



in association
with



Law of Tort

Course Manual

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Professional and Higher Education

HQ13HKU
2020/21 edition

Training
in Law

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Published in 2020 by:
CILEx Law School Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

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Sample

Sample

Chapter 1: General Principles of Liability

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

- 1 Understand the general principles of tortious liability
- 2 Understand the objectives of the law of tort

1.1 Introduction

The word “tort” is not one which you will see regularly in the newspapers, or hear in TV news bulletins, but you may be a little more familiar with words such as “negligence”, “nuisance” and “libel”. Few people either realise that these are individual torts or that there may be general principles which underpin these civil wrongs to which a specific name is given.

As part of your study of the law of tort, you will be learning about both the general nature of liability in tort (which is often described as tortious liability) and also a selection of everyday torts. The introduction to this manual has already shown how many aspects of the law of tort affected Laura during the course of one day. Laura was very unfortunate, but you will probably be able to think of similar incidents happening to you, your family and friends.

The law of tort is notoriously difficult to define. Two famous academic writers are often quoted. Sir John William Salmond (1862–1924), who was a legal scholar, public servant and judge in New Zealand, defined a tort as “a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a trust or other merely equitable obligation.” Winfield (1878–1953) defined tortious liability as “the breach of a duty primarily fixed by law; this duty is owed to persons generally and its breach is redressable by an action for unliquidated damages.” Salmond’s definition tells the student rather more about what tort is **not** and Winfield’s definition says more about the **content** of the duty. It is important to understand the nature and function of the law of tort, the interests protected and the relevant mental elements in tort.

Some of the questions on your exam paper will require the application of legal principles to a fictional scenario and others will expect you to consider and discuss legal concepts in an essay-style response. Success at such tasks is more likely if the answer shows an understanding of the essential characteristics of each tort and sets out those elements of liability which any claimant must prove, on the balance of probabilities, in order to establish that the tort in question has been committed.

The purpose of civil proceedings in tort is to defend an interest of the claimant that is protected by law. This is normally achieved by an award of damages by a court or the issuing of an injunction, which is an order to the defendant to do or refrain from doing something. In certain cases the victim may use a self-help remedy.

1.2 Interests protected

The law of tort is wide-ranging and protects a number of interests. Broadly speaking, three important interests are protected:

(1) A person's **bodily integrity** (body and mind) is protected by some torts. If a person is assaulted, or battered, or falsely imprisoned, they may bring an action in trespass to the person. Where injury is inflicted negligently, such as in a road accident, the victim may bring an action in negligence. Ancillary to personal security is a person's interest in their reputation. Where someone's character has been harmed by untrue imputations in speech or writing they may have an action in the tort of defamation. Tort law may also provide the arguments that help to protect a person's interest in their private life.

(2) **Property** is protected by tort law. If a neighbour interferes with my peaceful enjoyment of my land then I may be able to sue them in nuisance for damages or obtain an injunction ordering them to desist. If a person takes away my watch I can sue in the tort of trespass to goods. When my car is damaged in a negligently caused collision, I can bring an action for damages in negligence.

(3) The third major interest that receives limited protection in tort is the claimant's **economic interest**. If a claimant loses salary as a result of the defendant's negligence, or has to pay for, say, physiotherapy fees, etc, then tort will allow them to recoup the loss (known as consequential economic loss, in that it flows from damage caused to the claimant's person or property). One of the more difficult areas of tort is the question of when an action lies for negligently inflicted *pure* economic loss, that is, financial loss that does not flow from damage to person or property. An example of this might be the claimant who is caught up in a traffic jam caused by the negligence of a driver up ahead. Let's say the claimant is a delivery driver who loses money because of the delay – this financial loss is not caused by damage to their person or property but is financial loss caused by the negligence of the defendant, in other words, pure economic loss. Will tort law protect that claimant? The answer is probably not, for policy reasons which we will look at in more detail later. Occasionally the courts make an exception, and allow claimants who have suffered pure economic loss to bring an action, but this is relatively rare, and again, we will explore it later.

There is no action for legitimate business competition, even where its effect is to ruin another. This is known as *damnum sine injuria*, or harm without legal wrong. You might have seen this happen if your local corner shop goes out of business when the garage down the road is developed to include a shop run by a large supermarket chain.

Indeed, sometimes it will be a controversial matter whether the law should compensate a certain kind of harm. Suppose that your doctor gives you the wrong drug and, as a result, your risk of developing lung cancer is increased

by 20 per cent. Should you be able to bring an action against the doctor on account of that increase in risk? Or should you have a claim only in the unfortunate event that you develop lung cancer? As you will see in **Chapter 2** and **Chapter 4**, courts have tended to endorse the latter alternative, but their reasons for doing so are not always convincing.

On the other hand, there are examples in tort of conduct being recognised as actionable even where no harm is caused. For example, if a statue in a museum has a notice saying “Do not touch”, it will be trespass to goods to touch it. Trespass to land and trespass to the person are also actionable on the same basis. If a person walks on to my land without permission they may cause no harm but they will still be liable. These cases are known as *injuria sine damno*, or legal wrong although no harm is caused. Libel is another tort which does not require proof of harm. Where such a tort is actionable without proof of harm it is said to be actionable *per se*.

1.3 The mental element in tort

Tortious liability arises because the defendant interferes with a recognised protected interest of the claimant and the mental state of the defendant, if relevant, is usually measured by an objective assessment of the defendant’s conduct. A tort which does not require the claimant to prove malice, intention or negligence is known as a tort of strict liability.

