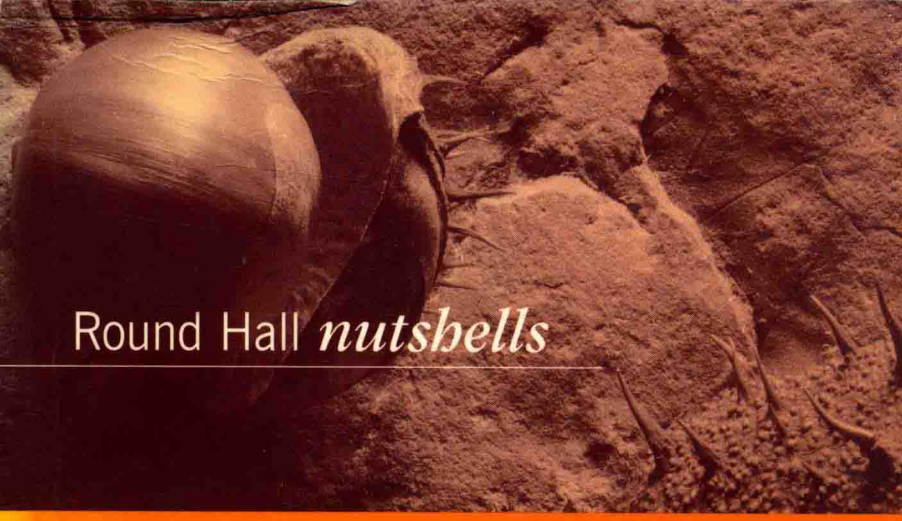

Round Hall *nutshells*

Tort

Ursula Connolly

THOMSON
ROUND HALL

Thomson Round Hall Nutshells

Tort

Ursula Connolly
B.Comm., LL.B.(NUI), LL.M.(KU Leuven)

Dublin
Thomson Round Hall
2005

Published in 2005 by
Thomson Round Hall
43 Fitzwilliam Place
Dublin 2
Ireland

Typeset by
Thomson Round Hall, Dublin

Printed by
ColourBooks, Dublin

ISBN 1-85800-390-3

A catalogue reference for this book is available from the British Library.

Thomson Round Hall Nutshells

Tort

AUSTRALIA
Law Book Co. Ltd
Sydney

CANADA AND THE USA
Carswell
Toronto

NEW ZEALAND
Brookers
Wellington

SINGAPORE AND MALAYSIA
Sweet and Maxwell
Singapore and Kuala Lumpur

PREFACE

This book is intended for those approaching tort law for the first time. It provides an introduction to the principles of tort law and an overview of the primary torts in a manner which seeks to be as comprehensive as possible without befuddling the reader. To aid in the understanding of the torts discussed, the facts of a number of cases are given. This is not intended to replace the reading of the cases themselves, but more to help in understanding the torts in a factual context. As such, this text provides an excellent basis for further study of the law of torts and a helpful guide for the purposes of revising the fundamental principles.

Care has been taken in the examination of the various torts to include all significant recent developments. The decisions of *Glencar Exploration plc v Mayo County Council* [2002] 1 I.R. 84 and *Breslin v Corcoran and the Motor Insurers Bureau of Ireland* [2003] 2 I.L.R.M. 189 are discussed, in addition to recent caselaw which helps understand the scope of the Occupiers' Liability Act 1995.

Recent reform and proposals for reform are also discussed. The establishment of the Personal Injuries Assessment Board, which provides an alternative to the traditional courts in negligence claims, is examined. Recent legislation, in the form of the Civil Liability and Courts Act 2004, is explained. This Act not only amends current limitation periods but also introduces strict penalties for fraudulent claims. Finally, the findings of the Legal Advisory Group on Defamation, which has proposed significant reforms to the tort of defamation, are discussed.

The author would like to thank Sinead O'Donnell for her research assistance, as well as the staff at Thomson Round Hall. All responsibility for errors and omissions rests with the author.

Ursula Connolly

TABLE OF CONTENTS

1. NATURE AND FUNCTION OF THE LAW OF TORTS

1.1 Introduction

The area of tort law covers a wide range of wrongs committed by one person against another. It deals with situations as diverse as slippages in supermarkets and pubs, car accidents, bus collisions, the viewing of a traumatic event, assault, defamation, defective products and the giving of negligent advice. The range of injury it seeks to compensate is equally diverse, ranging from physical injuries to psychological injuries and, in some cases, economic injury. It is this dynamism that makes it a hugely interesting subject to study but also a difficult one to define or classify into neat categories. We will see that given the dynamic nature of jurisprudence in this area some torts are of recent origin while other, more traditional torts are in a constant state of development. This book seeks to act as an aid in the study of tort law by providing an introduction to its fundamental principles and an analysis of some of the major torts.

