

# CHAPTER 1

## AN OVERVIEW OF THE LAW OF TORT

The aim of this chapter is to consider the definition, objectives and scope of the law of tort, and to take an overview of the subject. Tort law has developed over many centuries and has its origins in an agricultural society and largely rural economy of the middle ages in Britain. It is sometimes regarded as the area of common law which remains after all the other causes of action, such as contract or breach of fiduciary duty have been subtracted. As this area of law has developed it has proved to be infinitely adaptable, but it has not developed in isolation. Other areas of law have evolved alongside tort.

### 1.1 WHAT IS TORT?

The word 'tort' is derived from the Latin *tortus*, meaning 'twisted'. It came to mean 'wrong' and it is still so used in French: '*J'ai tort*'; 'I am wrong'. In English, the word 'tort' has a purely technical legal meaning – a legal wrong for which the law provides a remedy.

Academics have attempted to define the law of tort, but a glance at all the leading textbooks on the subject will quickly reveal that it is extremely difficult to arrive at a satisfactory, all-embracing definition. Each writer has a different formulation, and each states that the definition is unsatisfactory. In order to understand what tort law involves, it is necessary to distinguish tort from other branches of the law, and in so doing to discover how the aims of tort differ from the aims of other areas of law such as contract law or criminal law. The main emphasis in this chapter will be on the distinction between tort and contract, as these two subjects are closely related. Criminal law will be dealt with separately below.

### 1.2 TORT AND CONTRACT

The scope and objectives of tort as compared with contract are often discussed in the context of duties fixed by law and people to whom the duties are owed. The two subjects are frequently studied alongside each other.

#### 1.2.1 Duties fixed by law

Many duties in tort arise by virtue of the law alone and are not fixed by the parties. The law imposes a duty in tort not to libel people, not to trespass on their land, and so on. By contrast, the law of contract is based notionally on agreements, the terms of which are fixed by the parties.

However, in modern law, it is unrealistic to suppose that contract and tort are so very different from each other in this respect. Terms of contracts are now imposed upon the parties by numerous statutes, quite independently of any 'agreement' and, indeed,

the notion of true agreement has long been discredited in many contractual situations, since few individual consumers have real bargaining power. Moreover, it is possible for the parties in contract to arrive at agreement to vary the tortious duties which the law imposes.

### 1.2.2 The relationship between the parties

As duties in tort are fixed by law, the parties may well have had no contact before the tort is committed. The pedestrian who is injured by a negligent motorist will probably never have met the defendant until the accident which gives rise to the legal action. Of contract, it is often said that the parties will, through negotiation or by the very act of contracting, have had some contact and be fully aware of their legal duties before any breach of contract occurs.

This is too simplistic a view. Contracting parties often have little or no contact, and many of the terms of the contract may be implied by the operation of various statutes. In tort, the parties may well know one another before the tort is committed, as for example the doctor who negligently injures a patient who has been receiving a course of treatment, or the neighbour who allows fumes to pour over adjoining property, causing a nuisance. The distinction between the branches of law is again blurred.

Although the absence of a contract does not prevent a claim in tort, for a long time a claim for breach of a contract could only be brought by one of the contracting parties. However, the Contracts (Rights of Third Parties) Act 1999 now allows third parties to enforce contractual terms in certain circumstances.

The notion of relationship or proximity between the parties has recently been given much greater prominence in tort in recent cases than ever before. This draws the two branches of the law even closer.

The relationship between the parties is the basis for distinguishing between tort and contract when dealing with the notion of remoteness of damage. Here the courts consider the question: 'for how much of the damage suffered in a case should the defendant be held responsible?' The rules of contract require a closer relationship than the rules of tort in dealing with this issue.

### 1.2.3 Choosing tort or contract

There are practical reasons for distinguishing between tort and contract when deciding how a claim is to be made. The remedy for breach of duty in tort is usually a claim for damages, though equitable remedies are also available in appropriate cases. The *main aim of tort* is said to be compensation for harm suffered as a result of the breach of a duty fixed by law. Tort seems to place greater emphasis on wrongs of commission rather than wrongs of omission. Another important aim of tort is to deter behaviour which is likely to cause harm.

The *main aim of contract* on the other hand is to support and enforce contractual promises, and to deter breaches of contract. Contract, then, has no difficulty compensating for wrongs of omission. The doctrine of consideration, based on mutual promises, is all important in the law of contract, and failure by omission to keep the terms of a promise is a breach of contract which the law will seek to amend.

The distinction in practice is less clear, as many fact situations could give rise to an action in both contract (if there is a contract in existence) and tort. Numerous examples of this are to be found in cases of professional negligence, for example, where the parties may also have a contractual relationship (doctors, surveyors, architects, etc). In such cases, it again becomes necessary to decide whether to sue in contract or in tort. However, it often makes little difference to the outcome which branch of the law is chosen (see *Johnstone v Bloomsbury AHA* [1991] 2 All ER 293).