1.3.1 Malice

Malice in tort has two distinct meanings. It may be:

- the intentional doing of some wrongful act without proper excuse; or
- acting with some collateral or improper motive.

There is a general principle that malice (in the sense of an improper reason or purpose) is irrelevant in tort law. If a person has a **right** to do something, their **motive** in doing it is irrelevant. Equally, the fact that a person violates another’s right **intentionally** rather than carelessly does not aggravate that person’s responsibility in tort.

In ***Bradford Corporation v Pickles [1895]*** the defendant had extracted percolating water which flowed under his land, with the result that the water supply to the claimant’s reservoir was reduced. The defendant’s motive was to compel the claimant to buy his land at the defendant’s asking price. The claimant’s action failed as the defendant had a right to extract the water and his motive was irrelevant.

There are exceptions to this general principle.

For example, malice may be relevant to liability without being part of the definition of the tort. In private nuisance the question is whether the defendant’s behaviour is reasonable and a bad motive (malice) may be a factor in deciding that an act is a nuisance (***Christie v Davey [1893]***). In defamation cases the defendant’s malice may defeat the defence of fair comment or qualified privilege.

1.3.2 Intention

This **state of mind** is relevant in torts deriving from the old writ of trespass.

When a person wishes to produce a result forbidden by law and foresees it and carries on regardless of the consequences, they are said to act intentionally. It is probably most relevant to trespass to the person. Here, the defendant must intend to do the act amounting to the trespass, but need not intend to cause harm. The practical joker can be made liable for the joke that goes wrong, but a person who suffers a fit and strikes someone as a result will not be liable in trespass as they do not intend the act. They may be liable in negligence where, for example, they drive a car contrary to medical advice and have an accident.

1.3.3 Negligence

Negligence is a tort in its own right but the word is used here in the sense of careless conduct. In practice, most decided tort cases turn on negligence. It is important to note that it does not truly describe a state of mind; when a court finds a defendant to be negligent, it is making an assessment of their **conduct** by looking **back** to the time when that conduct caused harm to the claimant. The person who totally disregards the safety of others but does not injure them may be morally reprehensible but is not guilty of negligence; the person who tries their best and still falls below the relevant legal standard of behaviour is liable in tort for the harm they cause.

An objective standard is applied, that is, how would the “reasonable person” have behaved in the circumstances in which the defendant found themselves? This means that, normally, no account is taken of individual disabilities or peculiarities. It has been held that a learner driver is judged by the standard of a qualified driver of average competence, not that of an average learner (***Nettleship v Weston [1971]***).

Whether this is an appropriate approach depends on the purpose of the negligence formula. If the purpose is to compensate the claimant for their injuries, then it is clearly to the claimant’s advantage to set the legal standard of reasonable care as high as possible. The victim of a road accident caused by a learner driver is unlikely to be satisfied if the law permitted the learner driver to argue that they had only taken three lessons and were doing the best they could in the circumstances. In such a situation, the activity of driving a motor vehicle creates a serious risk to other highway users. This high risk has also been acknowledged by Parliament, which requires drivers to be covered by third party insurance. If it is to deter the defendant, then setting too high a standard will be counterproductive as the defendant may not be able to avoid accidents and has no incentive to improve their driving standard. It may be that what is classed as negligence on the part of car drivers is sometimes unavoidable even by safe drivers.

1.3.4 Strict liability

It is not always necessary to prove fault and carelessness in order to establish liability in tort. Sometimes tort law holds a defendant liable even when that defendant has taken every reasonable care to avoid an accident – that is, the law may impose **strict liability** on the defendant. There are several areas in which tort law imposes strict liability.

One example is the liability for interfering unreasonably with another's use and enjoyment of land, a tort called **nuisance**, or the liability for accumulating dangerous substances that escape and cause harm to another's land, the so-called **Rylands v Fletcher [1868]** tort (see **Chapter 11**); a claimant in nuisance does not need to prove that the defendant was careless in causing such interference.

Another example is the liability of employers for the torts of their employees, what tort law calls **vicarious liability** (see **Chapter 9**); a claimant in vicarious liability does not need to establish that the defendant employer was personally careless in any way.

A third example is **defamation** (see **Chapter 12**); a claimant in defamation does not need to prove that the defendant was careless in publishing a statement that caused harm to the claimant's reputation.

Holding persons liable for the harm caused by their negligence is straightforward; holding persons strictly liable is less so. Why hold a person responsible for harm that they took every care to avoid? There is no single answer to this – the justification for strict liability will differ depending on the kind of activity that it is attached to. For example, one obvious reason why the law holds employers vicariously liable for the torts of their employees is that employers stand to gain if one employs others and expects to make gains from their activity; one should also shoulder the costs that may arise in the course of that activity. The reason why the law holds people strictly liable for damage caused by dangerous substances is different: keeping a dangerous substance on one's land creates serious risks for other's use and enjoyment of their own land and it is fair to hold one liable for damage that occurs if those risks materialise.

Students will find that strict forms of liability tend to exist in the older torts such as conversion and nuisance, where liability is based on the fact of invasion of the claimant's interest rather than the defendant's conduct.

The deficiencies of a fault-based system in providing speedy compensation for accident victims who suffer personal injuries are now frequently debated. Schemes to provide compensation without proof of fault are proposed in certain fields of activity, such as medical negligence cases.



Self-assessment Question

- (1) Do all torts require the claimant to prove damage?

