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Thirteenth Edition

LAW OF TORT

John Cooke



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Law of Tort

Thirteenth Edition

Law of Tort

JOHN COOKE

Emeritus Professor of Common Law

Liverpool John Moores University



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PEARSON EDUCATION LIMITED

Edinburgh Gate
Harlow CM20 2JE
United Kingdom
Tel: +44 (0)1279 623623
Web: www.pearson.com/uk

First published 1992 (print)
Second edition published 1995 (print)
Third edition published 1997 (print)
Fourth edition published 1999 (print)
Fifth edition published 2001 (print)
Sixth edition published 2004 (print)
Seventh edition published 2005 (print)
Eighth edition published 2007 (print)
Ninth edition published 2009 (print)
Tenth edition published 2011 (print)
Eleventh edition published 2013 (print and electronic)
Twelfth edition published 2015 (print and electronic)
Thirteenth edition published 2017 (print and electronic)

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- © Pearson Education Limited 1999, 2001, 2004, 2005, 2007, 2009, 2011 (print)
- © Pearson Education Limited 2013, 2015, 2017 (print and electronic)

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ISBN: 978-1-292-17607-9 (print)
978-1-292-17608-6 (PDF)
978-1-292-17609-3 (ePub)

British Library Cataloguing-in-Publication Data

A catalogue record for the print edition is available from the British Library

Library of Congress Cataloguing-in-Publication Data

A catalog record for the print edition is available from the Library of Congress

Names: Cooke, John (Law teacher), author.

Title: Law of tort / John Cooke, Emeritus Professor of Common Law, Liverpool, John Moores University.

Description: Thirteenth Edition | Harlow, England : Pearson, 2017.

Identifiers: LCCN 2016059008 | ISBN 9781292176079 (Print) | ISBN 9781292176086 (PDF) | ISBN 9781292176093 (ePub)

Subjects: LCSH: Torts—England. | Negligence—England. | Liability (Law)—England.

Classification: LCC KD1949 .C67 2017 | DDC 346.4103—dc23

LC record available at <https://lcn.loc.gov/2016059008>

10 9 8 7 6 5 4 3 2 1
21 20 19 18 17

Print edition typeset in 9/12, Stone Serif ITC Pro by SPi Global
Printed in Slovakia by Neografia

NOTE THAT ANY PAGE CROSS REFERENCES REFER TO THE PRINT EDITION

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Preface

Both the courts and Parliament have been very busy in tort law since the last edition. I was surprised to find such an amount of new material relevant to this edition.

The Supreme Court has made major statements in a number of areas. In vicarious liability (see Chapter 22) there are the cases of *Cox v Ministry of Justice* (2016) and *Mohamud v WM Morrison Supermarkets plc* (2016). In informed consent the decision in *Montgomery v Lanarkshire Health Board* (2015) appears to have finally laid the ghost of *Siddaway* to rest. The rule in *Wilkinson v Downton* has been given structure in *O v Rhodes* (2015) (see Chapter 19). The area of illegality continues to cause problems and has been looked at in *Hounga v Allen* (2014) and *Jetivia SA v Bilta (UK) Limited* (2015) (see Chapter 11).

Elsewhere, case law has started to come through on the Defamation Act 2013: on serious harm – *Lachaux v Independent Print Ltd* (2015), *Cooke v MGN* (2015), *Brett Wilson LLP v Person(s) Unknown* (2015) EWHC 2628; and on libel tourism – *Ahuja v Politika Novine I Magazini DOO* (2015) (see Chapter 20).

On the statutory front there has been SARAH (Social Action, Responsibility and Heroism Act 2015) (Chapters 1, 6 and 8) on factors to be taken into account in determining negligence. The Enterprise and Regulatory Reform Act 2013 s 69 (see Chapters 13 and 14) appears to remove much of the significance of the tort of breach of statutory duty in the area of employer's negligence. The Crime and Courts Act 2013 (see Chapters 20, 21 and 25) deals with exemplary damages against the media.

As regards structural changes to the book, three chapters have gone. These are the chapters on liability for animals, deceit and malicious falsehood, and joint and several liability. Deceit has migrated to Chapter 5 and malicious falsehood to Chapter 20. The changes were in response to reviews of the previous edition. I am extremely grateful to the work done by reviewers and have tried as far as possible to incorporate their suggestions.

Thanks go to the editorial and sales staff at Pearson for their great assistance.

My thanks go to my wife Joan for her support and to my former colleagues and students at Liverpool John Moores University for everything they have taught me.

I have attempted to state the law as it was at 30 July 2016.

