

# English Law and Terminology 2.

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# The Law of Tort.

- ▶ Tort is a **civil wrong** removed and independent of contract law. It is the name given to the branch of law that imposes civil liability for breach of obligations imposed by law.
- ▶ The civil wrong is caused by individuals and other **legal entities**.
- ▶ Tort has two main objectives. One is to offer **compensation** to the victims of civil wrongs for the loss, damage or injury that they have suffered.
- ▶ The second is to act as a **deterrent**, and aims to reduce the harm caused by making the **tortfeasor (person causing civil wrong)** responsible for providing a remedy.

# Tort- Differentiation.

- ▶ Tort is to be distinguished from both the law of contract and criminal law as it differs from either.
- ▶ In terms of the law of contract- a breach of contract like a tortious action is a civil wrong. Which means that the **innocent party** can start civil proceedings against the **defaulting party** (behaves in a manner which shows an intention not to perform their obligations).
- ▶ The difference between contract and tort resides in **the liability**- in contract there must be a pre-existing contractual relationship between the parties. In tort cases there is no need for a pre-existing relationship.
- ▶ In terms of criminal law, the difference resides in the way and by whom action is initiated. The State starts actions in criminal law courts on behalf of a victim, with the intention of punishing the offender. In tort cases, the victim brings an action in civil court and seeks compensation for loss suffered.
- ▶ There is sometimes some crossover- **Concurrent liability**-occurs where there is an action in tort and contract, for example a contract breach results in personal injury. Also, tortious behaviour can amount to a crime.

# Fundamental Principles of Tort Liability.

- ▶ There are three main elements to a tort claim. First, it must be proved that there was a **wrongful act** or omission (=failure to act) by the defendant. Second, that the claimant suffered **loss, damage or injury** as a result. Third, that the defendant had a duty to act in a certain way but didn't, meaning he was **at fault**.
- ▶ Therefore the basic elements of a tortious action 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 recognized as attracting legal liability. This model can be represented:
  - ▶ **Act (or omission) + causation + fault + protected interest + damage = liability**. 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.

# Fundamental Principles cont.

- ▶ To demonstrate **causation in tort law**, the claimant must establish that the loss they have suffered was **caused (causal link)** by the defendant. In most cases a simple application of the **'but for'** test will resolve the question of **causation in tort law**, 'but for' the defendant's actions, would the claimant have suffered the loss?
- ▶ If yes, the defendant is not liable. If no, the defendant is liable. **Causation** may be problematic where there exists more than one possible cause. Various formulations have evolved to ease the burden of proving **causation** in such situations.
- ▶ **Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428**- Mr Barnett went to hospital complaining of severe stomach pains and vomiting. He was seen by a nurse who telephoned the doctor on duty. The doctor told her to send him home and contact his GP in the morning. Mr Barnett died five hours later from arsenic poisoning. Had the doctor examined Mr Barnett at the time there would have been nothing the doctor could have done to save him.  
Held/decision: The hospital was not liable as the doctor's failure to examine the patient did not cause his death. Introduced the 'but for' test ie would the result have occurred but for the act or omission of the defendant? If yes, the defendant is not liable.
- ▶ **Multiple causes – Successive-** Where there exist two causes occurring in succession it may be possible to identify the factual cause of the damage. However at times policy factors may come into play: **Performance Cars Ltd v Abraham [1962] 1 QB 33** Court of Appeal: The appellant hit the claimant's car (a silver cloud Rolls Royce) as a result of his admitted breach of duty. Two weeks prior to this incident the Rolls Royce had been in a previous incident whereby another negligent driver had hit the car. As result of the previous incident the car required a re-spray. The claimant claimed £75 for the re-spray for the prior incident and obtained judgment by default. However, the claimant has never received the sum. The claimant sought to claim the £75 from the appellant. It was conceded that the claimant could not recover the same loss twice. The question for the court was which defendant should pay or whether they should be jointly liable. Held:  
The first defendant was responsible for the whole amount. The appellant was therefore absolved from all liability to pay.

# Fundamental Principles of Tort cont.

- ▶ **Multiple causes – concurrent-** Where there exist **two or more causes** which operate concurrently it may be factually impossible to determine which one was the cause. This has proved problematic not least because it is the claimant's responsibility to establish which one was **the cause**.
- ▶ On general principles the burden of proving this is on the balance of probabilities ie the claimant has to demonstrate that there is more than a 50% likelihood of the **cause** being the breach of duty of the defendant. Where there are **two causes** this means the burden of proof is impossible to discharge leaving the claimant uncompensated often for an obvious breach of duty. Various formulations have arisen to circumvent the strict approach.

- ▶ **Fitzgerald v Lane [1989] 1 AC 328** House of Lords

The claimant walked across a pelican crossing when the lights for pedestrians were red. He was struck by the first defendant and bounced off the bonnet on to the path of the car driven by the second defendant. He suffered tetraplegia. The claimant was unable to establish whether it was the first impact or the second impact which caused the tetraplegia. The trial judge held that the three were equally at fault with both defendant's travelling too fast and not paying sufficient attention. He assessed the damages at £596,553 and order the two defendants to pay one third of that amount. The defendants appealed. Both defendants appealed against the apportionment of the damages in that if the judge held they were equally at fault the claimant should have his damage reduced to 50%. The second defendant also argued that he was not the cause of the tetraplegia.