1.4 Objectives of tort

Two clear objectives of tort law can be identified: **deterrence** and **compensation**. There is general agreement that tort law does not normally have a punitive function, as shown by the fact that exemplary damages, designed to punish the defendant, are rarely available (**Cassell v Broome [1972]**). One of the Law Lords (Lord Wilberforce) was of the opinion, however, that there was no reason for civil damages not to contain a punitive element. This kind of disagreement among the judiciary is not uncommon in tort and students must be prepared for there to be grey areas.

1.4.1 Deterrence

(1) Individual deterrence

The idea of individual deterrence is that the defendant will change their behaviour and be deterred from causing a similar accident in the future. In some areas of tort law it is clear that this does not work. In the area of motor vehicle accidents, those which are legally attributable to a lack of reasonable care on the part of the driver may be unavoidable, even by those who are classed as safe drivers. If a person cannot avoid an error, they cannot be said to be deterred by a liability rule – the real deterrent here is the criminal law. Even if the driver could accommodate their driving to this standard, any damages which are awarded against them would be paid by their insurance company and the cost to the driver would be their no-claims bonus and an increased annual premium. A further argument against this form of deterrence is that damages are not assessed according to the degree of culpability (blame) of the defendant – the slightest degree of fault may give rise to a large award of damages. This can be contrasted to criminal law, where the penalty is related to culpability.

Individual deterrence may have some part to play in torts such as defamation or cases of professional negligence. The major reason why newspapers do not libel people more often is probably the fear of a defamation action. One of the reasons why a doctor or lawyer takes care with their work is fear of a negligence action. If the law were to demand a standard of care which is unattainable in fields such as medical negligence, in which every error of judgment leads to a successful claim for compensation, medical professionals would not wish to do their jobs at all, for fear of litigation. This problem of defensive medicine is already affecting the provision of medical care and treatment in the USA and is creeping into medical care in the UK.

(2) General or market deterrence

Interest in deterrence has been renewed by the work of American scholars on the theory that tort law should aim to reduce the costs of accidents and encourage accident prevention. Those who participate in accident-causing activities should bear the costs of those activities. The theory is complex but can be illustrated by an example. If a car manufacturer were to be charged with the accident costs of cars in which seat belts were not installed, the price of cars without belts would reflect the accident costs. In its turn the risk creator, if a business, would pass on the costs of extra insurance cover through the products it manufactured and sold. The end result is that the consuming public

pays the cost and it is spread over that large group, rather than being borne by a particular defendant alone. It is debatable whether a general deterrence theory can be applied to the risk-creating activities of everyday life for non-business people.

Overall, it should be noted that it is usually the defendant's insurer who pays the compensation and not the defendant in person. The alleged deterrent effect on the defendant is certainly watered down by this fact.

1.4.2 Compensation

It is generally accepted that the main aim of tort is to compensate victims of accidents who have suffered damage (i.e. harm which the law deems worthy of a remedy). The most common type of damage for which compensation is sought is personal injury. How this transfer of money should be achieved is a source of acute controversy. At present, the law shifts losses from the claimant to the defendant when the defendant has been proved to have committed a tort. This liability-based system has been criticised as an inefficient and expensive method of compensating accident victims.

The tort system is not the only system for compensating accidental harm, but it is the most general and, in the absence of a specific regime, it applies to all sorts of accidents and other harm-causing events. Other systems for compensating accidental harm include the **Criminal Injuries Compensation Scheme** and the **Industrial Injuries Disablement Benefit Scheme**. The former pays out fixed amounts of compensation to victims of violent crime; the latter pays out fixed periodic amounts to victims of industrial accidents. Both schemes are public, in that they are funded by the taxpayer.

What distinguishes state payments from tort damages is that the former are payable on the occurrence of an event, according to need, whereas the latter are payable only on proof that a person (the defendant) caused an injury and was committing a tort in doing so. Private (first party) insurance plays an increasingly important part in accident compensation; private health or personal accident insurance is still relatively expensive but is being taken up by more people and by employers for their key personnel. Many insurance schemes now include legal protection cover which means more injured parties are able to initiate a claim.

With regard to this aim of compensation the tort system can be criticised on the basis that it is very expensive to administer in comparison with social security. As long ago as 1978, the cost of operating the tort system accounted for 85 per cent of the sums paid to accident victims. The system is unpredictable and places pressure on claimants to settle, often for less than they would receive if they went to trial. It is also slow: claimants may have to wait many years after an accident before they receive compensation. Awards of damages are often made as a single lump sum, which cannot be adjusted if circumstances change for better or for worse. An improvement for some claimants has been achieved by the introduction of periodic payments but this method is also subject to criticism. These issues are covered in more detail in **Chapter 13**.

In New Zealand, the tort system for personal accident cases was abolished in 1972 and replaced by a comprehensive no-fault accident compensation scheme. This replaces the victim's loss of earnings with up to 80 per cent of their earnings before the accident. The victim need not prove fault; they simply make a claim through the Accident Compensation Commission. Payments are made weekly and can be adjusted to reflect inflation and the victim's medical condition. Compensation for non-pecuniary loss – for example, pain, shock and suffering – is low compared with a tort system, but the scheme has the advantage that everyone receives some compensation.

In England, the Pearson Commission (*Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmnd 7054, 1978)) was established in the wake of the thalidomide tragedy to enquire into certain aspects of compensation. The Commission made 189 proposals but it is doubtful if many reforms can be traced directly to them. Some of the Pearson proposals were undoubtedly unworkable and their overall effect would have led to piecemeal reform in comparison with the radical approach of the New Zealand system. Amongst other things, the Pearson Commission made two very interesting findings about the practical use of the tort system in the UK. On the one hand, it found that only about 200,000 of the 3,000,000 people injured in the UK (6.6 per cent) turned to the tort system to obtain compensation, the rest claiming compensation through insurance and social security systems. On the other hand, it found that this tiny group of claimants obtained over 25 per cent of the total compensation paid out from all sources of compensation in the UK.