The considerations which may be relevant to the choice of contract or tort are that there may be more generous limitation periods (time limits) within which to bring an action in tort rather than in contract. In tort, the claimant's cause of action arises when the damage is suffered, but under the rules of contract, it arises when the contract is breached, irrespective of when the damage occurs. The need to prove fault is not always present in contract, whereas it is frequently necessary to do so in tort; and the range of remedies and amount of damages which are available in tort may be greater than in contract. The rules for determining remoteness of damage differ as between contract and tort. In tort, under the rule in the *Wagon Mound* case (*Overseas Tankship (UK) Ltd v Morts Docks Engineering Co Ltd* [1961] AC 388, there may be liability for highly unlikely results of a tortious act, but in contract, a substantial degree of probability is required. In tort, forcibility of damage is required at the moment the tortious act is committed, whereas in contract the relevant time is when the contract is concluded. There are also differences in relation to the concept of contributory conduct on the part of the claimant. In tort the defence of contributory negligence is of general application, but in contract it will only be available if there is a breach of a contractual duty to take care – see *Forsikringsselskapet Vesta v Butcher* [1988] 2 All ER 43.

The courts now take the view that where professionals owe duties to their clients in both tort and contract, the claimant has a free choice as to which remedy to pursue. The extent of this concurrent liability was confirmed by the House of Lords in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506. In that case, it was held that the duty of care which was owed in tort to Lloyd's 'names' by their managing agents was not precluded by the existence of a contract between the same parties. In a later case in which the choice between contract and tort was relevant, *Holt and Another v Payne Skillington (A Firm) and Another* [1996] PNLR 179, the Court of Appeal held that where a duty of care in tort arose between the parties to a contract, wider obligations could be imposed by the duty in tort than those which arise under the contract. In the earlier case of *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd* [1986] 2 All ER 947, the Privy Council had held that, in commercial situations, if a contract exists between the parties, the proper action lies in contract rather than in tort. In *Holt*, however, the arguments raised in the *Tai Hing Cotton* case were rejected by the Court of Appeal. The defendants contended that if, as here, there is a contract in existence, the duties of the parties in contract and tort are to be defined according to the express and implied terms of the contract, and would, if necessary, be limited by those terms. Accordingly, it was argued, there could be no expansion of liability by means of a duty of care in tort. However, the Court of Appeal accepted the claimant's arguments that a consideration of the facts of each individual case would determine whether a duty of care in tort existed which was wider than any duties imposed by contractual terms. Such a tortious duty, if it arose, was imposed by the general law and would not arise out of the common intention of the parties to any

contract. The matter was also discussed in *Spring v Guardian Assurance* [1992] IRLR 173 in connection with the existence of a possible implied term in contracts of employment requiring employers to exercise care in writing references. Further examples of cases which highlight the advantages of one action over another will be encountered throughout this book.

In recent years, the distinction between tort and contract has been blurred by new departures, and the differing aims of the two areas of law have become less clear. The development of the doctrine of promissory estoppel in contract suggests that contract may be moving closer to tort. When conditions allow that doctrine to apply, it may be possible to side-step the doctrine of consideration.

Developments in tort in the 1980s, in particular the case of *Junior Books Ltd v Veitchi Co Ltd* [1983] AC 520, now discredited and confined to its own particular facts, gave rise to the view that the tort of negligence was being used in what should have been contractual situations. This will be considered in detail later (see Chapter 5).

Since the rise of the tort of negligence during the 20th century, the law of tort places great emphasis on the need to prove fault. The aim here is to compensate for wrongs suffered through the fault of another person. Damages will usually only be awarded in tort if the claimant can establish fault. The system requires that someone be blamed for the injury sustained.

Contract on the other hand has been less concerned with fault as a basis of liability, and it is often unnecessary to prove fault in order to be compensated for a breach of contract. All that is necessary to prove is that the act which caused the loss was committed. This is known as strict liability and is a feature of much of the law relating to sale of goods. However, there are established areas of strict liability in tort, such as libel and trespass.

One important distinction between contract and tort which has been emphasised in recent cases (for example, *Murphy v Brentwood DC* [1990] 2 All ER 908) is that, in the case of compensation for defective products, tort is concerned only with unsafe products, but contract will provide compensation for shoddy products too

There are some tort actions, such as trespass, which do not require proof of damage, but negligence, the tort action most commonly in use today does require the claimant to prove that he or she has suffered damage. *Johnson v Neill International Combustion Ltd* [2007] UKHL 39 is a case in which the claimants chose to bring claims in the tort of negligence, and were unsuccessful because they were unable to prove that they had suffered recognisable damage. The House of Lords ruled that the pleural plaques which were present in the lungs of the claimants had been caused by negligent exposure to asbestos, but did not in themselves amount to actionable damage. Nor did they amount to actionable damage when anxiety about the risk of developing future disease as a result of pleural plaques was taken into account. However, Lord Hope, Lord Scott and Lord Rodger pointed out that for future claimants, there was a possibility of exploring contractual remedies against employers, as it is not necessary to prove damage to succeed in a claim for breach of contract.

