Tort

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A tort is a civil wrong for which the remedy is an action in common law. The law of tort imposes obligations that are not voluntarily undertaken as in contract. The source of tort law is generally from past decisions of the civil court. A tort must be capable of giving rise to a claim for unliquidated (not agreed in advance) damages.

Not all actions that give rise to loss or damage will give rise to an action in tort. The principle of *damnum sine injuria* allows for circumstances where harm is done without the commission of a legal wrong e.g. there is no legal duty to save a drowning man even if you can swim.

While the majority of claims in tort require there to be evidence of loss or damage resulting from the act, there may be some circumstances where an action will succeed where there is no damage (*injuria sine damno*). Actions in trespass are actionable without proof of loss or damage.

Torts may be broadly classified as the following

- Negligence
- Nuisance
- Trespass
- Strict liability
- Statutory liability

Negligence

Negligence was defined in *Blyth v Birmingham Waterworks Co 1856* as *'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do'.*

The definition of negligence was developed in *Lochgelly Iron & Coal Co v McMullan 1934* where it was stated that *'In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing: on all this the liability depends'*.

In order to prove negligence, the plaintiff must prove

- That the defendant owes him a duty of care
- That the defendant was in breach of that duty
- That the plaintiff suffered loss or damage as a result of the breach

Duty of care

A duty of care is owed to another if it is reasonably foreseeable that that other person will be affected by one's own acts or omissions.

The case of *Donoghue v Stevenson 1932* introduced the neighbour concept. In the House of Lords decision, Lord Atkin stated *'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so directly affected by my act that I ought reasonably have them in my contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question'.*

What is 'reasonably foreseeable' will of course depend on the specific circumstances of the case. In *Carmarthenshire County Council v Lewis 1955* it was held that the operators of nursery school that allowed a 4 year old child to escape from the premises were liable to both the child and also to the drivers on the highway who were involved in an accident while avoiding hitting the child.

Similarly, a duty of care was owed to the owners of a marina by prison officers overseeing prisoners who escaped and damaged a yacht (*Home Office v Dorset Yacht Company 1970*). In *Petrovitch v*

Callinghams 1969 decorators working in a house left the front door unlocked when they temporarily left the property. While they were away a thief stole jewellery. The court found that the decorators owed a duty of care to the householder, and that the loss was reasonably foreseeable.

In the majority of cases the onus is on the claimant to show that, on the balance of probabilities, the defendant was negligent. There may however be instances where the circumstances are such that the facts strongly imply that there has been negligence and the burden shifts to the defendant to disprove negligence. In such a case the rule followed is *res ipsa loquitor* – the facts speak for themselves.

A case that demonstrates this principle is *Byrne v Boadle 1863*. The claimant was injured by a barrel of flour that fell from an upper storey of a warehouse. The court held that as the barrel could not have fallen without negligence on the part of the warehouse keeper, there was a presumption of negligence.

Breach of duty

A breach of the duty of care will arise if the defendant fails to do something that a *'reasonable man'* would do in the circumstances, or does something that the reasonable man would not do (*Blyth v Birmingham Waterworks 1856*).

The standard for the duty of care is objective, and will be determined on the facts of each case. The greater the risk of injury or damage arising from an activity, the greater the duty of care owed.

The court will consider factors including

- The magnitude of the risk – the likelihood of damage and potential severity of any damage
- The ease with which the risk could be eliminated
- The state of technical or scientific knowledge

In *Bolton v Stone 1951* a batsman struck a cricket ball out of the ground and injured a passer-by. There were records of only six previous instance of the ball leaving the ground in over 30 years. The cost of the club installing a higher wall or fence around the perimeter of the ground was disproportionate to the risk of injury, and the cricket club were held to be not liable.

While the standard is objective, the court will impose a higher duty on a person who holds themselves as having a particular skill e.g. a doctor, solicitor or accountant. In that case the expectation is that the skill has been exercised competently (*Wilsher v Essex Health Authority 1986*).