Court of Appeal:

Held:

1. As the claimant was unable to prove which impact was the cause of the tetraplegia, it was for each of the defendants to demonstrate that ,that they were not the cause. If they were unable to do so they would be jointly liable.
2. The trial judge was correct in the apportionment of loss under the Law Reform (Contributory Negligence) Act 1945. The defendants appealed this point to the House of Lords.

House of Lords

Substituted an apportionment of 50% to be divided between the defendants. The court is to first assess the full damages and then assess the degree to which the claimant contributed to their own injuries. Then reduce the damages accordingly. A claimant is not to be over compensated simply because there are two defendants.

# Fundamental Principles of Tort.

- ▶ **Novus actus interveniens** (New intervening act)- Where there is a new intervening act this may **break the chain of causation** removing liability from the defendant. The legal test applicable will depend upon whether the new act was that of a third party or an act of the claimant.
- ▶ **Novus actus interveniens - Act of 3rd party** - Where the new act is of a third party, the test is whether the act was **foreseeable**. If the act of the third party was foreseeable, the defendant remains liable and the **chain of causation remains in tact**. If the act of a third party is not foreseeable this will **break the chain of causation** and the defendant is not liable for the actions of the third party:
- ▶ **Home Office v Dorset Yacht Co Ltd [1970] AC 1004 House of Lords**  
Some young offenders were doing some supervised work on Brown Sea Island under the Borstal regime. One night the Borstal officers retired for the evening leaving the boys unsupervised. Seven of them escaped and stole a boat which collided with a Yacht owned by the claimant.

Held:

The Home Office owed a duty of care for their omission as they were in a position of control over the 3rd party who caused the damage and it was foreseeable that harm would result from their inaction.

- ▶ **Novus actus interveniens - Act of the claimant** -Where the new intervening act is that of the claimant, the test is whether the claimant acted **reasonably in the circumstances**. If the claimant's actions are deemed **reasonable** the **chain of causation** remains in tact and the defendant is liable for the actions of the claimant. If, however, the claimant's actions are **unreasonable in the circumstances** the **chain of causation is broken** and the defendant is not liable for the actions of the claimant:
- ▶ **Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360**  
House of Lords

Martin Lynch committed suicide whilst in a police cell. He had attempted suicide earlier that day in the cells at the magistrates. He had also attempted suicide on previous occasions. He had been seen by a doctor at the police station on arrival who reported that he was not schizophrenic or depressed but was a suicide risk. The custody officer checked him at 1.57 pm and left the hatch open. He was found at 2.05 pm having used his shirt as a ligature secured by the open hatch. He was unable to be resuscitated and died a week later. The defendant argued that as Lynch was of sound mind his voluntary and informed act of suicide broke the chain of causation.

Held:

The act of suicide was the very thing that the police were under a duty to prevent to treat this as a novus actus interveniens would deprive the duty of any substance. Therefore the defendant was liable, however damages were reduced by 50% under the Law Reform (Contributory Negligence) Act 1945.

# Fundamental Principles of Tort cont.

- ▶ Causation is normally straightforward however there are two circumstances where difficulties arise.
- ▶ The first involves a claimant not properly or fully informed of the risk involved in an operation. It is difficult to prove what the claimant would have definitely chosen but for the information.
- ▶ The second involves industrial illnesses, such as those caused by coal inhalation or asbestos- these develop overtime. Here the particular employer must have materially contributed to the risk.
- ▶ **Contributory Negligence:** defence available where it is proved that the **claimant's** own negligence contributed to its loss or damage. The Law Reform (Contributory Negligence) Act 1945 provides for apportionment of loss where the fault of both claimant and defendant have contributed to the damage. "Fault" is defined in the Act as "**negligence** or other act or omission which gives rise to liability in **tort** or would, apart from this Act, give rise to the defence of contributory negligence" (*section 4*). A claim for damages will be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in responsibility for the damage. The Act was designed for the tort of negligence but can be applied to cases of contractual breaches where the defendant's liability in contract is the same as his liability in negligence.
- ▶ **Remoteness/ legal reasoning:-** any act of a person can set in motion a chain of events that can lead to almost unlimited consequences.
- ▶ For purely practical reasons, no defendant will be liable for everything which occurs as a result of his behaviour;
- ▶ Liability must be limited in time and space.
- ▶ Consequences which are too far removed, too indirect from the original act are said to be remote. The Claimant will not be able to recover damages.
- ▶ Remoteness is a judicial control device to restrict unlimited liability on the basis of practicality rather than logic.



# Main Types of Torts.

- ▶ **Defamation:** occurs when there is publication to a third party of words or matters containing an untrue imputation against the reputation of individuals, companies or firms which serve to undermine such reputation in the eyes of right thinking members of society generally, by exposing the victim to hatred, contempt or ridicule.
- ▶ The tort of defamation acts to redress unjustified injury to the claimant's reputation and can be divided into two areas, **slander and libel**. **Slander** is the publication of **defamatory** words or actions in a temporary form, for example by spoken word. **Libel** is the publication of defamatory materials in permanent form.
- ▶ Defamation relies on the meaning of the words or actions in question to establish slander or libel. Defamation trials are increasingly being heard without a jury unless the court orders otherwise (matter of high damages). The judge will determine whether the words given their ordinary and natural meaning would damage the claimant's reputation.