Ultimately, however, the choice between contract and tort may, for a claimant, depend upon practical matters relating to pleadings or choice of jurisdiction, as well as upon which area of law will provide the most appropriate remedy.

### 1.2.4 Unliquidated damages

The aim of tort damages is to restore the claimant, in so far as money can do so, to his or her pre-incident position, and this purpose underlies the assessment of damages. Tort compensates both for tangible losses and for factors which are enormously difficult to quantify, such as loss of amenity and pain and suffering, nervous shock, and other intangible losses. Tort damages are therefore said to be 'unliquidated'. The claimant is not claiming a fixed amount of compensation.

The aim of the award of damages in contract is to place the claimant in the position he or she would have been in if the contract had been performed. Thus tort is concerned with restoring the status quo, while contract is concerned with loss of expectation (see Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, 2000, Oxford: Hart). Contract is less willing to contemplate awarding damages for such nebulous factors as injury to feelings. The damages are described as 'liquidated'. The claimant has assessed exactly how much the breach of contract has cost and claims that fixed amount.

However, recent years have seen a willingness on the part of the courts to award damages for 'disappointment' in contract in some unusual cases, indicating that contract is willing to recognise and compensate certain intangible losses (*Jarvis v Swans Tours* [1972] 1 All ER 71).

Tort will not only provide a remedy in the form of money compensation but will, like contract, grant an equitable remedy in appropriate circumstances. For example, an injunction may be awarded to prevent repeated acts of trespass. Numerous equitable remedies are provided in the law of contract but these are often difficult to obtain, as it is necessary to prove that money would not be the real answer to the claimant's problem. In tort, the situation which calls for an injunction will usually be very clear cut and there will be fewer obstacles in the way of obtaining that remedy than in contract.

Specialist texts provide a detailed analysis of these matters, and it will be evident that the distinction between contract and tort is blurred. The two subjects were classified as separate topics by the early textbook writers when law began to be treated as a suitable subject for academic study. It is not surprising that some writers call for a different approach to these common law subjects by sweeping aside the dichotomy and dealing with the 'common law of obligations' as a whole. This approach would do away with some of the problems of definition. Despite the divergence between tort and contract, as is confirmed in *Spring v Guardian Assurance* (see 5.1.8, below) some important distinctions remain and for practical purposes should be understood.

## 1.3 TORT AND CRIMINAL LAW

The same fact situation, for example, a road accident, may give rise both to criminal prosecutions and to tort actions. Tort, which deals with civil liability, is concerned with claims by private individuals against other individuals or legal persons. Criminal law is concerned with prosecutions brought on behalf of the state for breaches of duties imposed upon individuals for the protection of society. Criminal prosecutions are dealt with by criminal courts and the standard of proof is more stringent than in civil cases.

The consequences of a finding of criminal guilt may be regarded as more serious for the individual concerned than the consequences of civil liability.

Both areas of law are concerned with the breach of duties imposed by law, but the criminal law has different priorities. It is concerned with the protection of society by deterring wrongful behaviour. It is also concerned with the punishment of criminals. These concerns may also be found in tort, but are secondary to the main objective of compensation. A motorist who is speeding is far more likely to be worried about being caught by the police than being sued by a person whom he may happen to injure if he is negligent. Nevertheless, tort does have some deterrent value. For example, motorists who have been negligent have to pay higher insurance premiums.

To complicate matters, criminal law does make provision for compensating victims in some cases by compensation orders or through the Criminal Injuries Compensation Scheme, but this is not the main objective of the criminal law.

Similarities and differences may be found between tort and criminal law and, at the very least, the definition at 1.1 above should have made clear that tort is a branch of civil law to be distinguished from criminal law.

There are some instances in which people have brought civil claims in an effort to encourage prosecutions in criminal law. For example, the family of a woman who was killed by her former boyfriend succeeded in having him branded as a killer in a successful civil claim for assault and battery heard in the High Court in 1998 (*Francisco v Diedrich* (1998) *The Times*, 13 April). The Crown Prosecution Service had decided not to prosecute.

Some aspects of the meaning of tort have been considered here. Deeper analysis should reveal more similarities and differences between tort and contract law, tort and criminal law, and tort and other areas of law. The simple fact is that the boundaries of the subject are not easily defined.