Damage results from the breach

The loss or damage caused by the defendant must have been foreseeable in the circumstances. Where the damage was not reasonably foreseeable, the court will find the loss to be *'too remote'*.

In *Overseas Tankship UK Ltd v Mort's Dock and Engineering Co Ltd 1961* (also known as The Wagon Mound) the defendants negligently spilled fuel oil into the harbour. The oil mixed with cotton waste floating in the harbour and drifted to a nearby wharf. Sparks from welding ignited the floating waste material leading to a fire which damaged the claimant's property. It was held that although the oil was spilled by the defendant's negligence, it was not known or foreseeable that the cotton waste would ignite in the way that it did. The defendants were therefore successful.

It would not however be a defence to claim that an injury was not foreseeable because it resulted from some pre-existing condition that the defendant could not be aware of. This type of claim is often referred to as being an 'egg shell skull case'. In *Smith v Leech Brain & Co Ltd 1961* the claimant suffered burns when molten metal splashed onto him. The injury caused a cancer (to which the claimant was pre-disposed) to develop and he subsequently died from the cancer. The court found the defendants liable even though death from the minor injury was not foreseeable. The minor injury was foreseeable and the defendants should have done more to prevent it happening.

The courts are reluctant to allow claims for economic loss to succeed unless there is also physical damage.

The case of *Weller and Co v Foot and Mouth Disease Research Institute 1966* followed an instance of the defendants allowing the foot and mouth virus to escape from its research facility, causing infection in local cattle. Two local cattle markets were closed by the government and the claimants who were auctioneers sustained financial losses. The losses were foreseeable, but the court held that economic losses alone were not recoverable.

The circumstances in *SCM (UK) Ltd v W J Whittall & Son Ltd 1971* and *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd 1973* were very similar, and the outcome was the same. In both

cases, contractors damaged the electricity supply to the claimant's premises causing liquid metal in furnaces to solidify. The claimants were able to claim the value of the metal that was being processed, the cost of repair to the furnaces and also the loss of profit on that metal. They were not however able to recover the loss of profit while repairs were carried out as this was an economic loss only.

Defences

The plaintiff will, in most cases, have to prove that the defendant owed him a duty of care, that the duty was breached and that as a consequence the plaintiff suffered injury or damage. There may however be defences available to the defendant that may enable them to avoid liability

Self defence

A person may use force to defend themselves or their family against a person using unlawful force, and may also take necessary action to protect his property and possessions. The force used must be reasonable in response to the harm that they would suffer, and be proportionate in the circumstances

Inevitable accident

The defence is simply that the accident that occurred could not have been avoided by any reasonable precautions. In *Stanley v Powell 1891*, a member of a shooting party fired at a pheasant. The shot ricocheted off a tree and injured the claimant. It was held that in the circumstance all reasonable precautions had been taken and the action failed.

Act of God

An Act of God was defined in *Greenock Corporation v Caledonian Railway 1917* as *'circumstances that no human foresight can provide against, and of which human prudence is not bound to recognise the possibility'*. Act of God must involve natural forces (e.g. earthquake, exceptional rainfall or high winds, lightning strike etc.) acting without human intervention.

In *Nichols v Marsland 1876*, the defendant had constructed a number of artificial lakes on her land. There was a period of exceptionally heavy rainfall which caused the lakes to burst their banks and the escaping water damaged a number of bridges belonging to the claimants. The

claim failed, as the court found that the defendant could not be expected to take precautions to prevent a circumstance that she could not reasonably anticipate.

Volenti non fit injuria

Where there is a voluntary acceptance of a risk, the person who knows of and willingly consents to the risk has no right of action if he is injured. So, it is implied that a footballer playing in a game accepts that he is a risk of injury from a poor tackle or accidental collision that is incidental to the game. He does not however accept the risk that he may be deliberately injured by an opponent.

In *Hall v Brooklands Motor Racing Club 1933* a spectator at a motor race was injured when a car left the track following a collision. The court considered that motor racing is a dangerous sport, that the claimant knew that and assented to the risk of injury. The claim did not succeed.