The **NHS Redress Act 2006** established a scheme to enable redress without recourse to litigation where, under the English law of tort, an action in tort for personal injury may have been brought against a hospital or public healthcare provider. The redress scheme covers acts and omissions in diagnosis, care and treatment of patients. The consultation paper had also proposed the introduction of a no-fault scheme for compensating neurologically impaired babies, where the birth was under NHS care and the impairment was birth related, but this proposal was not included in the Bill.

There is a great deal of debate in the UK that the civil justice system is in the grip of what is called a "compensation culture". This is the belief that claimants will sue at every possible opportunity and for any loss whatsoever. The media frequently report on cases being initiated for trips on village greens, injuries from conkers and slips on icy steps. The **Compensation Act 2006 (CA 2006)** was introduced partly to respond to such concerns.

CA 2006 has three objectives. **ss1** and **2** address the perception of a developing compensation culture in this country and put into statutory format some of the views expressed by the Law Lords in *Tomlinson v Congleton Borough Council [2003]*. It has been noted in commentaries that the wording of **ss1** and **2** does no more than codify the existing common law position by indicating what a court **may** consider when determining the standard of reasonable care in a claim alleging negligence or breach of statutory duty. Regard may be had to whether expecting a defendant to take particular steps might prevent a desirable activity from being undertaken or might discourage people from undertaking functions in connection with a desirable activity (**s1**). Further, an apology or offer of treatment shall not be taken in itself to amount to an

admission of legal responsibility (**s2**). The implementation of these sections aims to discourage people from avoiding activities which have benefit to the wider community such as volunteering, amateur sports and youth groups.



Self-assessment Question

(2) Identify two objectives of the law of tort.

1.5 Tort and crime

Tort is part of the civil law and the correct terminology should be used. In criminal law the state “prosecutes” a person, who is found “guilty” or “not guilty”. The purpose of the proceedings is to punish the guilty person. In tort cases an individual (the claimant) “sues” the defendant, who is found “liable” or “not liable”. The rules of procedure and evidence are also different; for example, in a criminal case the standard of proof is “beyond reasonable doubt”, in a tort case it is “on the balance of probabilities”. This places an easier burden on the claimant. In tort cases the main purpose is to compensate the claimant, not punish the defendant, although it is true that a criminal court can order the defendant to pay some compensation. This tends to blur the line slightly between tort and crime. In minor cases of assault or theft, it may be easier for the victim to obtain such an order than to bring separate civil proceedings for trespass to the person or conversion of their property.

The relationship between tort and crime may be illustrated in a practical way. If Fred negligently runs Sid down, it is likely that Fred has broken one of the criminal road traffic laws. If Fred is successfully prosecuted, it is unlikely that in any civil proceedings brought by Sid, Fred would be able to deny negligence. Sid’s claim is therefore likely to be settled rather than go to court. This process is facilitated by the evidence rule that would allow Sid to place Fred’s criminal conviction in evidence in any later civil action arising from the same incident (**s11 Civil Evidence Act 1968**).

Differences between Tort and Criminal Law	Tort	Crime
Aim	Deterrence/ Compensation	Deterrence/Punishment
Parties	Claimant v Defendant	Prosecution v Accused
Result	Defendant “liable” or “not liable”	Accused “guilty” or “not guilty”
Standard of proof	Balance of probabilities	Beyond reasonable doubt
Competent court (first instance)	Civil courts (judges only)	Criminal courts (judge and jury)

1.6 Tort and contract

The traditional distinction between tort and contract was that an obligation in contract arose from the agreement or will of the parties, whereas an obligation in tort was imposed by law. This oversimplified distinction can no longer be maintained as there are numerous contractual obligations which are imposed by law – for example, the implied terms in the **Sale of Goods Act 1979** (as amended by the **Sale and Supply of Goods Act 1994**) and the **Consumer Rights Act 2015**. On the other hand, some tortious obligations arise out of a pre-existing relationship between the parties – for example, that of occupier to visitor or doctor to patient.

A second distinction was that contract was said to protect the **expectation** interest of the claimant whereas tort protected the **reliance** interest; for example, if X sold Y a picture for £1,000 which was worth £700 but X had said it was worth £1,200, Y's contract damages would be £500, whereas their tort damages would be £300. £500 would put Y in the position they would have been in had X's statement been true, whereas £300 returns Y to the position they were in before the tort was committed.

A further distinction was that contract liability is strict whereas tort liability is predominately fault-based; however, many contract cases may be decided on the basis of negligence. If a patient sues their doctor in tort, the issue will probably be whether the doctor acted negligently; if a similar action is brought in contract it will be for breach of an implied term that the doctor will act with reasonable care.

Some writers now argue that we no longer have separate laws of contract and tort but a civil **law of obligations**.

	Tort	Contract
Source of obligation	Law (common law + statutes)	Agreement (common law and statutes)
Aim	Repair/restore	Fulfil expectation
Standard of conduct	Generally fault-based (negligence)	Generally strict (breach suffices)
Competent court	Civil courts	Civil courts



Self-assessment Questions

- (3) Identify two differences between tort and contract.
- (4) Identify two differences between tort and crime.