## 1.4 INSURANCE AND THE LAW OF TORT

Underpinning the modern tort system is the system of insurance which provides payment of compensation in most tort cases. Indeed, it is usually not worth the trouble and expense of claiming in tort unless the defendant is insured (or is very wealthy). It is possible to insure against liability in tort in relation to many different activities. Motorists are compelled by statute to insure against liability for injuries to third parties and passengers (see the Road Traffic Act 1988), and manufacturers insure against harm caused by their products. Employers (see Employers' Liability (Compulsory Insurance) Act 1969) and occupiers take out insurance policies to cover the cost of accidents. Insurance is also important in relation to sporting and educational activities, and clubs and schools are covered by insurance policies. Many large public bodies carry insurance, but some act as their own insurers, taking upon themselves the risk of paying damages if they are found liable. First party insurance should not be overlooked. This type of insurance allows individuals to buy policies that will compensate them if they are injured, regardless of the fault of others.

To some extent, insurance can influence the way in which people behave. Thus, motorists are aware that their insurance premiums will be higher if they are found

negligent and may be encouraged to take fewer risks. Some motorists have to pay higher premiums because they fall into a high risk category. Figures published in 1999 by the Office for National Statistics indicate that young men under the age of 25 years are three times more likely to die in a road accident than women of the same age group, and are much more likely to be involved in accidents than older motorists. To allow for this, young men pay higher premiums than other motorists.

There is, of course, a counter-argument concerning insurance – that people who are aware that they are insured are likely to be less careful because they can be confident that their insurance company will compensate any victims of their wrongful activity. Insurance can also create problems of waste, because it is impossible to predict when liability will arise and people may over-insure. It has also been claimed that in some cases insurance may motivate decisions in the law of tort, so that in road accident cases, judges may be more willing to find in favour of claimants because they know that there will be a source of compensation available to support them through insurance. A judge may find the defendant legally to blame though morally he should not be responsible (see *Nettleship v Weston* [1971] 2 QB 691). Despite this, there are several cases in which judges have stated that the insurance positions of the parties should be ignored when determining liability (*Morgans v Launchbury* [1973] AC 127). Nevertheless, insurance is a useful way of spreading the cost of compensating people who suffer injury as a result of negligence. Insurance allows people to recover damages for negligent driving from close relatives, so easing the burden of caring within families.

## 1.5 AN OVERVIEW OF THE LAW OF TORT

In order to understand tort, it may be helpful to withdraw for a moment from the problems of definition and take an overview of the subject to consider the nature of the duties which are imposed and the interests which are protected by this branch of the civil law.

Tort has been used for many centuries to protect personal interests in property. Some of the earliest actions known to English law are those concerned with protecting interests in land. These include the torts of nuisance and trespass to land.

Tort has also been concerned with protecting people from intentional interference, through actions for assault and battery and false imprisonment, and the reputation, through the torts of libel, slander, malicious prosecution and injurious falsehood. Purely financial interests, economic and trading interests have more recently been brought within the province of tort and their scope is still unclear but personal property has been protected by tort for hundreds of years.

The evolution of the law of tort has been somewhat haphazard, and it is an area of law which is still developing. The process of evolution is in part a response to changes in social and economic conditions and social values. This is acknowledged by the judges as they develop the law. For example, in *Chester v Afshar* [2004] UKHL, Lord Steyn said:

I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. The result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision . . . reflects the reasonable expectations of the public in contemporary society.

Only since 1932, when the tort of negligence was first officially recognised by the House of Lords as a separate tort, has negligence been of central importance. However, the vast majority of tort claims today are for negligence, and negligence has proved the most appropriate claim in modern living conditions, especially since the development of the motor car. In negligence, the main issue is not what interests the law intends to protect, since negligence is of general application, but whether or not a duty of care was owed to the claimant by the defendant.

The continued development of tort can be seen in the action for breach of confidence which some authorities claim is not a tort at all, contending that it belongs to equity. The Court of Appeal has recently referred to the equitable origins of this action in *R v Department of Health ex p Source Informatics* [2001] QB 424. The issue under consideration concerned the passing of anonymised patient information by pharmacists, for a fee, to the appellants, Source Informatics.

Source Informatics sought a declaration to the effect that there was no breach of confidence involved in passing on anonymous information about patients. The Court of Appeal considered the classic statement of the prerequisites of a successful claim for breach of confidence by Lord Greene in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 (Note) and the legal basis of the doctrine of confidentiality. Whilst recognising that the action for breach of confidence lies in the law of tort, the Court of Appeal also reviewed the cases which had been decided on equitable principles. The conclusion of the court was that in a case involving personal confidences, confidence was not breached where the identity of the confider was protected. The reasoning of the Court of Appeal in this case appears to merge the tort of breach of confidence with principles of equity, which lie at the heart of the development of the law in this area.

The implementation of the Human Rights Act 1998 has facilitated and accelerated evolutionary changes in Tort (see 1.10) as can be seen in the development of something akin to privacy law – *Campbell v Mirror Group Newspaper Ltd* [2004] UKHL 22 (see Chapter 19).