For the defence to succeed, it must be demonstrated that the claimant both knew of the risk and willingly accepted the risk. That consent could be expressed orally or in writing, or otherwise be implied by conduct.

There may be instances where the person knows of a risk, but does not voluntarily accept it. For example, an employee may be aware of a risk but cannot be said to have accepted it if the alternative was to lose his job. In *Smith v Baker 1891* the claimant was working in a quarry while stones were carried in a crane over his head. He had raised concerns with his employer about the practice, but was injured when a stone fell on him. It was held that while he was aware of the risk of stones falling into him, the claimant had not consented to the risk and his claim succeeded.

A person cannot be considered to be willing if the law imposes a duty to run the risk. In *Haynes v Harwood 1935* the claimant (a policeman) was injured when he attempted to stop an unattended horse that had bolted in a busy street. He had a legal duty to protect the public and was successful in his claim.

The defence of volenti may not be available where a person is injured while carrying out a moral duty. In *Chadwick v British Railways Board 1967* the plaintiff suffered nervous shock after helping victims of a railway accident caused by the negligence of the railway company. The defendants were held liable even though the claimant was helping as a volunteer out of a moral duty and had no legal obligation to assist with the rescue

Necessity

If the defendant carries out acts which were reasonable to prevent a person or property from danger, a defence of necessity may be argued.

In *Cope v Sharp 1912* the defendant started a fire on moorland adjoining his own to create a firebreak and prevent a fire from spreading onto his own land. The court found that the defendant had acted reasonably in the circumstances.

Statutory authority

If it can be demonstrated that a statute permits the negligent act, it can be a defence to an action. For example, in *Vaughan v Taff Vale Railway 1860* sparks from a locomotive set fire to woods on the claimant's land. It was found that the railway company had taken measures to prevent sparks from the locomotive, and that the operation of the railway was authorised by statute.

Limitation

A claim may be statute barred if the plaintiff brings the action outside the period of time allowed by the law. The Limitation Act 1980 sets out the timeframe for actions to be brought, and generally actions in tort in respect of damage to property must be commenced within six years of the date of the incident. Where the damage caused by a tort is not immediately apparent, the time starts to run from the date of the damage accruing.

In *Pirelli General Cable Works Ltd v Oscar Faber and Partners 1983*, the defendants designed a chimney using unsuitable materials. The chimney was constructed in the summer of 1969, and cracking started to develop in 1970, but the claimants did not notice the damage until 1977. Proceedings were started in 1978. The claim was not successful as the court held that the action accrued when the damage came into existence and not when it could reasonably have been discovered. The claim was therefore statute barred.

The defendants in *Dove v Banhams Patent Locks Ltd 1983* installed an insecure security gate at the claimants' premises in 1967. The property was burgled in 1979 when the gate was forced open. The court found that the claim was not statute barred as the cause of action arose in 1979 when the gate was damaged and not at the time of installation.

An action in respect of personal injury must be commenced within three years of the cause of action accruing. For a minor or person under a disability at the time of the cause of action, the time period starts when the minor becomes 18, or the disability ceases.

Where damage to property is latent or concealed, the Latent Damage Act 1986 allows for the action to be brought within six years of the date of action accruing, or three years from the time that the claimant had the knowledge of the right to bring an action. There is however a fifteen year 'longstop' to bring a case from the date of the negligent act.

Contributory negligence

Prior to the passing of the Law Reform (Contributory Negligence) Act 1945, if the defendant could show that the claimant was in some degree responsible for the loss or damage suffered that element of contributory negligence provided a complete defence. The legislation recognised that this situation was not equitable, and the Act states that 'where any person suffers damage as a result partly of his own fault and partly the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just or equitable having regards to the claimant's share in the responsibility for the damage'.

So, contributory negligence is no longer a defence to liability, but the argument may be used as a means of reducing the amount of damages payable. In *Baker v Willoughy 1969* the damages awarded to a pedestrian knocked down by a car were reduced by 50% as the judge found that the motorist and pedestrian were both equally at fault.

