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W.V.H. ROGERS

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PREFACE TO THE SIXTEENTH EDITION

Even if there has been nothing quite so fundamental in the case law as *White v. Jones* in the last four years the appellate courts have been developing and rewriting tort law with energy. *Arthur J.S. Hall, Frost, McFarlane, Reeves* and *Three Rivers* are "major league" decisions on any view, *Reynolds* has completely changed the common law approach to the media and privilege and after initial caution there are some signs (*Saad Al-Faghi and Loutchansky (No. 2)*) that things are moving the media's way. We were assured during the passage of the Human Rights Bill that it would not lead to a law of privacy applicable to the media. Nevertheless, the courts have been quietly developing one under the guise of confidence and it seems that the position now is that a "duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected" (*A v. B* [2002] EWCA Civ 337 at [11], which appeared too late for consideration in the text). If we substitute "defendant" for "party subject to the duty" that seems to convey the message more clearly. Quite how newspapers will cope with the somewhat open-textured guidance given in that case remains to be seen, though it has to be said that the protection of freedom of expression seems to veer towards including what *interests the public* (even salacious tittle-tattle) rather than just what is *in the public interest*.

The life span of even the highest level decisions may not be very long: our law on the liability of public authorities is still in some confusion despite the extensive restatement in *X v. Bedfordshire*; and despite *Stovin v. Wise* it looks less and less difficult to persuade a court that a public agency should protect and rescue people. To some extent these matters are the product of what is easily the most significant legislative event of our period, the Human Rights Act 1998 and the consequently greater input of the Convention into our domestic decisions. The Strasbourg court has pulled back from its position in *Osman*, but the impact of that decision on striking out continues to have a profound influence on the law of negligence. The Act and Convention provide plenty of problems for the courts and we are a long way from working out the relationship between the Act and the common law. But for writers there is a more mundane problem. A claim under the Act is almost (but not quite) an action for breach of statutory duty, but if one therefore chose to give an account of the law of the Convention one would double the size of the book with Strasbourg case law. On the other hand, one cannot just ignore it: as far as people like Mr Marcic are concered (para. 14.21) it does not make a great deal of difference whether they lose at common law and win on the Act (Judge

Havery, Q.C.) or win on an updated common law with the coda that the result would be the same under the Act (the Court of Appeal). Judges cannot, of course, reject *legislation*, they can only declare it incompatible with the Convention (see *Matthews*, para. 24.3, for the first tort example) but how can a government deny responsive action? And even if it does, an application can still be made to Strasbourg (for the implications of which see *Hatton v. U.K.* (para. 14.35)—to be reargued before the Grand Chamber).

The text is, broadly speaking, based on material available to me at the beginning of 2002. It has been possible to incorporate (sometimes only very briefly) what became available in the following three months. However, I would draw the reader's attention to the following developments which came too late even for that.

1. In *Heaton v. Axa Equity & Law* [2002] UKHL 15 the House of Lords has clarified the meaning of *Jameson's* case (para. 21.2). Where there is a settlement by the claimant with one tortfeasor the question whether the agreed sum represents the claimant's full loss so as to preclude further action by him against another tortfeasor is a question of construction of the agreement. The issue is not whether the agreement confers a directly enforceable benefit upon the second tortfeasor (generally it does not) but whether the claimant can assert that he still has any unsatisfied loss. An express reservation of his rights against the second tortfeasor may fortify the inference that he can but "the absence of such a reservation is of lesser and perhaps of no significance, since there is no need for A to reserve a right to do that which A is in the ordinary way fully entitled to do without any such reservation" (at [9]). The decision in *Cape & Dalgleish v. Fitgerald* (para. 21.2, note 32) was, therefore, upheld ([2002] UKHL 16).

2. On the same day the House of Lords considered the meaning of "the same damage" in the Civil Liability (Contribution) Act 1978 (para. 21.4) in *Royal Brompton Hospital NHS Trust v. Hammond* [2002] UKHL 14. The decision of the Court of Appeal (see note 41 *sub nom. Royal Brompton etc v. Watkins Gray International*) was upheld. The example given in note 41 of allowing a limitation period to expire in fact occurred in *Wallace v. Litwiniuk* (2001) 92 Alta. L.R. (3rd) 249 and the decision that the claim against the lawyers was outside the contribution legislation was approved by Lord Steyn. Lord Steyn at [28] describes the test in *Howkins & Harrison* (note 42) as "a practical test to be used in considering the very statutory question whether two claims under consideration are for 'the same damage' " but not necessarily determinative in all cases.