# Types of Torts cont.

- ▶ **Slander:** There must be an accusation
- ▶ Requires proof of special damage (there are limited exceptions to this)
- ▶ Must be against made against an identifiable individual or individuals
- ▶ Must be a statement which would cause someone to think less of the individual/individuals to whom it refers.
- ▶ **Libel:** Is not limited to the written word
- ▶ Must be against made against an identifiable individual or individuals
- ▶ Must be a statement which would cause someone to think less of the individual/individuals to whom it refers.
- ▶ **Serious Harm:** Section 1 of the Act 2013 creates the new requirement that a statement must have caused or would be likely to cause serious harm to the claimant's reputation. If serious harm to the reputation of the client cannot be established then that statement is not deemed to be defamatory.
- ▶ **Serious Financial Loss:** In order for legal entities to bring an action for defamation the damage that they must prove is serious financial loss.

# Types of Torts cont.

- ▶ **Nuisance:** There are two types of nuisance in English law: Public nuisance and Private nuisance. In some instances, the same set of facts can produce liability in both kinds of nuisance, although the two types of nuisance are very much distinct.
- ▶ Private nuisance is concerned with protecting the rights of an occupier in respect of unreasonable interference with the enjoyment or use of his land. The parties to an action in private nuisance are generally neighbours in the popular sense of the word and the courts undertake a balancing exercise between the competing rights of land owner to use his land as he chooses and the right of the neighbour not to have his use or enjoyment of land interfered with.
- ▶ Private nuisance is essentially a land based tort. In order to bring a claim in private nuisance, a claimant must have an interest in the land in which he asserts his enjoyment or use has been unreasonably interfered with.
- ▶ *Hunter v Canary Wharf* [1998] 1 WLR 434 House of Lords 690 claims were made against Canary Wharf Ltd. The claimants lived in the Isle of Dogs and complained that the erection of the Canary Wharf Tower interfered with their television reception. In addition, a second action against London Docklands Development Corporation involved 513 claims for damages in respect of excessive amounts of dust created during the construction of the tower. Some of the claimants were owners or tenants of properties, but many of the claimants had no proprietary interest in land at all. Some were children living with parents, some were relations or lodgers with use of a room and some were spouses of the tenant or owner of the property. The two issues the House of Lords were required to consider were:
  - ▶ 1. Whether interference with television reception was capable of giving rise to an actionable nuisance 2. Whether an interest in property was required to bring an action in
  - ▶ Held:1. There is no right of action in nuisance for interference with the television reception. 2. An interest in property is required to bring an action in nuisance. *Khorasanjian v Bush* overruled in so far as it holds that a mere licensee can sue in private nuisance.
  - ▶ Lord Hoffman: "In this case, however, the defendants say that the type of interference alleged, namely by the erection of a building between the plaintiffs' homes and the Crystal Palace transmitter, cannot as a matter of law constitute an actionable nuisance. This is not by virtue of anything peculiar to television. It applies equally to interference with the passage of light or air or radio signals or to the obstruction of a view. The general principle is that at common law anyone may build whatever he likes upon his land. If the effect is to interfere with the light, air or view of his neighbour, that is his misfortune. The owner's right to build can be restrained only by covenant or the acquisition (by grant or prescription) of an easement of light or air for the benefit of windows or apertures on adjoining land."
  - ▶ In relation to planning permission: "In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build."

# Types of Torts cont.

- ▶ **Public nuisance** is an act or omission which materially affects the reasonably comfort & convenience of life of a class of Her Majesty's subjects. It is a crime but becomes actionable in tort law if the claimant suffers 'particular damage' over and above the damage suffered by the public generally.
- ▶ *Tate & Lyle v Greater London Council* [1983] 2 AC 509
- ▶ Tate & Lyle operated a sugar refinery on the bank of the river Thames. They had a jetty from which raw sugar would be offloaded from barges and refined sugar would be taken. The sugar would be taken by larger vessels and then transferred to smaller barges to enable them to get through the shallow waters. As part of development Tate & Lyle wished to construct a new jetty and dredge the water to accommodate the larger vessels. At the same time the GLC was constructing new ferry terminals. The design of the ferry terminals was such that it caused siltation of the channels. After using the channels for a short while, Tate & Lyle's larger vessels were no longer able to use them. Further dredging at the cost of £540,000 was required to make the channel and jetties usable by the vessels. Tate & Lyle brought an action in negligence and nuisance to recover the cost of the extra dredging.
- ▶ Held:
- ▶ The claim in negligence and private nuisance failed since they did not possess any private rights which enabled them to insist on any particular depth of water. The claim succeeded in public nuisance since the interference caused by the ferry terminals affected public navigation rights. Tate & Lyle suffered particular damage as a result of this interference.
- ▶ **Trespass:** Can be committed against a person, to land or to goods.
- ▶ Trespass to the person can also take three forms: assault, battery and false imprisonment.
- ▶ **Assault** is where the defendant acts in a way that the claimant is put in fear of violence. It's important to note that there is no requirement for punches need to be thrown.
- ▶ This has been established in case law, specifically *R v Costanza 1997*, whereby the defendant sent 800 threatening letters, followed the victim home, wrote offensive words on her front door and stole items from her washing line. This resulted in the claimant suffering from clinical depression and the defendant was charged with ABH under the **Offences Against the Person Act 1861**. Assault is justified in situations of self-defense and also in a sport such as boxing, where consent is present.

