



Max Planck Institute
LUXEMBOURG
for Procedural Law

"English Law and Legal Terminology"

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Topics to be Covered this Semester

Main focus on:

- Contracts - 08.04;
- Torts - 15.04;
- Commercial Law - 13.05;
- Company Law - 20.05.

Exam: 03.06, 16.00-18.00 (HS 2).

Final class and return of exams: 17.06.



Short Presentations and Written Exam

- Presentation of 3-5 minutes;
- 10 points for the presentation;
- 90 points for the final exam.



Introduction to Tort Law

- A tortious wrong, committed by one party resulting in damage or injury to another party.
- What kinds of injury or loss?
 - Physical injury (damage to person or to property);
 - Nervous shock (psychiatric illness);
 - Financial loss.



Introduction to Tort Law

- A tort is a civil wrong; and breach of contract is a civil wrong;
- But differences?
- Contract – pre-existing relationship; not so with tort.
- What interests are protected in tort law?



Introduction to Tort Law

- Numerous torts, each of which has its own requirements:
- Examples:
 - Negligence;
 - Defamation;
 - Nuisance (private and public);
 - Trespass;
 - Will come back to all – negligence esp. important.



Introduction to Tort Law

- General requirements of all torts:
 - A tortious wrong, committed by one party and damage or injury to the claimant;
 - Causation;
 - Not too remote;
 - No contributory negligence on the part of the injured.



Causation

- A **causal link** between the wrongful act of the defendant and the injury suffered by the claimant;
- Had the wrongful act not occurred, the injury would not have arisen;
 - “**But for**” test.
- To ensure the defendant is only held responsible (liable) for the damage he has caused.



Causation

Difficulties in establishing causation:

Example - industrial illnesses:

- Medical conditions that develop over years;
- May have initiated from a certain type of work;
- Multiple employers over time;
- How to establish causation concerning one employer (defendant)?
- Courts – need to show material **contribution** to injury.



The Issue of Remoteness

- Any act or omission can give rise to a chain of events and numerous consequences;
- No defendant will be held liable for all consequences;
- If consequences are **too remote or too indirect** from original tortious act, damages will not be available;
- **Practical need for limitations of liability** – judicial control and determined by the court.



Negligence

What does negligence mean?

2 meanings:

- The **opposite of intention** (negligent in the sense of not thinking about doing something wrong) = careless conduct;
- A distinct tort.



Contributory Negligence

- What if the claimant has been (partly) responsible for the damage?
- Even if defendant's act caused injury – liability is limited if the claimant has also been negligent and defendant can show this.

Example: car accident caused by wrong act of party A; B is injured as a result but B wasn't wearing a seatbelt.



Contributory Negligence

- How are damages calculated?

Law Reform (Contributory Negligence) Act 1945

- On the basis of the culpability of each party;
- Defendant should prove how less severe injury would have been if not for contributory negligence (e.g. 20% less severe = 20% less damages)?



Tort: Defamation

- Untrue statement negatively affecting a person's reputation;
- Effect = lowered estimation of injured party in eyes of right-thinking members of society – being shunned or avoided;
- Not enough that person is offended.



Tort: Defamation

Two types of defamation:

- Libel: permanent form of defamation (writing, printing, photos) – books, newspapers, radio, TV, performance, internet.
- Slander: spoken words giving rise to defamation.

May be heard by jury trial; damages calculated by jury – difficulties? Damages are too high?



Tort: Nuisance

An unreasonable interference with something to be enjoyed.

Overlap between two types of nuisance:

- Private nuisance: tortious;
- Public nuisance: criminal.



Tort: Private Nuisance

- **Unreasonable interference** with **reasonable enjoyment** of privately-held land;
- Interference? = Act or omission;
- Injury: physical damage or loss (e.g. use of chemical that kill flowers) or undermine enjoyment (e.g. playing loud music);
- Balance of interests : reasonableness of conduct of defendant and right of claimant to peaceful enjoyment of land;
- Courts therefore engage numerous considerations in establishing liability.



Tort: Public Nuisance

- Act or omission that **affects materially** the life of a particular class of citizens;
- Not limited to acts or omissions that cause interference with land but includes all types of convenience;
- A criminal prosecution in the public interest;
- For a civil claim, the claimant has to show he or she suffered a special type of loss, greater than any other individual.