1.7 Parties

1.7.1 Introduction

The question of capacity to sue or to be sued in tort does not present the same difficult issues as can arise in contract and criminal law. For example, students are often surprised to learn that a child of any age can be sued in tort, in theory, and that a child's parents are not automatically liable for what their offspring cause by way of damage to other people! Of course, it is usually futile to sue a minor with no assets or relevant insurance cover with which to compensate the successful claimant. If the young man who mugged Laura on her way home is identified and turns out to be 14 years old, there may be little point in Laura pursuing him through the civil courts even though the torts of trespass to the person and to goods have definitely been committed.

1.7.2 Special categories

Some attention must be paid to the categories listed below and to the legal and practical consequences of the situation in which the claimant's loss is attributable to more than one wrongdoer:

- sovereign immunity;
- administration of justice;
- artificial legal persons;
- minors;
- joint and several liability.

1.7.2.1 Sovereign immunity

Since the **Crown Proceedings Act 1947**, the Crown is, in general, liable in tort for the actions of its servants or agents just as if it were a private individual of full age and capacity. The Crown may be liable as employer or occupier. By virtue of the **Crown Proceedings (Armed Forces) Act 1987** a member of the armed forces can now sue a fellow member who inflicts injuries in the exercise of their duties. No proceedings can be taken against the sovereign in person, however.

Foreign sovereigns may not be sued in the English courts unless the immunity has been waived (**State Immunity Act 1978**). Certain exceptions exist – for example, matters relating to commercial contracts, acts and omissions which lead to death or personal injury and obligations arising from the use and occupation of premises. Diplomatic personnel above a certain status are also immune from action.

1.7.2.2 Administration of justice

Certain acts done in the administration of justice attract total immunity. The immunity of advocates in negligence has now been removed but this case does not affect other core immunities, such as that afforded to a person giving evidence in court. One of the reasons for this immunity was, as stated by Lord Wilberforce in **Roy v Prior [1971]**, "to avoid a multiplicity of actions in which

the value or truth of their evidence would be tried over again". There is another reason, which was identified by Auld LJ in the Court of Appeal in **Darker and Others v Chief Constable of the West Midlands Police [2000]**: *"to encourage honest and well-meaning persons to assist justice even if dishonest and malicious persons may on occasion benefit from the immunity"*.

This absolute immunity is justified by public policy and applies also to what is said or done in the course of proceedings by jurors and the judge. The House of Lords in **Darker** held that the immunity did not extend to certain acts of the police done during their investigation of a case and preparation for a trial. One public policy issue was paramount – that a person who had suffered a wrong should have a remedy. On the facts of the case, the police officers had fabricated evidence and actions could be commenced against them in the torts of conspiracy and misfeasance in public office. The earlier Court of Appeal interpretation of the extent of the immunity in **Silcott v Commissioner of Police of the Metropolis [1996]** was overruled in part.

1.7.2.3 Artificial legal persons

A **corporation** (an artificial legal person) – for example, a limited company – may be vicariously liable in tort for the actions of its members or employees. It can also commence actions in its own name. A corporation, although an artificial as opposed to a real person, may even have torts attributed to it which require some mental element; for example, malice of an employee acting in the course of their employment will render the corporate employer vicariously liable in a tort such as injurious falsehood.

Clearly, not all torts are capable of being committed against a corporation – for example, it could hardly be falsely imprisoned – but many other torts can be committed against the corporation's property, for example, in negligence, nuisance, etc. Even defamation can be committed against a company if the defamation relates to the company rather than its members or employees personally.

A **limited liability partnership (LLP)** may be set up by two or more persons who are prepared to undertake registration formalities in order to be associated for the purpose of carrying on business with a view to profit. In return, they secure limited liability, except for their own tortious acts. Such a partnership is set up under the **Limited Liability Partnerships Act 2000**. The LLP is a separate legal entity and actions are taken against the partnership.

A **partnership** is not a distinct legal person separate from the partners and so actions by or against a partnership must be in the names of the partners, although the partners may sue or be sued in the name of the firm. Partners are jointly and severally liable for the torts of the other partners (**Partnership Act 1890**).

It is far from clear in which capacity entities such as **trade unions** or **clubs** have to sue or be sued. It may be possible to sue members who are individually responsible – for example, a governing body or committee – and make them personally liable. Rules of court provide for the possibility of a representation order, whereby certain members only of a body are allowed to take or defend proceedings in the interests of the whole membership.

1.7.2.4 Minors

Apart from procedural requirements – for example, that a minor must sue by their “litigation friend” – there is no distinction between an adult and a minor for the purposes of commencing an action. The **Congenital Disabilities (Civil Liability) Act 1976 (CD(CL)A 1976)** provides that a child born alive and disabled may have a right of action in respect of torts committed while the child was in the womb. *Born* is defined in **s4(2)** as being born alive, that is, the moment when a child first has a life separate from their mother, and *disabled* as being born with any *deformity, disease or abnormality, including predisposition . . . to physical or mental defect in the future*.

The disabilities from which the child suffers are actionable by the child if they were caused by the wrongful act of the tortfeasor (a person who commits a tort). **CD(CL)A 1976** applies to two broad types of occurrence:

- first, one which affected either parent of the child in their ability to have a normal, healthy child (i.e. a preconception occurrence);
- second, one which affected the mother during pregnancy or the course of the birth of the child.

No action can be taken against the child’s own mother unless her acts fall within the wording of **s2**, that is, she was driving a motor vehicle at a time when she knew or ought to have known that she was pregnant. In such a situation, the woman is treated as owing the same duty of care for the safety of her unborn child as she owes to other highway users. This exception to the general rule of a mother’s immunity is acceptable in that the child’s claim will normally be met by the mother’s compulsory third party motor insurance.