There is still greater potential for further development of the law, in particular, the law of negligence, in the light of the European Convention on Human Rights. In *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39, Pill LJ was impressed by the human rights arguments presented to the Court and commented that there was a strong case for developing the common law action for negligence in the light of Convention rights. Time will tell as to whether this is in fact what happens.

Occasionally, it is possible to observe the dynamic nature of tort in the development of little used, rather obscure torts in modern conditions. For example, in *Three Rivers DC and Others v Bank of England (No 3)* [2000] 3 All ER 1, HL, the unusual tort of ‘misfeasance in public office’ was revived in an attempt to provide remedies for those who suffered losses in the BCCI incident. The Court of Appeal held that, in order to succeed in a claim for this tort, it had to be proved that there had been a deliberate and dishonest abuse of power. The tort only applies to the acts of public officers, and the claimant must prove to the satisfaction of the court that damage was suffered by him as a result of abuse of power by a public officer. The official concerned must have known that the claimant would suffer loss as a result, or must have been reckless or indifferent as to that result. The House of Lords dismissed the appeal in this case, ruling that a public officer would be liable for the tort of misfeasance in public office only if he or she acted knowingly or

with reckless disregard to the likelihood of causing injury to either the claimant or a person who was a member of the class to which the claimant belonged. However, the basic elements of the tort were confirmed as two 'limbs'. First, there must be targeted malice with the intention to injure, and second, there must be knowledge on the part of the defendant that his conduct is unlawful.

In *Docker v Chief Constable of West Midlands Police* [2001] 1 AC 435, the House of Lords held that the police are not immune from action by former defendants alleging conspiracy to injure and misfeasance in public office.

The tort was further clarified in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, in which the House of Lords concluded that there must be proof of material damage in the form of financial loss, physical injury or psychiatric damage.

If a claim for misfeasance in public office is successful exemplary damages may be payable (*Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29). For further consideration of the scope of this tort, see *Iqbal v Legal Commission Services*, QBD, 6 August 2004.

Not every wrongful act is actionable as a tort. There are some activities which cause harm but are not treated as torts. The case of *Bradford Corp v Pickles* [1895] AC 587 is an example of this. Here, the defendant had prevented underground streams flowing through his land from reaching the claimant's land, to force them to buy his property at a much inflated price. The House of Lords held that the defendant could not be liable because every landowner has a right to take water from his own land even if it means that neighbouring properties are deprived of water altogether. This is an illustration of a principle known as *damnum sine injuria* (a wrong without a legal remedy).

This has recently been confirmed in *Arscott v The Coal Authority* [2004] EWCA Civ 892, in which the Court of Appeal held that the so-called 'common enemy rule' did not contravene Art 8 European Convention of Human Rights (see 11.10.3 for the details of this case).

The opposite side of the same principle, *injuria sine damno*, is present in cases where no damage is suffered but a tort action is available because the interest to be protected is regarded as being of vital importance. A recent, and somewhat controversial example of this can be found in the case of *Chester v Afshar* [2004] UKHL 41, in which the House of Lords recognised that a patient's right to be given appropriate information which she requested about the risks involved in a surgical procedure was so important that there was no need for her to prove that she had suffered damage as a result of not receiving the information she had sought. The tort of trespass to land is another, much older, example of the way in which the common law operates to protect a crucially important interest without requiring the claimant to prove damage. To obtain an injunction to prevent further acts of trespass, it is enough to prove that the defendant has walked onto the claimant's land, and there is no need for any damage to have been caused.

## 1.6 CASE LAW

Although there are some recent statutory developments, tort is essentially a common law subject developed by the judges, often in response to changes in social and economic conditions. It is important to appreciate that many of the decisions have been influenced by judicial policy founded on pragmatic considerations and notions of social justice, such as loss distribution based on the extended use of insurance. The Human Rights Act 1998 has added a new dimension to judicial decision making in tort cases.

Some tort decisions appear to conflict, and judges may seem to be doing one thing when saying another. It may appear that the judge decided at the outset on the outcome of a case, and found reasons later to support that decision. However, as will be seen, in the great landmark cases like *Donoghue v Stevenson* [1932] AC 562 the policy behind the decisions is usually discussed openly and in depth by the judges.

All these factors may cause confusion to students first embarking on the study of tort. It is only towards the end of the study of the law of tort that it will be possible to form a complete picture of the subject. It is worth returning to this first chapter at the end of the entire book to put the subject into perspective.

## 1.7 OTHER SYSTEMS OF COMPENSATION

Tort is not the only means whereby a person who suffers as a result of a wrongful act may receive compensation. Indeed, tort is the least efficient system of compensation. Other sources include the social security system, the industrial injuries scheme, the criminal injuries compensation scheme, charitable gifts, and first party insurance.

