. 131, 133.
⁴⁴ By Fortescue J., in *Reynolds v. Clark* (1725) 1 Str. 534, 536.
⁴⁵ *Leame v. Bray* (1803) 3 East 593, 602, *per* La. Blanc.
⁴⁶ (1803) 3 East 593. Even today intentional trespass is not equivalent to negligence, *Long v. Hepworth* [1968] 1 W.L.R. 1299, 1302.
⁴⁷ *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218, 244.
⁴⁸ See below, § 74.
⁴⁹ As in *Kaye v. Robertson* (1991) F.S.R. 62 (below § 3.1).

Conversely, a successful plaintiff in trespass may be deprived of his costs if his action was "oppressive to the last degree."⁵⁰

Is trespass preferable to case?

M2S11

At the present day trespass has been somewhat eclipsed by the growth of the action on the case for negligence, and it has even been suggested in the Court of Appeal that the time has come to abolish the difference between them.⁵¹ This is partly because most actions for personal injuries are brought against an employer vicariously liable for the torts of his servant⁵², partly because of the growth of the rule that the plaintiff must prove negligence when damage has been caused to his person or chattels as a result of the defendant's conduct on the highway, or where his property adjacent to the highway has been injured in consequence of the defendant's conduct on the highway⁵³, and partly because the courts insist that actions against physicians or surgeons should be in negligence and not in trespass.⁵⁴ Further, it has even been held that in an action for personal injuries, whether on or off the highway, the onus is always on the plaintiff to prove intention or negligence in the defendant.⁵⁵ But the authority of this decision is doubtful, and many think that there is still a difference between trespass and case,⁵⁶ and that that difference has important practical consequences—for example, in relation to the burden of proof,⁵⁷ or inevitable accident,⁵⁸ or the limitation of actions⁵⁹ or the place where the tort was committed when an action is brought upon a foreign tort,⁶⁰ or remoteness of damage,⁶¹ or the granting of an injunction to restrain the commission of an act which does not cause actual damage.⁶² In Australia it has been asserted that "The two causes of action are not the same now and they never were."⁶³ and "Despite many attacks by judges and scholars, the trespass action has survived in Canada."⁶⁴ Modern English statutes

M2S12

never were,⁶⁵ and "Despite many attacks by judges and scholars, the trespass action has survived in Canada."⁶⁶ Modern English statutes

M2S13

⁵⁰ As in *Fildes v. Cox and Brook* (1906) 22 T.L.R. 411.
⁵¹ *Berry v. British Transport Commission* [1962] 1 Q.B. 307, 339; *Leung v. Coopér* [1965] 1 Q.B. 232, 238.
⁵² The Civil Judicial Statistics for 1985 revealed that 73 per cent of defendants in tort actions are corporations. The same statistics reveal the overwhelming preponderance of negligence actions for personal injuries—there were 33,850 such claims, but only 880 for all other torts.
⁵³ See below, § 74.
⁵⁴ *Chatterton v. Gerson* [1991] Q.B. 432, 443.
⁵⁵ *Fowler v. Lanning* [1959] 1 Q.B. 426; see below, § 74.
⁵⁶ See *Buckleley L.J. in S.C.M. Ltd. v. Whitfall Ltd.* [1971] 1 Q.B. 377, 387, and *Croom-Johnson L.J. in Wilson v. Pringle* [1987] Q.B. 237, 247.
⁵⁷ See below, § 74.
⁵⁸ See below, § 24.
⁵⁹ See below, § 25.
⁶⁰ See below, § 25.
⁶¹ See below, § 25.
⁶² *Paid v. W.H. Smith Ltd.* [1967] 1 W.L.R. 853, 858.
⁶³ *Williams v. Millton* (1957) 97 C.L.R. 465, 474, *per curiam*.
⁶⁴ *Bell Canada Ltd. v. Cope (Sermia) Ltd.* (1980) 11 C.C.L.T. 170, at 180, *per Linden J.*

have also recognised the continued existence of trespass as a distinct concept. So the Theft Act 1968, s 9(1) refers to entry "as a trespasser," and the Family Law Reform Act 1969, s 8 permits a minor to give a valid consent to acts which would otherwise "constitute a trespass to his person."⁶⁵

CHAPTER 2

GENERAL PRINCIPLES OF LIABILITY

§ 2.1. THE NATURE OF A TORT

(1) Tort and crime¹

There are several connections. Historically tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. Analytically some distinctions must be made.