The disabled child’s claim is derivative in that no duty (except for **s2**) is owed directly to the unborn child. The defendant’s tort is committed initially against either or both parents, with the result that damage is caused to the foetus either before it is born or during the birth process. For example, the employer of a pregnant woman may be in breach of their duty of care to her with regard to the system of work at her place of work. An accident at work involving the woman may be actionable by a disabled child born after the event if the injuries were caused by the breach of the employer’s duty of care to the mother. The defences which could have been raised against the parent can also be raised against the child – for example, if the parent was contributorily negligent, or if the mother knew of the particular risk of a child being born disabled, or if the parent was subject to a contract term which limited or excluded the defendant’s liability. This last-mentioned defence will be of limited value in the light of the **Unfair Contract Terms Act 1977**.

There is no defence of infancy in tort. A negligent driver aged 17 will be held as liable as a driver who is a year older. In the case of torts involving negligence (and particularly in the case of contributory negligence), it has been held that the proper standard of care to be expected from a child is what a reasonable child of that age would be capable of achieving (**Mullin v Richards [1998]**).

A parent is not liable for the torts of their child unless they are liable under some separate principle – for example, if the parent was also the employer of the child or if they told the child to commit the tort.

In the general law of negligence, a parent, or person standing in the position of a parent, may be personally liable if there was a failure to control the child properly – for example, by giving the child a dangerous thing such as an air rifle, or failing to supervise them properly, or allowing a small child to wander on a busy road so that they cause an accident. In such circumstances the tort is that of the parent, or person standing in the position of a parent, and is quite separate from any tort which the child may have committed.

1.7.2.5 Joint and several liability

No special rule applies if two or more people cause one claimant **different** injuries. The claimant may sue each defendant separately for the injury each has caused. Where two or more breaches of duty or other tortious acts cause **one single injury** the position is more complex. The basic position is that the claimant can sue all or any of the potential defendants and each individual defendant is wholly liable for the full extent of the harm, although the claimant can, of course, only recover their loss once.

Persons are **joint tortfeasors** when they are being made **liable for the same tort**. The phrase “several tortfeasors” relates to multiple potential defendants whose separate torts have resulted in the **same damage** to the claimant. In the example given below, Laura, Josh and Deepak are several (separate) tortfeasors whose concurrent torts cause injury to Cherry. The common law consequences of the distinction between joint and several tortfeasors has been rendered less important by the **Civil Liability (Contribution) Act 1978 (CL(C)A 1978)**. The wording of **s1(1) CL(C)A 1978** enables one tortfeasor to claim a contribution from another tortfeasor who is liable for the same damage.



Example

At an unmarked crossing, cars negligently driven by Laura, Josh and Deepak collide. Cherry, an innocent pedestrian, is injured. When Cherry sues the three defendants and obtains judgment against all of them for £10,000, she may recover the whole amount from any of the three defendants. It will then be up to the defendant who paid the whole amount to seek any appropriate contribution from the remaining defendants.

The importance of this rule in practice is obvious: if only one of several defendants is solvent, the claimant can enforce judgment against that defendant alone and thus the rule favours the claimant. In the above example, the court would go on to establish the relative contributions of each defendant to the accident, for example, Laura – 40 per cent, Josh – 30 per cent, Deepak – 30 per cent. If Cherry chose to pursue Laura for the whole of the £10,000, Laura, having paid Cherry, would be entitled to contributions of £3,000 each from Josh and Deepak.

The courts are often required to consider the allocation of responsibility between multiple defendants and a claimant who has been contributorily negligent. Such a situation arose in *Fitzgerald v Lane [1988]*. The claimant attempted to cross the road at a pelican crossing when the lights were red for pedestrians and green for the traffic. He was hit by the car of D1 and thrown into the path of D2. The House of Lords identified the correct approach to this problem. First, the claimant's contributory negligence should be assessed against the totality of both D1's and D2's conduct (i.e. apply the provisions of the **Law Reform (Contributory Negligence) Act 1945**) and, second, consider the proportionate blame of the separate tortfeasors. On the facts of the case, the claimant was 50 per cent to blame and the two defendants were required to contribute equally to the remaining 50 per cent of the claimant's losses.

1.8 Human Rights Act 1998

The law of tort has the capacity to evolve to accommodate the many and varied ways in which one person can interfere with another's interests in the 21st century. The diversity of the content of the law of tort can make it more difficult to study than criminal law or the law of contract but there is arguably greater potential flexibility for development in tort than in those other areas of legal liability. A few such developments have come through the intervention of Parliament but the majority of any expansion has occurred, and is likely to occur in the future, through the principles established, explained and applied in the appellate courts. Many people thought that the **Human Rights Act 1998 (HRA 1998)** would make a dramatic impact on English law but its effects in the law of tort have been limited. The protection of private and confidential information remains a major concern for many people.

HRA 1998 makes many of the provisions of the **European Convention on Human Rights (ECHR)** justiciable in the UK courts. People who foresee only a limited effect of **HRA 1998** on private law (i.e. claims by one citizen against another) point to the fact that **HRA 1998** cannot create a different right or freedom from that in the original article of **ECHR**, which has no application as between individuals. Others argue that, because certain rights are now enshrined in domestic legislation, the rights exist independently of **ECHR** and could become enforceable as between individuals.