The claimant in *Sayers v Harlow UDC 1958* entered a public lavatory owned by the defendants. The lock to the cubicle door was defective and she could not open the door. Trying to climb out of the cubicle, the claimant placed her foot onto the revolving toilet roll and she fell and injured herself. While the defendants were negligent, the damages were reduced by 25% as the claimant actions had contributed to the accident.

In *Froom v Butcher 1976*, the defendant was found to be wholly responsible for causing a motor accident. The claimant, who was driving the other vehicle involved in the accident, was injured. He had not been wearing a seat belt and the award of damages as reduced by 25% to reflect the fact that the injuries he suffered were made worse by his not wearing a seat belt.

Nuisance

Nuisance concentrates on the protection of a right or interest, and is usually associated with land. It looks at the outcome of a person's actions rather than whether that person conformed to any particular standard of conduct or duty of care. If a person carries on an activity that unreasonably interferes with his neighbour's enjoyment of his land he will be guilty of nuisance.

It differs from negligence in that it does not apply or consider the duty of care that one party may owe to another. The term unreasonable considers the outcome of the action, and not the standard of care that was exercised. If a man has a bonfire in his garden causing heavy smoke to blow across his neighbour's garden, he may be liable in nuisance if the volume of smoke was unreasonable even though all reasonable steps had been taken to control or limit the smoke.

There are two types of nuisance; public and private.

Public nuisance

A public nuisance involves carrying on any activity which may cause inconvenience or annoyance to the public or a section of the public, or interferes with their safety or comfort. A public nuisance is a crime and action will usually be taken by the police. Examples of public nuisance include obstructing the highway, selling food that is unfit for consumption, allowing noise or noxious fumes to escape from a factory or running a brothel.

There may be instances when a public nuisance is also a private nuisance if an individual suffers particular damage which is greater than that suffered by the public at large.

In *Castle v St Augustine Links 1922* a taxi driver was injured by a golf ball that was struck from a tee onto the adjacent roadway. It was established that balls from the 13th tee frequently went onto the road and was a common occurrence, and this created a public nuisance. The driver who was injured was also able to sue.

This can be contrasted with *Bolton v Stone 1951* where the passer-by was injured by a cricket ball struck out of the ground. There were records of only six previous instances of the ball leaving the ground in over 30 years. The claim in nuisance did not succeed as the circumstances did not occur on a regular or frequent basis.

Private nuisance

A private nuisance is unlawful interference with the use of a person's use or enjoyment of land. To be successful in an action for nuisance there must be damage to the plaintiff's land or property, and it will be necessary to prove that the nuisance has existed for a period of time and is not a brief 'one off' event.

Nuisance may arise for example through the creation of noise, smoke, smells, vibration, dirt or dampness.

It will usually be the occupier of the affected property that can bring an action against the person who created or caused the nuisance. Where premises are leased the landlord may be liable if he created the nuisance and then let the property, or if the landlord authorised the tenant or another party to commit the nuisance.

Defences

The following defences may be available to an action in nuisance

Statutory Authority

If the actions of the defendant are authorised by statute it may be a defence to an action.

Prescription

If the nuisance has existed continuously for more than 20 years the under the Prescription Act 1832 the nuisance cannot be challenged. However, the defence will not be effective if though a change of circumstance the activity becomes a nuisance.

In *Sturgess v Bridgman 1879*, the defendant had been using heavy machinery on his premises for over 20 years. The plaintiff was a doctor who built consulting rooms in his garden and complained about the noise of the factory. The defence of prescription was rejected, and the noise only became a nuisance when the consulting rooms were built.

Lawful use of the land

The defendant may prove that the use of his land does not create a nuisance.

Triviality

The defendant may prove that the act or omission is small and trivial and does not cause any damage.

Remedies

The remedies in an action in nuisance are

Damages

Payment of compensation in respect of the damage caused

Injunction

An application may be made to the court for an order to make the defendant stop any further acts that would continue or perpetuate the nuisance.