Tort: Trespass

- A tort committed against a person, land or goods;
- Exception to general rule that claimant needs to show loss or damage;
- Occurrence of trespass is enough to bring an action;
- If no loss actually suffered, nominal damages will be awarded.



Trespass to Goods

- Intentional and forceful interference with goods possessed (not necessarily owned) by another person;
- Interference can range from e.g. touching to destruction;
- Example:
 - *Kirk v Gregory* (1876) 1 Ex D 55 – moving jewellery from one room to another where it was later stolen – trespass to goods.



Trespass to Land

- Interference with land that cannot be justified;
- Usually intentional but can also be negligent;
- Overlap with criminal acts (Criminal Justice and Public Order Act 1994);
- Key example: entering property belonging to another person without permission to do so.



Trespass to a Person

Three types (all both criminal and tortious):

- **(1) Battery:** intentional and direct application of force
- Unwanted physical contact; need not be violent but sometimes needs to be “hostile”;
- Usually physical but may encompass emotional distress;
- Example: hairdresser put different product on a client, who had only given permission for a certain product – caused rash (*Nash v Sheen* [1953] CLY 3726).



Trespass to a Person

- **(2) Assault:** an act which makes a person think force will be used against him even if it is not;
- Fear of immediate physical violence;
- No requirement that actual damage is caused;
- Example: silence, e.g. through harassing phone calls, can be sufficient (*R v Costanza* [1998] AC 147).



Trespass to a Person

- **(3) False imprisonment:** complete restraint and deprivation of liberty inflicted without being authorised (need not be physical contact or physical restraint);
- Depriving the claimant of freedom of movement, without a lawful justification for doing so;
- A tort of strict liability – no intention is required but deprivation must be caused by deliberate act.



Strict Liability

General rule: need for an intentional or negligent act or omission; i.e. need for fault.

Exception: strict liability :

- Irrelevant that there is no fault; damage is sufficient;
- Established in *Rylands v Fletcher* (1868) LR 3 HL 330 (strict liability for damage caused by escape of something collected by person on his land – sunken coal shifts not blocked in by contractors in construction of reservoir; flooded land of neighbour);
- E.g. if the owner of a zoo keeps lions and tigers, he is liable if the big cats escape and cause damage or injury..



Strict Liability

Strict liability arising in relation to certain torts:

- Various things deemed to be potentially dangerous and use will give rise to strict liability;
- E.g. liability for defective products is strict - Consumer Protection Act 1987.



The Development of New Torts: Negligence

Donoghue v Stevenson [1932] AC 562

- Mrs Donoghue was drinking a bottle of ginger beer labelled (with Mr Stevenson), bought for her by a friend from a café owned by Francis Menghella;
- She found a snail at the bottom of the bottle and fell ill.
- She wanted to sue Mr Stevenson for her suffering? How could she do it?



The Development of New Torts: Negligence

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Donoghue v Stevenson [1932] AC 562

- Development of tort, from distinct, separate situations to a general duty “to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour...persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question” (p 580).



Donoghue v Stevenson [1932] AC 562

Prior to *Donoghue v Stevenson*, liability for personal injury in tort usually depended upon showing physical damage inflicted directly or indirectly, through trespass; negligence was only relevant in relation to particular circumstances (ie as a state of mind).

Negligence as independent tort (where state of mind is irrelevant) – rather neighbourhood principle: DoC if reasonably foreseeable for neighbour to be affected.



Negligence

Negligence as a distinct tort:

- More than carelessness;
- Where one person suffers damage or loss as a result of the negligence of another;
- The breach of a legal duty to take care;
- Developed through the courts;
- Flexibility and allows for developments in new contexts.



Negligence

1. Does the defendant owe the claimant a duty of care?
2. Is the defendant in breach of that duty of care?
3. Did the defendant's negligence cause the damage to the claimant?



Negligence

1. Does the defendant owe the claimant a duty of care?
 - In certain situations, the duty is cemented;
 - E.g. a motorist has a duty of care not to injure other road users;
 - Lack of a general test re where a duty of care exists;
 - Various factors and considerations need to be taken into account.