# Types of Torts cont.

- ▶ **Battery** is different to assault in that it requires force, direct application and intent. There only needs to be proof of contact as opposed to proof of injury.
- ▶ Additionally, there only needs to be an intention of the act, not an intention to harm. In *Nash v Sheen*, a hairdresser put a tone rinse on the claimant instead of a perm, but was liable for battery after it caused a rash.
- ▶ As with assault, consent and self-defence are defences to battery. There is also a defence of necessity. For example, a paramedic may need to touch a person in order to provide emergency aid.
- ▶ **False imprisonment** deprives the claimant of movement without lawful justification for doing so.
- ▶ Intention is not needed, but it must be caused by a deliberate act. In *Sayers v Harlow Urban District Council 1958*, it was decided that a faulty lock that was not deliberate and therefore didn't amount to false imprisonment.
- ▶ Convicted criminals cannot be falsely imprisoned, nor can a suspect arrested in line with the Serious Organised Crime and Police Act 2005 and Police and Criminal Evidence Act 1984.

# Types of Torts cont.

- ▶ **Trespass to goods:** is defined as wrongful (intentional & forceful) physical interference with goods that are in the possession of another.
- ▶ The goods need not be owned just possessed and the trespass can occur via the mere touching of the good.
- ▶ In *Kirk v Gregory*, the defendant moved jewelry which was later stolen and it was held that there was a trespass to goods.
- ▶ Defences include statutory authority (if the police have to take an item as evidence), consent, and where it is necessary to interfere with the goods.
- ▶ **Trespass to land:** involves unjustifiable interference to somebody else's land. Interference must be physical and direct for obvious reasons; it's hard to trespass on land when you aren't actually on that land. Trespass can be committed negligently or accidentally.
- ▶ And it's not just a simple mowed lawn or some neatly arranged gravel that can be trespassed upon. Airspace and things below the ground (including treasure!) is also included in trespass of the land.
- ▶ *The Civil Aviation Act 1982* ruled that it is not trespass if an aircraft is flying at a reasonable height. For example, an overhanging crane can be trespassing but a plane merely flying over your house whilst on a standard flight path is not trespassing.
- ▶ Defences to trespass to land include license (which is express or implied permission from the possessor to be on the land) and justification by law.
- ▶ Is it ever necessary to trespass on land? It can be. In *Esso Petroleum v Southport Corporation 1956*, a ship captain committed trespass in allowing oil to flood a shoreline. However, this was necessary to protect the ship and crew.

# Types of Torts cont.

- ▶ **Strict liability** can arise in both civil and criminal law; it is essentially a liability imposed by law even if the party concerned has acted reasonably and taken appropriate steps to stay within the law.
  - ▶ Such offences are primarily regulatory offences aimed at businesses in relation to health and safety. Also many driving offences are crimes of **strict liability** eg. speeding, driving without insurance.
  - ▶ Liability under *Rylands v Fletcher* is now regarded as a particular type of nuisance. It is a form of strict liability, in that the defendant may be liable in the absence of any negligent conduct on their part. Imposing liability without proof of negligence is controversial and therefore a restrictive approach has been taken with regards to liability under *Rylands v Fletcher*. There have been attempts to do away with liability under *Rylands v Fletcher* but the House of Lords have retained it.
- ▶ Requirements: 1. Accumulation on the defendant's land, 2. A thing likely to do mischief if it escapes, 3. Escape, 4. Non-natural use of land & 5. The damage must not be too remote.
  - ▶ 1. Accumulation: The defendant must bring the hazardous material on to his land and keep it there. If the thing is already on the land or is there naturally, no liability will arise under *Rylands v Fletcher*:
  - ▶ 2. A thing likely to do mischief. The thing need not be inherently hazardous, it need only be a thing likely to cause damage if it escapes
  - ▶ 3. Escape: There must be an escape from the defendant's land. An injury inflicted by the accumulation of a hazardous substance on the land itself will not invoke liability under *Rylands v Fletcher*.
  - ▶ 4. Non-natural use: An open fire in a domestic fire grate does not constitute a non-natural use of land.
  - ▶ 5. Remoteness of damage: Liability in *Rylands v Fletcher* is subject to the rules on remoteness of damage. There is no liability for economic loss under *Rylands v Fletcher*.

# Types of Torts cont.

- ▶ *Rylands v Fletcher* [1868] UKHL 1 House of Lords

- ▶ The defendant owned a mill and constructed a reservoir on their land. The reservoir was placed over a disused mine. Water from the reservoir filtered through to the disused mine shafts and then spread to a working mine owned by the claimant causing extensive damage.

- ▶ Held:

- ▶ The defendants were strictly liable for the damage caused by a non-natural use of land.

- ▶ Lord Cranworth:

- ▶ "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

- ▶ Lord Cairns LC:

- ▶ "The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature... On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, - and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable."



# Types of Torts cont.

- ▶ **Negligence**: forms one of the most dynamic and rapidly changing areas of liability in modern common law.
- ▶ It is simply defined as a careless behaviour with no intention of causing damage. This careless behaviour of others which makes other suffer damage may be entitled for compensation. That is the main concern of negligence.
- ▶ 'The existence of general duty imposing liability for careless behaviour across a range of situation and relationships was not recognised until 1930s'.
- ▶ Negligence originated and established by the House of Lords after the decision made in the case of *Donoghue v Stevenson*.
- ▶ Examples of some cases which might be brought in negligence are, people injured in a car accident who sued a driver, business which loses money because of improper advice from an accountant or patients who sue doctors when medicals go wrong. Negligence protect against 3 different types of harm which includes personal injury (example is broken leg), damage to property (example is damaged car) and economic loss.