A tort is a species of civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant. Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. It is settled that not every breach of a criminal statute gives rise to an action in tort.² But it is often the case that the same wrong is both civil and criminal—capable of being made the subject of proceedings of both kinds. Assault, libel, theft and malicious injury to property, for example, are wrongs of this kind. Speaking generally, in all such cases the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished criminally by imprisonment or otherwise, and also compelled in a civil action to make compensation or restitution to the injured person.³

Damages essential mark of tort

Although a tort is a civil injury, not all civil injuries are torts, for no civil injury is to be classed as a tort unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort.⁴ Thus a public nuisance is not a tort merely because the civil remedy of injunction may be obtained at the suit of the Attorney-General, but only in those exceptional instances in which a private per-

¹ See Winfield, *The Province of the Law of Tort* (Cambridge, 1931), Chap. 8; Williams, "The Definition of Crime," [1955] C.L.P. 107; Linden, "Tort Law as *Ordnungsmass*," (1973) 51 Can. Bar Rev. 150.

² *Lambie Ltd. v. Shell Petroleum Co. Ltd.* (No. 2) [1982] A.C. 173. For this case, see below § 10.01.

³ A criminal court may order a convicted person to pay a sum of money to the injured party by way of compensation; see the Powers of Criminal Courts Act 1973, ss 35-38, as amended by the Criminal Justice Act 1988, ss 104-105. These compensatory sums are unliquidated, but (unlike damages in tort) are not claimable in the first instance, but only in addition to some punishment. Yet increasing use is made of them, and a court is under a statutory duty to give reasons for not making an order. But the average amount of the order is only £100.

⁴ *Gauruzi v. Union of Post Office Workers* [1978] A.C. 435, 459; *Garden Cottage Ltd. v. Milk Board* [1984] A.C. 130, 136.

⁶⁵ See, conversely, the Justices of the Peace Act 1979, s 44 for recognition of "a tort, in the nature of an action on the case."

APPENDIX F

Features chart of various types of liability available to claimant(s)

	RYLANDS v FLETCHER	PUBLIC NUISANCE	PRIVATE NUISANCE	TRESPASS	NEGLIGENCE
Who can sue?	Anyone who can prove damage caused by 'escaper'	Any members of the public who can prove 'special damage'	Usually person with proprietary interest in land affected	Person in possession	Anyone who can prove breach of duty
Who can be sued?	Person in control of non-natural user on land, usually landowner	The perpetrator	The creator or adopter	Person committing act of trespass	Person causing damage
Frequency of wrongful acts?	Single act is enough	Single act is enough	Must be 'state of affairs' - some element of continuity	Single act is enough	Single act is enough
Directness?	Act may be direct or indirect	Direct or indirect act	'Indirect act only'	Direct act	Direct or indirect act
Must 'fault' be proved?	No need to prove fault	Fault must usually be proved - exception <i>Wringe v Cohen</i>	Must prove 'unreasonableness' - which is akin to fault. Strict liability in <i>Cambridge Water</i> case	Strict liability. No need to prove fault	Must prove fault - breach of standard of care
Is the locality relevant?	Not relevant	Marginally relevant in some cases	Relevant	Not relevant	Not usually relevant may be a consideration
Sensitivity of claimant relevant?	Not relevant (except thin skull rule)	Not relevant (except thin skull rule)	Relevant - unusually sensitive claimant may not succeed	Not relevant (except thin skull rule)	Not usually relevant except in thin skull rule
Are damages for personal injuries available?	Probably - <i>Hale v Jennings</i>	Yes	Only to people with a proprietary interest in land affected	Yes - but no need to prove damage at all	Yes
Are damages for economic loss available?	Probably not	Possibly	Must prove economic loss arising out of damage to use/ enjoyment of land	Yes - but no need to prove damage at all	Yes
Special defences?	Act of God Act of stranger General defences	General defences	Ultra-sensitive claimant Prescription. Statutory authority. General defences	Many statutory defences - eg. PACE, involuntary trespass. General defences	General defences
Could there be a prosecution on same facts?	No, unless there is a statutory nuisance	Yes, if statutory nuisance	No, unless there is also a public nuisance	Criminal trespass - very narrow circumstances. Public Order Act 1986	Gross negligence may result in prosecution eg. driving and medical cases