## 1.8 TORTS OF STRICT LIABILITY

Although the vast majority of tort actions are for negligence, which requires proof of fault, there are some torts in which it is not necessary to prove fault. All that needs to be proved is that the defendant committed the act complained of, and that the damage was the result of that act. These are termed torts of 'strict liability'.

However, the term 'strict liability' covers a wide variety of circumstances and does not itself withstand strict scrutiny as it is so indeterminate. It is, therefore, an easy label to attach but remains conceptually awkward. To some extent, strict liability appears to occupy a continuum with complete absence of concern for any mental element on the part of the defendant at the one end, to the other end where the rules are sufficiently relaxed to allow some consideration of voluntariness, as in the tort of trespass.

Some strict liability is of very ancient origin, whereas other examples, such as the instances of strict liability introduced by the Consumer Protection Act 1987, are fairly recent. All have in common the fact that the society in which they originated demanded particular protection for potential claimants, and the emphasis tends to be on the type of activity rather than the defendant's conduct in carrying it out. There may be no obvious reason for such emphasis, and some authorities suggest that strict liability is merely a

form of loss distribution. Another argument is that, because many of the torts of strict liability are concerned with particularly hazardous activities, the defendant bears some initial blame for being prepared to impose hazards on others, and it would offend justice and morality to impose the requirement of proving fault in such circumstances. However, instances of strict liability are often haphazard and it may appear strange that driving, arguably one of the most hazardous activities in modern life, does not attract strict liability. Many instances in which strict liability has been imposed are the responses by judges to the particular circumstances of the cases before them, as in *Rylands v Fletcher* (1868) 100 SJ 659, (1868) LR 3 HL 330, (1866) LR 1 Ex 265, or by Parliament to the demands of the EU or pressure groups, as in the Consumer Protection Act 1987 and the Vaccine Damage Payments Act 1979.

The conclusion must be that there is no general underlying rationale, but a series of ad hoc adjustments prompted more by pragmatism than principle.

Strict liability is imposed to varying degrees in the following circumstances:

- liability for dangerous wild animals;
- liability for livestock straying onto neighbouring land;
- liability for defective products under the Consumer Protection Act 1987;
- liability under the rule in *Rylands v Fletcher*;
- liability for breach of statutory duty, if the statute in question imposes strict liability;
- liability for defamation;
- liability for man made objects causing damage on the highway.

In almost all of these instances strict liability is subject to exceptions and defences. Indeed, in some cases, there are so many avenues of escape from strict liability that the term hardly seems appropriate to describe the particular tort (see sections on the Consumer Protection Act 1987, Chapter 15 and *Rylands v Fletcher*, Chapter 11). Moreover, absolute liability, which does not admit of any defence at all, is almost never to be found outside the criminal law.

On the other hand, in the law of negligence, there are certain circumstances where in effect there is strict liability, as in the case of learner drivers (*Nettleship v Weston*), the egg-shell skull cases in remoteness of damage, and in many of the cases in which the defendant was insured, in which judges have mysteriously found in favour of the claimant.

This further supports the view that tort suffers from internal contradictions and inconsistencies derived in part from haphazard decisions and judicial policy making, and that, therefore, the search for some grand design giving coherence to different areas of tort is misguided and naïve.

Details of the torts of strict liability will be covered in course of this book.

## 1.9 HUMAN RIGHTS ACT 1998

Although various aspects of Human Rights law will be referred to throughout this book, the impact of the Human Rights Act 1998, which came into force on October 2, 2000, does

deserve consideration at this point. For several years before the year 2000, UK judges had been hearing arguments about the European Convention on Human Rights, and taking it into account when considering issues in tort, with a view to promoting consistency between the common law and the Convention. This position was formalised by the coming into force of the Human Rights Act 1998. The Act provides that, wherever possible, UK legislation must be interpreted in such a way as to be compatible with the European Convention on Human Rights. Although the Human Rights Act 1998 has no effect on the continued validity of a statute or statutory instrument, the higher courts have the power to issue declarations of incompatibility, if satisfied that any legislation is incompatible with the Convention. This is intended to alert Parliament to the need to change the law, but it does not have any effect on the position of the parties to the litigation that led to the declaration. It is up to Parliament to decide how to respond, and there are fast track procedures to amend incompatible legislation if it is decided that this is necessary.

Certain statutes have been subjected to scrutiny – for example, the Police and Criminal Evidence Act 1984, as amended, breaches of which can in certain circumstances give rise to civil claims for damages for assault, battery and false imprisonment, and the Mental Health Act 1983. The Human Rights Act 1998 makes it unlawful for public authorities (including courts and tribunals) to act in a way which is incompatible with a Convention right. If the alleged tortfeasor is a private individual rather than a public authority, Art 6 of the Convention might assist a claimant who qualifies as a ‘victim’ as defined by the Act. It provides that everyone is entitled to a fair trial in the determination of his or her civil rights and obligations, within a reasonable time, by an impartial tribunal. If there is no existing tort remedy equivalent to a Convention right, the judges are required, by Art 6, to develop one.