# Types of Torts cont.

- ▶ The four main elements of the tort of negligence are **duty, breach, damage and causation**. There is no successful negligence claim without any of the elements.
- ▶ The case of ***Donoghue v Stevenson*** created the tort of negligence. The defendant must owe claimant duty of care, the defendant must breach that duty and that failure must cause damage to the claimant.
- ▶ These elements are the factors the British court will consider when deciding whether a defendant has generally breached their standard of care.
- ▶ **Case Study: *Donoghue v. Stevenson* (aka. the “Snail in the Bottle” Case)**
- ▶ Until 1932, there was no precedent that held businesses accountable for the well-being of the users of their products. This changed with the historic “Snail in the Bottle” case.
- ▶ The story goes that in 1928, May Donoghue was given a bottle of ginger beer by a friend. Unbeknownst to her, the bottle contained a dead snail. She drank most of the beverage before she found the snail, and consequently suffered gastroenteritis. Donoghue sued David Stevenson, the ginger beer’s manufacturer, for £500 damages.
- ▶ This was an unprecedented case. Up to this point, plaintiffs were responsible for proving that negligence breached a contractual agreement. However, because Donoghue hadn’t purchased the beverage for herself, she technically hadn’t entered into an agreement with Stevenson. By ruling in favour of Donoghue, the House of Lords laid the groundwork for legal principles such as negligence and duty of care.

# Types of Torts cont.

- ▶ **Duty of Care:** refers to the circumstances and relationships which the law recognises as giving rise to a legal duty to take care.
- ▶ A failure to take such care can result in the defendant being liable to pay damages to a party who is injured or suffers loss as a result of their breach of **duty of care**.
- ▶ Therefore it is necessary for the claimant to establish that the defendant owed them a **duty of care**.
- ▶ The existence of a **duty of care** depends on the type of loss and different legal tests apply to different losses.
- ▶ The most recent authority on the question of establishing a duty of care is *Caparo v Dickman*. A court will find a duty of care if the claimant can show that the damage he suffered was foreseeable; that there was proximity between himself and the defendant; and that in all the circumstances it would be fair, just and reasonable to impose liability on the defendant.
- ▶ **Breach of Duty:** An objective test is applied to determine if the defendant is in breach of duty. The defendant must have failed to adhere to the standard of care required by law.
- ▶ **The objective test: Breach of duty** in negligence liability is decided by the **objective test** i.e. the defendant is expected to meet the standard of a reasonable person:
- ▶ *Vaughan v Menlove (1837) 3 Bing NC 467*: the defendant's haystack caught fire due to poor ventilation. The defendant had been warned on numerous occasions that this would happen if he left the haystack. The defendant argued he had used his best judgment and did not foresee a risk of fire. The court held his best judgment was not enough. He was to be judged by the standard of a reasonable man.

# Types of Torts cont.

- ▶ **Caparo Industries plc v Dickman** [1990] 2 AC 605 House of Lords: Caparo Industries purchased shares in Fidelity Plc in reliance of the accounts which stated that the company had made a pre-tax profit of £1.3M. In fact Fidelity had made a loss of over £400,000. Caparo brought an action against the auditors claiming they were negligent in certifying the accounts.
- ▶ Held: No duty of care was owed. There was not sufficient proximity between Caparo and the auditors since the auditors were not aware of the existence of Caparo nor the purpose for which the accounts were being used by them.
- ▶ Lord Bridge: (*The Caparo test*) "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."
- ▶ In relation to economic loss:  
"One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss... To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corporation v. Touche* (1931) 174 N.E. 441, 444)."

# Types of Torts cont.

- ▶ **Duty of Care - Policy factors (Fair, just and reasonable):** In applying the third stage of the *Caparo test*, of fair, just and reasonable, the courts take certain policy factors into account. Policy factors which may influence the court include such issues as:
- ▶ **Loss allocation:-** Who can afford to bear the loss? Which of the parties have insurance/ is the situation one subject to compulsory insurance? Is the defendant a publicly funded body?
- ▶ **The floodgates:-** Will imposing liability lead to a high volume of new claims? What effect would this have on cost of insurance or its availability? Will the courts be able to cope with the volume of cases?
- ▶ **The practical effects of imposing liability:** Will the imposition of a duty of care act as a deterrent or raise standards? Will imposing a duty have an adverse effect on decision making? Will it effect the allocation of resources away from necessities? These issues often arise in the context of publicly funded bodies and in particular in relation to the police, the CPS, Local authorities and emergency services.

# Types of Torts cont.

- ▶ The law of negligence can be vague and imprecise. This is because negligence can occur in numerous ways and there are different types of relationships which give rise to different duties of care.
- ▶ Also, a negligent act can cause different forms of damage, which are governed by distinct rules. The most direct types are personal injury & property damage.
- ▶ The law adopts a restrictive approach in awarding damages for **negligently inflicted psychiatric injury**. In addition to the **Caparo test** for imposing a duty of care, the courts have laid down several obstacles which must be satisfied by claimants in order to establish liability for **negligently inflicted psychiatric injury**.
- ▶ Firstly, there must be an actual **psychiatric injury**. Secondly, Emotions of grief or sorrow are not sufficient to amount to psychiatric injury. Thirdly, Nor are feelings of fear, panic or terror.
- ▶ Initially psychiatric injury claims were limited to those who feared for their own safety. The law has since developed to allow more wide ranging circumstances but is still quite restricted. A distinction is drawn between primary & secondary victims.
- ▶ **Primary victims** are those who are involved 'mediately or immediately as a participant' Per Lord Oliver in *Alcock v Chief Constable of South Yorkshire*. This was later restricted to those in the zone of physical danger.
- ▶ An objective approach is taken as to whether the claimant is in the zone of physical danger. Primary victims only need to establish that physical harm was foreseeable. There is no requirement that psychiatric injury was foreseeable provided personal injury was foreseeable.
- ▶ A primary victim does not owe a duty of care to a secondary victim in relation to self-inflicted harm.
- ▶ **Secondary victims** are those not within the physical zone of danger but witnesses of horrific events. Secondary victims must demonstrate the four *Alcock* criteria are present in order to establish liability:
  - ▶ 1. A close tie of love and affection
  - ▶ 2. Witness the event with their own unaided senses
  - ▶ 3. Proximity to the event itself or its immediate aftermath
  - ▶ 4. Psychiatric injury must be a result of a shocking event
- ▶