Abatement

This is, in effect, taking the law into one's own hands. The injured party can take steps to remove or stop the nuisance but in doing so must not infringe another's rights. An example of abatement may be cutting roots or branches of a neighbour's tree if they are encroaching and causing damage, but the material that is cut off has to be returned to the neighbour.

Trespass

Trespass involves direct interference with another's property; be it his person, land or goods. Actions in trespass are actionable per se, that is without requiring evidence of injury or damage.

Trespass to the person

Trespass to the person may involve assault (fear of immediate and unlawful violence), battery (applying force, however slight, to a person against their will) or false imprisonment (restraint of another without lawful justification.

Trespass to land

Trespass to land is direct interference with land in the possession of another. It can arise through

- Unlawfully entering the land of another
- Unlawfully remaining on land when permission is revoked or the time limit to be present has expired
- Unlawfully throwing or placing objects onto the land of another e.g. dumping rubbish

The remedies for trespass to land include damages, grant of an injunction or ejection from the land using reasonable force.

Trespass to goods

This is the intentional or negligent interference with the possession of goods belonging to another person. The interference must be direct and forcible, and trespass to goods is actionable without needing to prove damage. Trespass to goods may arise by conversion, such as selling borrowed items, receiving stolen property or by theft.

Strict Liability

There may be instances where a strict liability is imposed on the defendant in circumstances where there is no breach of duty of care. In such circumstances the liability is not absolute (as there may be defences available), but the onus will shift to the defendant to prove a defence applies rather than the plaintiff having to prove fault.

Rylands v Fletcher 1868

The case of *Rylands v Fletcher 1868* established that an occupier of land who brings onto the land something which is likely to cause damage if it escapes (a dangerous thing) is liable for the damage caused as a result of its escape.

The defendant engaged contractors to build a reservoir on his land to provide water to his mill. The contractors filled a number of disused mine shafts, but as the reservoir was filled water escaped and flooded the plaintiffs mine workings. There was no negligence on the part of the defendant or his contractor, but the claim succeeded and the defendant was held to be liable.

A number of points arise that need to be considered.

- The occupier must bring onto the land and keep the 'dangerous thing' there. Water flowing naturally through the land is not accumulated.
- The dangerous thing is anything that is likely to cause damage if it escapes; this could include water, fumes, sewage, electricity or gas, etc.
- The accumulation must be artificial and not be a natural use of the land. Allowing weeds to grow is a natural use of the land (*Giles v Walker 1890*), but planting a yew boundary hedge and allowing the branches to overhang the neighbours' field is not (*Crowhurst v Amersham Burial Board 1878*). Natural use of the land can include industrial uses. In *Rickards v Lothian 1913* the judge stated that '*it must be some special use bringing with it some increased danger to others, and must not merely be the ordinary use of land or such use as is proper for the general benefit of the community'.*
- The dangerous thing must escape and cause damage.

There are possible defences to a claim

- Statutory Authority – if the actions of the defendant are authorised by an Act of Parliament there may be a defence to an action under *Rylands v Fletcher*, but a claim may still succeed if negligence can be proved.
- Consent – if there is consent by the plaintiff (not under coercion or duress) to the actions of the defendant it may be possible to show that the risk of an escape was accepted. The consent could be implied and may not have to be expressly stated.
- Act of a stranger – if the occupier has no control over the action of a stranger (e.g. a trespasser) and could not have foreseen or prevented the escape.
- Act of God – an event that could not reasonably be expected or guarded against

Liability for spread of fire

Liability for the spread of fire does not quite follow the definition of Rylands v Fletcher as the occupier of land will not usually bring fire onto his land; rather he may bring onto his land and store materials that may be highly flammable and a fire starting on his land may develop and escape.