The wording of **s1 HRA 1998** limits the **ECHR** rights created in **HRA 1998** to those contained in relevant articles of **ECHR**. A key section is **s7 HRA 1998**, which enables a person who is, or would be, a victim of a breach of an **ECHR** right to bring an action against a public authority. The defendant must therefore be such an authority, as defined in **HRA 1998** – that is, one which has a public function even if this is only a part of its overall functions.

This difficult issue has split the House of Lords. In *YL v Birmingham City Council [2007]* the question arose as to whether a privately owned nursing home (the second defendant) which was providing care for YL, who was funded by the local authority, was such a public authority when it was performing functions that would otherwise have been provided by the local authority itself. The House of Lords held by a majority of 3:2 that it was not exercising functions

of a public nature so as to bring it within the wording of **s6(3)(b) HRA 1998**. The majority of the Law Lords saw the provision of care in these circumstances as a private act.

YL was distinguished in **London & Quadrant Housing Trust (on the application of Weaver) [2009]**. Once again the question arose as to whether the defendant housing association (LQHT) was a public authority for the purposes of **HRA 1998**.

The Court of Appeal affirmed the decision of the Divisional Court of the Queen's Bench Division in **Weaver** by a majority, with Rix LJ dissenting. The defendant, LQHT, provided social housing and was substantially reliant on public finance. LQHT had charitable objectives and worked closely with local authorities, helping them to implement the government's policy for the provision of affordable housing. The Court of Appeal confirmed that this was a public function and that termination of the claimant's tenancy was integral to the exercise of this function.

Mrs Weaver had been served with a possession order when she fell behind with the rent. She argued that to be turned out of her home would interfere with her right in **Art 8 ECHR** to respect for her private home life and that the actions of LQHT were unlawful because they were incompatible with that right. Although the Court of Appeal confirmed the status of LQHT as a public authority, Mrs Weaver did not succeed in her claim because she could not prove that LQHT was in breach of its obligations under the relevant guidance of the housing corporation.

More generally, **HRA 1998** adopts an unusual method of enshrining **ECHR** rights in domestic law. Under **s3** both primary and secondary legislation must be given effect in such a way as to be compatible with **ECHR** and judges will be required to ensure compatibility so far as it is possible for them to do so. In this role judges may find that traditional approaches to statutory interpretation are inadequate to achieve the necessary compatibility. English courts should take account of the case law of the European Court of Human Rights (ECtHR). Under **s4 HRA 1998** a higher court can make a declaration that it is not possible to construe a provision in domestic legislation in accordance with the **ECHR** rights in question. Should this occur, a minister can choose whether to make appropriate amendments to the legislation using the fast track procedure set out in **s10 HRA 1998**, thereby sidestepping the full parliamentary process. Lastly, because the courts themselves are within the definition of public authorities, proceedings between individuals will have to be considered in a manner consistent with **ECHR**. This far-reaching consequence of **HRA 1998** will cover common law developments, on which so many tortious principles are based.

1.8.1 A right to privacy and its protection

A useful example which illustrates the relationship between human rights and tort law is the emerging body of law relating to privacy. **Art 8 ECHR** confers on individuals the right to respect for private life which of course encompasses the concept of privacy, but for some years before the enactment of **HRA 1998** the inadequacies of the law of tort in this area were plain. This is amply illustrated by the treatment of the actor Gordon Kaye in the *Sunday Sport*, at a time when

he was recovering in hospital from severe head injuries. The actor sought an injunction to prevent the newspaper from publishing pictures taken without his consent of him in hospital, and commentary relating to them, but the court found it difficult to identify a clear cause of action to enable it to grant that valuable remedy. Libel and malicious falsehood provided no obvious answer. Although an interlocutory injunction was granted, it was on the basis that the actor might wish to tell his own story and be paid for it at some future time and that to have the pictures and article published prematurely would lower the value of his own telling of the events at some future date (**Kaye v Robertson [1991]**). This convoluted reasoning demonstrated the urgent need for English law to protect the privacy of individual members of society in such circumstances.

Public attention was gripped by the dispute over the right to publish photographs taken at the wedding of Michael Douglas and Catherine Zeta Jones. The couple had granted *OK!* magazine the exclusive rights to photographs of their wedding, which went ahead under strict security. Two days after the wedding, it became known that illicit photographs had been taken at the event and that these were to appear in a rival magazine, *Hello!*, in advance of the planned publication of the images in *OK!*. The action that followed examined the considerations that a court should take into account in the granting of an interlocutory injunction in the broad context of the protection of freedom of expression in **HRA 1998**. Initially, the claimants were granted an emergency and then an interim injunction but when *Hello!* applied to discharge the injunction, the Court of Appeal granted its application.

The grant of any injunction presupposes a cause of action on the part of the claimants. Judges preferred the formulation of the legal principle as a breach of confidence action. They regarded **Art 8** as being available to cure a deficiency in the common law. The court had to be satisfied that the applicant was “*likely to establish*” that the publication should be stopped when the matter came to trial. In this case the bride and groom were not seeking privacy **as such** at their wedding but they did want to control the publication of photographs of the event. The Court of Appeal considered that money would be sufficient redress compared with the problems faced by *Hello!* if it was denied an entire week’s publication. The balance of convenience therefore favoured the discharging of the injunction (**Douglas v Hello! Ltd [2001]**). In the words of Sedley LJ: “*Mr Douglas and Ms Zeta Jones have a powerful prima facie claim to redress for invasion of their privacy as a qualified right recognised and protected by English law . . . This right [is qualified] by the right of others to free expression. The outcome [at the trial of the issues] is determined principally by considerations of proportionality.*”

Eventually, the case came to trial before Lindsay J (**Douglas v Hello! Ltd (No. 3) [2003]**). The judge held that the publication of the unauthorised wedding photographs by *Hello!* constituted an actionable breach of confidence. The wedding was a valuable trade asset of the famous couple.