John Cooke
30 July 2016

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Part 1

General principles of tort law

1 General principles

1

General principles

Objectives

After reading this chapter you will:

1. Understand the elements of a tort.
2. Have a knowledge of the interests protected by tort law.
3. Understand the distinctions between fault and strict liability.
4. Have a knowledge of the objectives of tort law.
5. Have a critical knowledge of alternative systems of compensation.
6. Have a critical knowledge of whether England and Wales have a compensation culture.
7. Have a critical understanding of the boundaries of tort law and its links with contract.
8. Understand the relationship between tort and human rights legislation.

Introduction

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

What is a tort?

Objective 1

A **tort** is a civil wrong in the sense that it is committed against an individual (which includes legal entities such as companies) rather than the state. The gist of tort law is that a person has certain interests which are protected by law. These interests can be protected by a court awarding a sum of money, known as **damages**, for infringement of a protected interest.

See 'The boundaries of tort' in this chapter for the relationship between tort law and other branches of law.

Alternatively, they can be protected by the issuing of an **injunction**, which is a court order, to the defendant to refrain from doing something. There are increasingly limited circumstances where the victim of a tort may avail himself of self-help.

Other branches of law also defend protected interests and the relationship between these and tort law will be discussed later.

Elements of a tort

Tort is a remarkably wide-ranging subject and probably the most difficult of all legal areas to lay down all-embracing principles for.

The approach that will be taken at this stage is to lay down a general pattern and then to show some of the main deviations from this pattern.

The basic pattern

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

This model can be represented:

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

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

Example

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

Variations

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

Example

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

For breach of statutory duty, see Chapter 13.

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

Example

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

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

Example

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

For trespass to land, see Chapter 16.

The interests protected

Personal security

Objective 2

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

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

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

Interest in property

For trespass to land, see Chapter 16; nuisance, see Chapter 17; *Rylands v Fletcher*, see Chapter 18 and negligence Chapters 2–10.

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

Economic interests

See 'The boundaries of tort' later in this chapter for the relationship between contract and tort.

Tort law will give limited protection to economic interests where the defendant has acted unlawfully and has caused **economic loss** to the claimant. These are known as the economic torts. Such protection is limited because the common law has been cautious in drawing the line between lawful and unlawful business practice. This is a line which is largely left to statute to draw. (See *OBG Ltd v Allan* [2007] 2 WLR 920.)

A controversial area, and one which will be dealt with in the chapter on negligence, is the extent of liability for *negligently* caused economic loss. This is an area where tort and contract intersect.

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

Example

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

Reputation and privacy

See Chapter 20 for defamation and Chapter 21 for privacy.

Increasingly important are a person's interests in their reputation and privacy. Where a person's reputation is damaged by untrue speech or writing, then they may have an action in the tort of *defamation*.

English law has been slow to provide tortious relief for invasions of privacy but has now created a tort of *misuse of private information*.

The role of policy

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

Take another look at the example given in the previous section. The court has the choice of allowing the loss to lie on the factory owner by saying that *A* is not liable, or of shifting the loss to *A* by holding him liable. The court's decision will be explained by saying, for example, that *A* owes no duty to the factory owner in terms of certain kinds of loss or that certain kinds of loss are too remote. But the decision can also be explained in terms of two policy factors. The courts are concerned with opening the floodgates of litigation: for example, consider the situation should the electricity cable be connected to 50 factories. Closely connected to this is the role of insurance. Most damages in tort are in practice paid by insurance companies. The court's decision will act as a signal to firms as to who will have to insure against this risk. The decision may also be based on who they think is the best insurer.

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

The role of insurance

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

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

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

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

Example

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

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

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

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

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

Example

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

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

Insurers pay out 94 per cent of tort compensation and in some areas of tort law have a considerable influence on the tort system. This may happen in one of two ways. The first is the impact on legislation and judicial decisions. If legislative change is being contemplated, the impact on insurance will be taken into account by Parliament. Impact on judicial decisions is harder to assess, as few judges acknowledge the effect of insurance on their decisions. (But see *Barker v Corus UK Ltd* [2006] 3 All ER 785.) The second is in the actual operation of the tort system. As the insurance companies are effectively the paymasters, they have a large say in its operation. Insurers determine which cases go to court. Only 1 per cent of all claims made go to court and far fewer go on appeal and appear in the law reports. Which cases are appealed may be determined by the insurer and one factor in their decision not to appeal may be that they want a point of law to remain uncertain. Other cases are settled by the insurers. For reasons of cost an insurer may wish to settle a case where in strict legal terms the claim might not succeed in court. Conversely, a party might be coerced by the insurer into accepting less on a settlement than they would have received if they had gone to court.

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

Why not abolish the law of tort and simply have insurance against injury?

Fault and strict liability

Objective 3

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

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

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

Example

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