# Types of Torts cont.

- ▶ **Negligently inflicted economic loss:** Generally no duty of care is owed to avoid causing another to suffer a loss which is purely economic. I.e. one where the financial loss is not related to a personal injury or damage to property.
- ▶ However, where the economic is caused by negligent mis-statement as oppose to a negligent act liability may be imposed as established by a House of Lords obiter.
- ▶ A duty of care may exist even where the defendant would have a defence to an action in defamation.
- ▶ **Liability for omissions in tort law:** The law takes a restrictive approach to imposing liability in relation to omissions. The law draws a distinction between misfeasance, where a party does an act negligently, and nonfeasance, where a party does nothing at all. Omissions relate to nonfeasance. The general rule is that no liability exists for an omission.
- ▶ Thus, a person who sees a child drowning in shallow water, is not under a legal obligation to save the child and will incur no liability for their failure to do so. If, however, the person attempts to save the child, but in doing so, acts carelessly and causes harm, they become liable.
- ▶ This rule can be seen as operating harshly in many situations it could be argued that there may well be a moral obligation to act and there is a need for the law to reflect this. There are exceptions to this rule where the law will impose a duty of care in certain situations.
- ▶ **1. Undertaking:** Where the defendant agrees to act or voluntarily accepts a responsibility, his later failure to do so will render him liable. **2. Special relationship:** Where there exists a special relationship, eg. parent and child, employer and employee, school and pupil, doctor and patient, between the parties there is a legal duty to act. **3. Control of 3rd party who causes damage. 4. Control of land or dangerous things.**

# Remedies.

- ▶ The most obvious objective of the law of torts 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.
- ▶ The two principal remedies available to the victim of a tort are **damages to compensate for the harm he has suffered and, where appropriate, an injunction to prevent future harm**. Damages is the predominant remedy. Certain forms of self-help, such as abatement of a nuisance or self-defence, can be regarded as remedies, but the courts do not encourage this.
- ▶ **An injunction** is the primary remedy sought, for example, in cases of nuisance and economic torts such as interference with contract. This is not because damages are unavailable but because the defendant is engaged in a continuing act and the damage suffered by the plaintiff may not yet have occurred or may be suffered over a long period of time.
- ▶ There are some situations in which the law imposes upon the defendant an obligation to disgorge the profits he has made from his wrongdoing, whether or not the plaintiff has suffered any loss. Injunctions are hence necessary.
- ▶ **Damages:** The fundamental principle applied to the assessment of an award of damages is that the claimant should be fully compensated for his loss. He is entitled to be restored to the position that he would have been in, had the tort not been committed, insofar as this can be done by the payment of money (*Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39*).
- ▶ **Types of damages:** A. **Nominal and contemptuous:** Nominal damages will be awarded where the claimant proves that the defendant has committed a tort but the claimant has suffered no loss.
- ▶ Contemptuous damages consist of the award of a derisory sum, usually the smallest coin of the realm of. They are awarded when the court considers that the claimant's action, although technically successful, was without merit and should not have been brought. The claimant may then be at risk on costs, which are normally awarded to the successful party.