The effect of the 1998 Act is that when hearing tort cases the judges are required to ensure that the common law is not incompatible with Convention rights. There is already a well established place within the law of tort for considering many of the matters that are contained within Convention rights. For example, the tort of trespass to the person has for many years protected individuals from inhuman and degrading treatment and torture. The Convention, in Art 3, protects the same rights. In claims for assault and battery, the courts are now required to take into account Art 3 and the jurisprudence of the European Court of Human Rights (ECtHR) on the subject. It will, therefore, be unusual for a person to base a claim solely on an infringement of a Convention right, as there are already tort actions which can be used. Arguments based on the infringement of Convention rights will usually simply be added to the contentions of claimants. However, in the case of claims involving less highly developed torts, such as those concerning alleged infringements of privacy, claims may be based purely on the Convention.

As far as the duty of care in negligence is concerned, Sedley LJ stated in a recent case:

There is . . . an unanswered question as to how, if at all, the common law of negligence is to develop in response to the Human Rights Act and the Convention values it imports [*Smith v Chief Constable of Sussex* [2008] EWCA Civ 39].

It could be argued that a new cause of action is created by the Human rights Act 1998, taking the form of a new action for Breach of Statutory Duty (see Chapter 9), in which the award of damages is discretionary (at common law, tort damages are available as of

right) (Law Commission, *Damages Under the Human Rights Act 1998*, Law Com 266, London: HMSO, para 4.20).

The Convention rights which have so far been prominent as far as tort is concerned are: the prohibition of inhuman or degrading treatment or punishment (Art 3); the right to liberty and security (Art 5); the right to a fair trial (Art 6); the right to respect for privacy, family life, home and correspondence (Art 8); the right to freedom of expression (Art 10); and the right to freedom of assembly and association (Art 11). Some of these have already been scrutinised by the courts and such cases are discussed in the relevant sections of this book. Students of tort law need to be familiar with the large body of case law that has already been developed by the ECtHR.

## 1.10 A SUMMARY OF THE OBJECTIVES OF TORT

The objectives of the law of tort can be summarised as follows:

- **Compensation**

The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.

- **Protection of interests**

The law of tort protects a person's interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person's use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.

- **Deterrence**

It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies.

The deterrent effect of tort is less obvious in relation to motoring, though the incentives to be more careful are present in the insurance premium rating system.

- **Retribution**

An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.

- **Vindication**

Tort provides the means whereby a person who regards him or herself as innocent in a dispute can be vindicated by being declared publicly to be 'in the right' by a court.

However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

- **Loss distribution**

Tort is frequently recognised, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expense which is reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and courts, and practical difficulties such as the funding of claims which may mean that many who deserve compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.

- **Punishment of wrongful conduct**

Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

### **1.10.1 An illustration of the operation of the tort system**

The issues raised by the road traffic accident described below illustrate some facets of the objectives of tort and its relationship with other systems of compensation.

#### **1.10.2 The scenario**

A, a man aged 27, had consumed five pints of beer in a public house one Sunday lunch-time. He left for home on foot in the early afternoon when road and weather conditions were good. His route took him across a busy main road close to the centre of a city, but as this was a quiet Sunday he decided to take a chance and cross the road some distance from the traffic lights and adjoining pedestrian crossing. He looked to the right and noticed that the lights were red and that there were two cars just approaching the traffic lights. Then he looked to the left and began to cross the road. As he reached the centre of the first carriageway, he realised that the cars were now approaching at speed and that he might not be able to reach the central reservation. He dithered for a moment and the next thing he knew he was hit by the car driven by B. A was taken to hospital and detained there for 10 weeks suffering from multiple injuries. After leaving hospital, A slowly recovered, but still suffers from mild post-traumatic stress disorder and has pain in his legs which were operated on immediately after the accident. A will always walk with a slight limp and he may develop arthritis at some distant future date as a result of the accident. He also has numerous scars on his face and arms, and will require cosmetic dental treatment to replace damaged teeth. He is paying for private dental treatment and hopes to recover the cost of this from B. The estimated speed of the car which hit A

was 45 mph in a 30 mph limit and he is lucky to have survived at all. A has at last managed to find another job as a lorry driver earning a comparable salary to that which he had before the accident. B was convicted by magistrates of driving without due care and attention, and was fined £150 and given nine penalty points.

A is now seeking compensation from B by means of a tort action. He is still angry about having been injured by B and would like to see B suffer by being brought before a civil court because he believes that B 'got off much too lightly' in the magistrates' court. A is also hoping to receive a large sum by way of compensation for the pain he has suffered.