Under s86 of the Fires Prevention (Metropolis) Act 1774 there is no liability in respect of a spread of fire from an accidental cause. The Act states *'that no action, suit or process shall be prosecuted against any person in whose house, chamber barn or other building any fire shall accidently begin'.* The Act does not absolve the occupier from liability if the fire starts through their negligence.

If a fire starts accidently but then spreads through negligence liability will attach. In *Musgrove v Pandelis 1919* the defendant started his car and petrol in the carburettor caught fire. The ignition was accidental and there was no negligence. Had the driver turned off the petrol supply the fire would have died out but he did not and the fire spread due to this omission. The court found that while the initial fire was accidental and started without negligence it was negligently allowed to spread.

In *Mason v Levy Autoparts of England Ltd 1967* the defendants used their premises for the storage of petrol, oils and grease. A fire broke out and spread to the neighbouring premises. The tests used by the court which found the defendant liable were

1. the defendant brought onto his land things likely to catch fire and kept them in such condition that if they ignited the fire was likely to spread
2. the use of the land was non-natural (although this was debated at length the court found that on balance it was)
3. the thing ignited and the fire spread

There was a contrasting judgement in the Court of Appeal in *Stannard v Gore 2012*. Here, the defendants were tyre fitters and stored around 3,000 new and used tyres at their premises. An accidental fire started following an electrical fault and the tyres were ignited. It was found that the tyres themselves were not a dangerous thing as they were difficult to ignite, further it was not the tyres that had escaped but the fire which the defendants had not brought onto their land. Further, it was found that in the circumstances of the case, storing tyres in the buildings was not a non-natural use of the land.

Liability for spread of fire can arise in negligence and nuisance

In *Balfour v Barty-King 1957*, the defendants engaged a plumbing contractor to thaw some frozen pipes. The contractor used a blowtorch which ignited insulation material and the spread to the next door house. The defendants were liable as there was a strict liability for the escape of fire, and they could not avoid liability by claiming the fire was caused by the negligence of the independent contractor.

Similarly, in *H & N Emanuel v Greater London Council 1971* the defendants employed contractors to clear a site that they occupied. The contract included a condition that the contractors were not to burn rubbish on the site but they did and the fire spread. The council were found liable as the spread of fire constituted a strict liability. They could not rely on the stipulation in the contract to escape liability.

Statutory Liability

There may be instances where liability attaches to a defendant by virtue of a Statute (Act of Parliament). In such cases, the plaintiff would need to demonstrate is that the statute applied in the circumstances, and that they had suffered loss or damage allowed for by the Statute. It would not be necessary to prove negligence or other breach of duty on the part of the defendant.

A statutory liability is not absolute, and the Statute may allow defences to be raised in particular circumstances, but the onus would be on the defendant to prove the application of the defence.

Statutes that may impose a liability include

- **Water Industry Act 1991** – s209 of the Act imposes a strict liability on a water supplier in respect of damage caused by water escaping from a mains supply pipe. There are certain defences available, including losses caused wholly by the action of the party who sustained the damage. The Act only applies to leaks from supply pipes; if the damage was caused by a surcharge or leak from a drain or sewer it would be necessary to prove negligence or other breach on the fault of the water undertaking.
- **Riot Compensation Act 2016** – where damage is caused in a riot (defined by the Public Order Act 1986), subject to certain requirements and limits, the Police Authority have a liability in respect of damage caused.
- **Animals Act 1971** – imposes a strict liability in respect of injury or damage caused by a dangerous species and in some circumstances other animals. Liability will also attach in respect of injury done to livestock by dogs and damage caused by straying animals.
- **Hotel Proprietors Act 1956** – the Act does not impose a liability, but allows the hotelier or innkeeper to limit their liability to £50 for any one item or £100 in total for any guest subject to their complying with e requirements set out in the Act. An innkeeper has a common law liability for the safekeeping of a guest's effect, subject to certain defences. Provided that there is no neglect or wilful act on the part of the innkeeper or his staff the limits within the Act will be the limit of the innkeeper's liability

In each case there may be defences available as set out under each Statute, but it would be necessary for the defendant to prove the application of the defence.