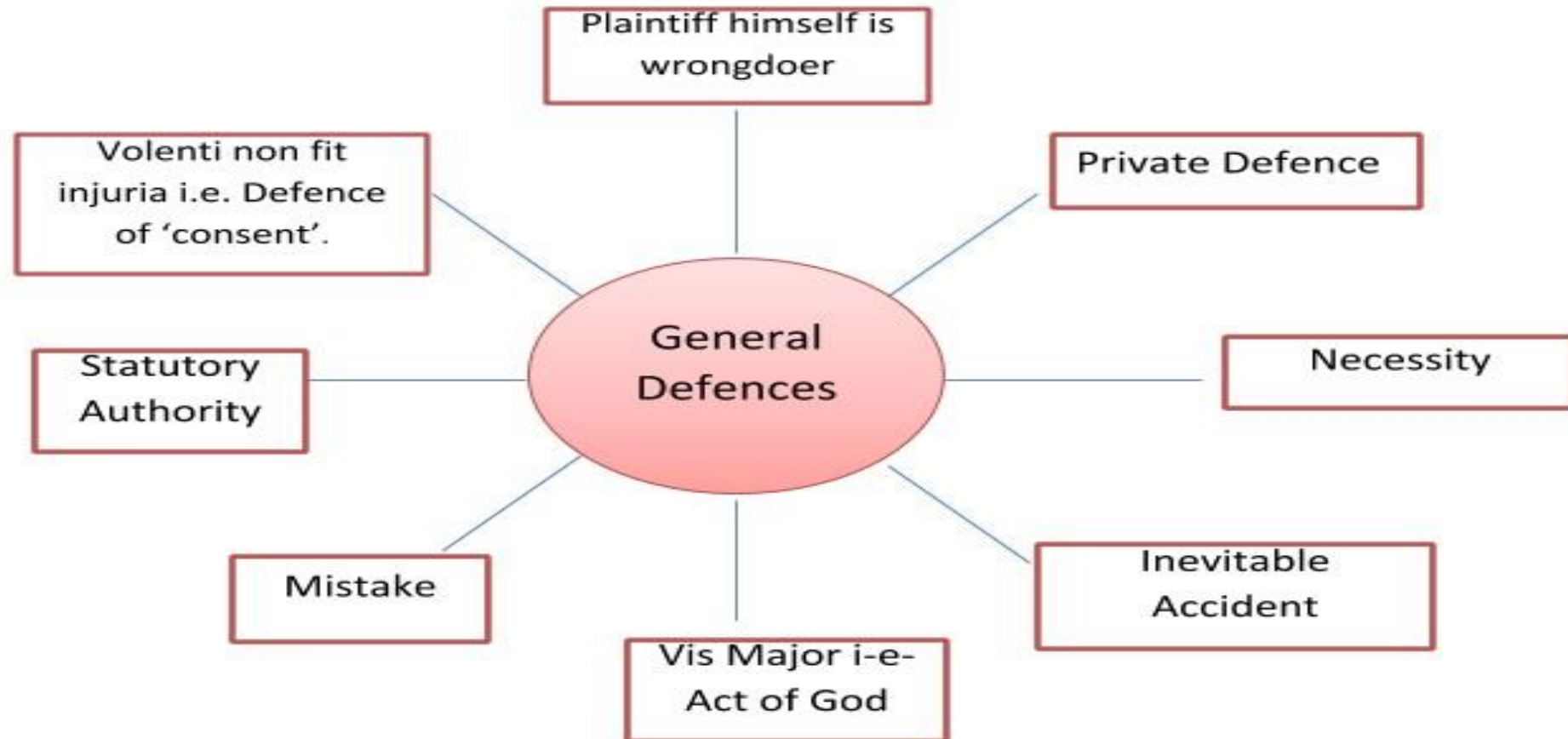
# Remedies.

- ▶ **B. General and special:** General damage is the damage that is presumed to flow from torts which are actionable per se, and so need not be specifically pleaded (e.g., loss of reputation in a libel action).
- ▶ Special damage refers to the damage that the claimant must plead and prove as part of his cause of action in torts where damage is the gist of the action (e.g., negligence, nuisance, slander).
- ▶ There is a second and much more commonly used meaning of the distinction between general damages and special damages. In practice, losses that are capable of being calculated with reasonable accuracy are pleaded as 'special damages'. Inexact or unliquidated losses (although they are not presumed and therefore must be pleaded) are compensated by an award of 'general damages'.
- ▶ For example, in a personal injuries action, accrued expenses such as damaged clothing, medical expenses and loss of earnings to the date of trial are special damages. Pain and suffering and loss of amenity (and prospective loss of earnings) are treated as general damages.
- ▶ **C. Aggravated and exemplary:** The court may take into account the manner in which the tort was committed in assessing damages. If it was such as to injure the claimant's proper feelings of dignity and pride then aggravated damages may be awarded. Aggravated damages are solely compensatory, but they are higher than would normally be the case to reflect the greater injury to the claimant.
- ▶ Aggravated damages should be distinguished from exemplary the damages, which are punitive in nature. It has been said that the distinction between aggravated and exemplary damages is that aggravated damages are awarded for conduct that shocks the claimant (and therefore constitutes a real loss), and exemplary damages are awarded for conduct the shocks the court. In **Rookes v. Barnard [1964] AC 1129**, the House of Lords held that, except where specifically authorised by statute, exemplary damages should be awarded only in two categories of case:
  - ▶ (a) Oppressive, arbitrary or unconstitutional action by servants of the government. (b) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable.

# Remedies cont.

- ▶ The majority of awards by damages are intended to be purely compensatory: the objective is to indemnify the claimant, not punish the defendant.
- ▶ In rare cases the courts may award *exemplary or punitive damages* in order to punish the defendant and to deter him from behaving in a similar way in the future.
- ▶ Such damages will be appropriate where the defendant has, for example, calculated that the profit he stands to make will exceed the likely amount of damages.
- ▶ Exemplary damages ensure that he does not gain a benefit from his tortious behaviour.
- ▶ One of the most controversial remedies in private law is that of punitive (or exemplary) damages. According to Ernest Weinrib, the remedy is 'encased in controversy'. Punitive damages are extra-compensatory damages the aim of which is to punish the defendant for his wrongful conduct and to deter him and others from acting similarly in the future.
- ▶ Since Lord Devlin's landmark speech in *Rookes v Barnard [1964] AC 1129 (HL)*, the remedy has been confined to just three categories of case. Those are cases of oppressive, arbitrary or unconstitutional conduct by government servants acting in that capacity (Category 1), cases of conduct aimed at making a profit in excess of the compensation payable to the claimant (Category 2), and cases where statute authorises an award of punitive damages (Category 3). The award of punitive damages is particularly relevant (and of particular concern) to corporate defendants given the extension of the award to Category 2.