In **Wainwright and Another v Home Office [2003]** the House of Lords rejected the argument that there is a right to privacy in English law. The case concerned the strip-searching for drugs of visitors to a prison. The claimants reluctantly agreed to be searched but found the experience disturbing and claimed damages for distress. The claimants argued that the strip-searching

constituted a battery, as well as a breach of their right to private and family life under **Art 8**. The battery was admitted and this judgment relates to the claim for interference with privacy.

The House of Lords reviewed the law on privacy, in particular the rejection of a right to privacy in **Kaye [1991]** and the conclusion of the Calcutt Committee that there should be no generalised tort of invasion of privacy. The House of Lords concluded that it was not necessary that English law recognise a right to privacy to comply with **Art 8 ECHR**. Provided that English law allowed a remedy in those circumstances where there had been a particular invasion of privacy contrary to **Art 8(1)**, that was sufficient. The action for breach of confidence and the action under **Wilkinson v Downton [1897]** provided such protection.

The boundaries of any protection of privacy in English law remained somewhat unclear after the decision of the House of Lords in **Campbell v Mirror Group Newspapers [2004]**. The model Naomi Campbell brought proceedings against the *Mirror* in relation to publication of a story containing details of her therapy and attendance at meetings of Narcotics Anonymous. At first instance her claim was successful and it was held that the details of the story were matters of a sensitive personal nature deserving of protection. The Court of Appeal overturned this decision, finding that the details of the story were no more than was needed to confer credibility on the story. In the House of Lords, the decision of the first instance judge was approved and the newspaper article was found to constitute a breach of confidence. The House of Lords judgment focused on the balance to be struck between protection of privacy and freedom of expression. It was accepted that the public had an understandable interest in being told information about public figures, even information of a trivial nature, but the details published in this case were unnecessary and interfered with the claimant's privacy. While the fact that the claimant had taken drugs and was seeking treatment was a matter of public knowledge, the additional information and photographs, by reason of their private nature, were to be kept private and the claimant was entitled to protection.

In **Murray (by his litigation friends) v Express Newspapers plc [2008]** the Court of Appeal decided that JK Rowling's son could have a legitimate expectation that his privacy would be protected even though he was in a public street when pictures of him were taken. Whether or not this expectation is reasonable will depend on all the circumstances. It might have been a different outcome if JK Rowling had claimed such a reasonable expectation of privacy for herself.

1.9 Summary

- (1) The law of tort protects personal interests, property interests and economic interests.
- (2) Intention is relevant, for example, in those torts based on the old writ of trespass.
- (3) Negligence is a measure of conduct against an objective standard of care based on a reasonable person test. As a tort it requires duty of care, proof of damage and proof of fault.

(4) Strict liability provides compensation for conduct irrespective of fault. Strict liability torts have developed in circumstances where the courts think it appropriate, for reasons of justice or economics, to make defendants accountable and to compensate claimants for injury.

(5) The main objectives of tort are:

- individual deterrence;
- market deterrence; and
- compensation.

(6) Tort must be distinguished from crime. Tort has different burdens of proof, different procedures and different objectives.

(7) Tort must also be distinguished from contract. Contracts are typically based on an agreement between the contracting parties and the claimant's expectation interest is protected if the contract is broken. Tortious responsibilities frequently arise whether the parties know or have agreed to them and any damages are calculated to put the claimant back into the position they were in immediately before the tort was committed.

(8) The law of tort has continued to develop and in particular has been influenced by the provisions of **HRA 1998**. An example has been the development of protection in tort for private and family life, using the old tort of breach of confidence.

(9) The Crown is now generally liable for the torts of its employees and foreign sovereigns cannot be sued in English courts unless immunity has been waived.

(10) A corporation may be liable in tort in relation to most torts and can sue in tort. A partnership cannot be sued or sue in tort, but can be sued or sue in the names of individual partners.

(11) A minor can sue and be sued in tort, though to sue in tort the minor must sue through a litigation friend. A child can sue under statute for injuries which occurred *in utero*, provided that the child is born alive and with disabilities that have been caused by the defendant's tort.

(12) If several people are responsible for the claimant's damage, the claimant can sue all or any of the tortfeasors, and each individual tortfeasor can be found liable for the full extent of the harm. One tortfeasor made liable for the full extent of the claimant's harm can sue, under statute, for a contribution to the damages from the other tortfeasors. In such a case the claimant may also be required to bear a portion of the damages if found to be contributorily negligent.



Discussion Points

Do you think that the aim of tort law should be to punish people?

Some people argue that strict liability is too demanding. Do you agree?



Key Cases

Bradford Corporation v Pickles [1895]

Nettleship v Weston [1971]

Rylands v Fletcher [1868]

Tomlinson v Congleton Borough Council [2003]

Mullin v Richards [1998]

Fitzgerald v Lane [1988]

CILEx assessment criteria

The content of this chapter covers all the CILEx assessment criteria which are set out below. You may find it helpful to review the assessment criteria during your revision to give yourself confidence that you have covered the content of the CILEx unit.

NB The assessment criteria are **not** questions and there are no answers given.

Assessment Criteria	
1.1	Define "tort"
1.2	Explain the characteristics of tort
2.1	Explain the objectives of the law of tort
2.2	Analyse the effectiveness of the law of tort in achieving its objectives