3. In *Cave v. Robinson Jarvis & Rolf* [2002] UKHL 18 the House of Lords allowed the appeal and overruled the short-lived view of the law in the *Brocklesby* case (para. 26.13, note 74). As before, to bring section 32(1)(b) of the Limitation Act 1980 into play the defendant must have engaged in deliberate wrongdoing which he conceals or fails to disclose or must have concealed his (non-deliberate) breach of duty after he became aware of it.

4. The House of Lords is currently hearing a claimant's appeal in *Fairchild v. Glenhaven Funeral Services* (mesothelioma, proof of causation where there are successive employers, para. 21.1). It seems unlikely to be decided before the autumn (or at least July). That in itself is a fundamental issue of the law of causation on which very large sums of money turn in other cases; but it is unclear how far it will also involve examination of the nature of "indivisible" damage and joint and several liability, a matter on which there have been some creative Court of Appeal decisions recently.

5. The Lord Chancellor has now issued a Consultation Paper (March 2002) on periodical payments of personal injury damages (para. 22.23). The paper provisionally proposes that courts should have power to make periodical payments awards for future pecuniary losses (perhaps in claims worth more than about £250,000) and that these would be assessed on a "bottom up" basis—*i.e.* by looking at the claimant's current annual losses rather than working down from a notional lump sum. Views are sought on how far such awards should be reviewable. It would be open to the parties to settle for a lump sum, but the existence of a periodical payments system would obviously affect the tactical position in such negotiations.

6. Laddie J. has examined "personality endorsement" in the context of passing off (para. 18.53) in *Irvine v. Talksport Ltd* [2002] EWHC 367 (Ch), [2002] 2 All E.R. 414. Since famous people nowadays commonly exploit their images for profit by way of endorsement, such "goodwill" should be protected by the law of passing off.

7. The problem of the assessment of damages for libel (para 12.67) has surfaced again in *Kiam v. MGN Ltd* [2002] EWCA Civ 43, [2002] 2 All E.R. 219. The defendants published an article to the effect that the claimant, a businessman, had become an incompetent "has-been" and that he had misled the public about his commitment to his company. The journalist's complete indifference to the truth of the story was amply demonstrated and there were aggravating features in the newspaper's conduct of the case. The jury awarded £105,000, whereas the judge had indicated a possible band of £40,000 to £80,000. A majority of the

Court of Appeal upheld the verdict. The jury's role in setting damages was still entitled to some deference and it had to be borne in mind that the level of personal injury damages for non-pecuniary loss (which *John v. MGN* had "linked" to libel) had risen substantially since that case. Sedley L.J., dissenting, thought that general damages for libel were much too high, though he remarked that the underlying tension between compensation and deterrence in this area was probably something only Parliament could resolve. Short of fining or imprisoning journalists it is hard to see how that can be achieved.

At a technical level we now have the Civil Procedure Rules and neutral citations. I have tried to incorporate neutral citations, where available, as well as a law report reference and to use the paragraph numbers for "internal" references in the cases, which removes the difficulty formerly faced by those using a different series of law reports. Although some may find it anachronistic and even shocking, I have used "claimant" instead of "plaintiff" throughout (except of course in quotations) even with reference to pre-1999 cases. The change of terminology in the Rules was pointless (we can at least be grateful that no one in authority thought "defendant" was too much for the CPR user to cope with) but we have to live with it and (a) the new term means exctly the same thing as the old and (b) if we go on being historically accurate, then in ten years' time a law book will be swapping back and forth several times on every page. There may, of course, still be a few dispossessed plaintiffs lurking in footnotes.

As before, references are given to Tony Weir's *Casebook on Tort*. Conspiracy theorists may think that the demise of "plaintiff" was part of a plan to sever our intellectual links with the rest of the common law world. I am certainly not an enthusiast for a "European Civil Code" but there is always something to be learned from how others go about things and I have included some refrerences to the *Tort Law* casebook by Walter van Gerven, Jeremy Lever and Pierre Larouche.

I am, as always, grateful to the publishers for their assistance in many ways and for their patience.

HORSFORTH W.V.H.R.
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