# Defences.



# Defences.

- ▶ ***Volenti non fit injuria*** is a defence of limited application in tort law. A direct translation of the latin phrase ***volenti non fit injuria*** is, 'to one who volunteers, no harm is done'. Where the defence of ***volenti*** applies it operates as a complete defence absolving the Defendant of all liability.
- ▶ It is often stated that the Claimant consents to the risk of harm, however, the **defence of *volenti*** is much more limited in its application and should not be confused with the defence of consent in relation to trespass.
- ▶ The defence of ***volenti non fit injuria*** requires a **freely entered and voluntary agreement by the Claimant, in full knowledge of the circumstances, to absolve the Defendant of all legal consequences of their actions.** There is a considerable overlap with contributory negligence and since the introduction of the Law Reform (Contributory Negligence) Act 1945, the courts have been less willing to make a finding of ***volenti*** preferring to apportion loss between the parties rather than taking an all or nothing approach.
- ▶ The requirements of the defence are thus:1. A voluntary 2. Agreement
- ▶ 3. Made in full knowledge of the nature and extent of the risk.
- ▶

# Defences cont.

- ▶ The latin maxim *ex turpi causa non oritur actio* refers to the fact that no action may be founded on *illegal or immoral conduct*. This maxim applies not only to tort law but also to contract, restitution, property and trusts. Where the maxim of *ex turpi causa* is successfully applied it acts as a complete bar on recovery. It is often referred to as the *illegality defence*, although it extends beyond illegal conduct to immoral conduct.
- ▶ It is also questionable whether *ex turpi causa* operates as a defence or simply denies the existence of a duty of care or other cause of action. The *ex turpi causa* principle is very much based on public policy and no clear legal principles emerge.
- ▶ The public policy factor often cited for *ex turpi causa non oritur actio*, is that it is wrong to allow a criminal to profit from his crime. However, such reasoning is difficult to reconcile in tort law where the Claimant is seeking compensation for a loss rather than seeking to make a gain. Some commentators have argued that it should have no application in a modern law of tort and that an apportionment approach would be preferable. Some principles which have emerged but are not always consistently applied include:
  - ▶ The reliance test, Inextricably linked, No benefit principle, Proportionality test, The public conscience test, Statutory influence.
  - ▶ The reliance test in relation to *ex turpi causa* is also referred to as the *Bowmakers Principle* and looks at whether the Claimant has to plead the illegality. Where the Claimant has to plead the illegality to found their claim, the courts will not allow them to succeed. Conversely if the Claimant does not need to plead the illegality the claim may succeed.
  - ▶ Closely related to the reliance test is the inextricably linked test. Where it is not necessary for the Claimant to plead the illegality, the claim may be defeated if it is inextricably linked to the cause of action;
  - ▶ The no benefit principle stems from a policy consideration that a criminal should not be able to benefit from their crime. The no benefit principle is of less significance in tort law than in other areas as generally tort law is concerned with compensating loss rather than the Claimant making a gain. Although in claims for indemnity it can be applied to prevent the claimant being relieved from the consequences of their crime.
  - ▶ The public conscience test looks at whether in all the circumstances it would be an affront to the public conscience to allow the Claimant to succeed. It also considers whether allowing recover would deter or encourage criminal behaviour.

# Defences cont.

- ▶ **An act of God is a defense** used in cases of torts when an event over which the defendant has no control over occurs and the damage is caused by the forces of nature even in cases of strict liability. In such cases, the defendant will not be liable in tort law for such inadvertent damage. Act of God or *Vis Major* or *Force Majeure* may be defined as circumstances which no human foresight can provide against any of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore are calamities that do not involve the obligation of paying for the consequences that result from them.
- ▶ Freedom of Speech in terms of defamation. Parliamentary Privilege also.
- ▶ A license to enter a property in terms of trespass.

# Recap.

## Defences and Remedies

### Defences

A defence enables a D to avoid liability. A general defence can be pleaded for a number of different torts.

Volenti non fit injuria (consent) – No injury can be caused to a willing person. If claimant consents he cannot later sue D for injury or loss. (**Hall**)

Necessity – D commits a tort to prevent something worse happening (**Cope**)

Inevitable accident – This defence covers damage or injury which was beyond D's control (**Stanley**)

Statutory Authority – Where an Act of Parl or local by-law authorises a tort, no action lies against D e.g. council roadworks blocking your drive

Act of God – Covers an act of nature which could not have reasonably been foreseen



#### Hall v Brooklands Auto Racing Club

Paid admission to watch, killed. Never happened before. Claim failed – Hall consented.



#### Cope v Sharp

Fire on C's land. D set fire to prevent fire spreading. C sued D. Failed – only trespassed due to necessity.

#### Stanley v Powell

Pellet from D's gun ricocheted off a tree – genuine accident.



#### Nichols v Marsland

Rainstorm caused artificial lake to overflow – no liability as beyond D's control.

### Remedies

#### Damages

Most common legal remedy. Designed to compensate C and put him in the position he would have been, had the tort not been committed. **Lord Denning** outlined in **Gefford v Gee** the types of damages are:

- Special damages – provable damage e.g. car repairs
- Loss of future earnings – when C cannot earn in future
- Pain and suffering – depending on nature of injury
- Loss of amenity – inability to enjoy a sport or hobby
- The injury itself – according to a published tariff depending on extent of injury

#### Injunction

Remedy which prevents D from committing the tort again in the future e.g. nuisance or trespass to land.



#### Chadwick v BRB

Rescuer – 12 hours helping = psychiatric injury. General damages £600, £900 lost wages as special damages.

#### AG v PYA Quarries

AG chose to sue for an injunction to limit the activities at the quarry.