Negligence

Caparo v Dickman [1990] 2 AC 605 – tripartite test:

- Damage must be foreseeable;
- There must be proximity between the claimant and defendant;
- It must be fair, just and reasonable to impose liability on the defendant.



Negligence

2. Is the defendant in breach of that duty of care?

- Two-stage test:
- Breach = failure to achieve standard of care required by law – standard to be decided by court (question of law);
- Objective test = standard of reasonable person in relevant profession, occupation or activity (and standards therein);
- Breach if failure to reach standard (question of fact).



Negligence

3. Did the defendant's negligence cause the damage to the claimant?

- Questions of causation and remoteness;
- The “but-for” test – “on the balance of probabilities” X has caused Y harm;
- Difficulties e.g. in questions of industrial illness (*Fairchild v Glenhaven Funeral Homes* [2003] 1 AC 32 – relaxation of causation rules by HoL: whether defendant had materially increased risk of harm” towards the plaintiff.



Negligence

3. Did the defendant's negligence cause the damage to the claimant?
 - Damage must not be too remote and must be foreseeable - *The Wagon Mound (No.1)* [1961] AC 388 (boat crew left on tap which leaked oil into sea; sparks by workers ignited oil and caused damage to wharf – no liability as too remote).



Negligence

- Different and numerous variables in each case; existence of a duty of care is context-dependent;
- Negligence acts and omissions may cause different kinds of damage, with different means of quantifying damages;
- Personal injury;
- Property damage;
- Economic loss;
- Psychiatric illness (nervous shock).



Negligence

Personal injury and property damage – physical damage:

- Defendant can be held liable for all damage to persons or property that he has caused;
- No public policy concern in awarding full compensation;
- The claimant is to be put into the position he would have been in had the tort not occurred;
- Pecuniary and non-pecuniary loss.



Negligence

Psychiatric illness – nervous shock:

- Legal term for illness suffered by defendant's negligence;
- Can be as serious as physical injury;
- Recovery of damages possible if claimant suffers from medically-recognised illness (e.g. grief not sufficient);
- Secondary victims: not directly affected by the negligent act or omission (e.g. being told about an accident).



Negligence

Financial loss:

- Can sometimes be linked to physical damage (e.g. taxi accident and loss of income);
- Pure economic loss – no causal link between physical damage loss; e.g. a person relying on negligent advice, and suffers damage – a lack of tangible damage and a question of limitation of liability (floodgates?);
- Public policy and practicability limit liability.



Remedies

Two main remedies:

- Damages: monetary redress for damage;
- Injunctions: a remedy to stop the defendant from continuing his wrongful act – especially useful re trespass (where damages do not do much to remedy the injury).



Remedies

Damages

- Key aim: to compensate the claimant for the loss he has suffered – to place the claimant in the position in which he would have been had the tort not occurred;
- Aggravated damages: compensation awarded where defendant's behaviour has been aggressive or malicious;
- Punitive or exemplary damages generally not available : to punish the defendant and deter such behaviour.



Remedies

- Calculation of damages can be difficult;
- Heads of damages provide guidance;
- Pecuniary loss: loss of earnings, cost of medical care, out of pocket expenses that have arisen because of the tort, any damage to the claimant's property;
- Non-pecuniary loss: damages for loss of amenity, and for pain and suffering.



Defences

- Legal justification of act or omission that is otherwise tortious;
- Either complete (free the defendant from all liability) or partial (e.g. contributory negligence which frees the defendant from part of it and reduces damages payable);
- General (apply to all torts) and special (apply only to certain torts) defences.



Defences

Consent:

- If the claimant has consented to the tortious act or omission – full defence due to voluntary assumption of risk;
- E.g. boxer consenting to be hit by a fist but not by e.g. an iron bar; consent to a medical procedure (not trespass).

Illegality:

- Where tortious act arises from both parties being engaged in illegality conduct;
- E.g. highwayman seeking an account of profits from another highwayman with whom he had been in partnership.



Defences

Examples of special defences:

- Defamation – freedom of speech (e.g. speech in parliament or in court are protected by privilege);
- Trespass - licence to enter property; justification (e.g. for police officers);
- Strict liability – act of God or via major – when the event, even if tortious – could not have been prevented by the defendant (e.g. flood, earthquake).



**Next session: 13th May - read chapter
on commercial law.**





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