A will need to consider how he can pay for legal advice and representation. He has received a large sum in state benefits during the recovery period and before he could find a new job. He is surprised to learn that this will be deducted from any award of damages which he will receive. He is also surprised to discover that because he has made such a good recovery he will not receive a particularly high award, especially as he has found a job. In addition, A is amazed that he is likely to be found at least 25% contributorily negligent because he told the doctor who admitted him to hospital that he had drunk about five pints of beer just before the accident. This is recorded on his medical notes, though A has no recollection of having told the doctor this. Witnesses have stated that they thought he took a chance in trying to cross the road when he did.

In the event, the case never reaches court. A is told that a sum of £10,000 has been paid into court by lawyers acting for B's insurance company. He is advised to accept this, because if the judge makes a lower award he will have to pay the costs of the other side from the date of paying in. His barrister is concerned that there may be a finding of a high percentage of contributory negligence (up to 40%). The case is finally settled three years after the accident for £12,000. The legal costs involved, solicitors' fees, the advice of a barrister, including a case conference and expert medical examinations and reports, total £8,000.

B is now having to pay very much higher motor insurance premiums and is worried about losing his licence if he is prosecuted for another driving offence in the near future. A does not know about this.

### **1.10.3 Are the objectives of tort met in this case?**

If one considers whether all the objectives of tort have been met in this situation, it is apparent almost immediately that they have not. To take the picture from A's perspective: the tort system has protected A's interests through the negligence claim. However, A does not feel that he has had his revenge. He has not had the opportunity of seeing B cross-examined in court, and he does not even know about B's fears for his driving licence, a criminal law matter in any event. He has had the support of the NHS and state benefits during the most crucial period of his hospitalisation and recovery, but feels that he has had to wait much too long to obtain his tort damages.

He is disappointed that he will only receive part of the compensation which he thought he deserved because the case is to be settled out of court, and he had never even heard about contributory negligence before this happened to him. He feels that he will go

on suffering for a long time because of the injuries which he received. However, he is more fortunate than many pedestrians who are injured. At least he could afford to pursue his claim through his conditional fee agreement. Those without such financial support frequently give up as soon as they discover the cost of litigation.

As far as B is concerned, tort has had some deterrent effect because he will now probably drive more carefully, at least for a while, to avoid having to go on paying higher insurance premiums, as these will gradually be reduced if he has no more accidents. He has probably had some sleepless nights worrying about what will happen, but he is reassured that the insurance company will pay any compensation. He has been more concerned about the criminal prosecution, as he wanted to avoid publicity because he was a married man and was in the car with a girlfriend on the day of the accident. He is also worried about committing another driving offence and losing his licence, and he will consciously drive more carefully. To that extent, he has been more concerned about criminal law matters than about tort.

From the point of view of society as a whole, tort has ensured that A is compensated. The insurance system has to some extent been driven by tort, and B's original insurance cover which provided the compensation was compulsory under the Road Traffic Act 1988 (usually regarded as a criminal law statute). Compulsory insurance for motorists means that all motorists help to pay compensation to people who are injured like A. This has achieved a form of loss distribution. The general deterrent effect of contributory negligence is minimal. A had never even heard of the rule and there are many road users who have not. The law has allowed recovery of the costs of A's financial support from B's insurance company but the NHS and the state benefit system have proved quicker and more efficient than the tort system in providing medical care and money to A at the very time he needed it.

This commonplace accident raises doubts about some of the claims which are made for tort and lead us to question seriously how far the present system really fulfils its objectives. It is clear that the state has provided better and more efficient support for A at the most crucial time and at a lower cost than tort. This has been a simple case in which there was sufficient evidence that B was at fault because there are witness statements and a police report as well as a criminal conviction. Also, A's injuries, although unpleasant, will have no serious lasting effect on him. However, there are many cases which are far more complex and where the issuing of proceedings is a real gamble. For example, suppose no one had witnessed the accident and A had no recollection of what happened. It might be difficult to prove that B was actually at fault, especially if he states that A had run out unexpectedly into his path. There could be complex issues concerning causation of the injuries, and the issue of quantum is often much more complicated than in this case. Suppose A could find no solicitor willing to act for him on a conditional fee (no win, no fee) basis. It would be very likely that A would bring no legal action at all in such circumstances and the legal system would have failed him.

It is worth returning to this scenario when considering the criticisms of tort in Chapter 22 at the end of the book.

## FURTHER READING

Cane, *The Anatomy of Tort Law*, Hart Publishing, 1999

Cane (ed), *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006,  
Chapter 1

Ibbetson, *Historical Introduction to the Law of Obligations*, Oxford University Press, 1999

Nolan, 'New Forms of Damage in Negligence' (2007) *MLR* 59

Wright, *Tort Law and Human Rights*, Hart Publishing, 2001