First, however, it is important to examine the nature of tort law and establish where it lies in relation to the other major branches of the law. The word "tort" is derived from the Latin word "*tortum*" (via French) and means a civil wrong, *i.e.* a wrong committed between private parties. It covers those wrongs that arise because of a breach of a duty imposed by law, as opposed to duties imposed by contract. The wrong may have occurred because of an intentional act (such as trespass) but in the vast majority of cases the area of tort law deals with the commission of unintentional harm or injury.

Not all wrongs are deemed to be torts, nor are all injuries compensatable. The principles of *damnum sine injuria* and *injuria sine damno* apply. Essentially, the former holds that the suffering of some loss or damage will not necessarily be compensated, and the latter, that some interests are deemed so important that they give rise to an action without any proof of damage (torts which are actionable *per se*).

The remedy sought is generally compensation in the form of monetary damages, although in some cases an injunction may be a more appropriate remedy. In the case where damages are awarded the guiding principle of the court is to place the victim in the position he/she would have been in had the tort not arisen. While this is often

an impossible task (how does one compensate the loss of an arm for instance?) the courts have established guidelines on the matter. Legislation, in the form of the Civil Liability Act 1961 (as amended), also plays an important role in the division of liability and the assessment of damages.

1.2 Actions in tort

An action in tort is a civil action, *i.e.* an action between private parties. It thus forms part of the civil law. The person who carries out the tort is termed a "tortfeasor" and when being sued is referred to as the defendant, while the victim is the claimant or plaintiff. The court in which a claimant brings an action depends on the level of compensation which is sought, subject to the maximum limits of each of those courts.

The basis of liability differs depending on the tort in question. In the tort of negligence for instance a duty of care must exist and there must be a clear breach of this duty. For other torts, such as nuisance, liability hinges on the unreasonableness of the behaviour in question. In others still, such as defamation, what is required is that the statement made is one that is capable of being defamatory. In all torts the defendant must have caused the act or the injury (causation) and the type of damage caused must be foreseeable (remoteness) except in cases where no damage is required (torts which are actionable *per se*). The absence or otherwise of an appropriate defence must also be explored before a breach can be compensated.

Since May 31, 2004 all claims relating to employers' liability, motor and public liability must first be presented to a body established by the State to deal with personal injuries cases, called the Personal Injuries Assessment Board (PIAB). This body was established by statute (the Personal Injuries Assessment Board Act 2003). The body only deals with cases where fault is not being contested and no legal argument takes place. Compensation is based on written evidence submitted by the claimant (including a medical report of injuries suffered) and awards are based on those amounts set out in the Book of Quantum (this book is publicly available—see www.piab.ie for more information). If the claim is contested, or if either party is unhappy with the award of the PIAB, the claim can be released to be dealt with by the courts.

1.3 Tortious liability and other branches of the law

The wrongs which are capable of constituting an action in tort can also give rise to an action in other areas of the law. A breach by an employer of his duty to provide a safe place of work for instance is also a breach of contract, as all employment contracts contain an implied term of a right to a safe place of work. Likewise, if someone causes to come onto property a flood, it can give rise to a breach of the constitutional right to property but also an action in the tort of nuisance. How then are the various potential avenues of redress reconciled and on the basis of which branch of the law should an action be based? Is it possible to seek redress through a number of avenues simultaneously? To answer these questions we must examine tort law in the light of each of the major branches of law.

1.3.1 Tort law and the Constitution

The fundamental document enshrining all of our basic rights as citizens is the 1937 Constitution (Bunreacht na hÉireann). Constitutional rights consist of both enumerated rights, *i.e.* those that are explicitly stated, such as the right to property and the right to education; and unenumerated rights, *i.e.* those which have been developed by the courts. Some rights protected by the law of torts will invariably overlap with those protected by the Constitution.

The guiding principle in relation to the balance to be struck between constitutional law and tort law can be found in the case of *Hanrahan v Merck Sharpe & Dohme (Ireland) Ltd* [1988] I.L.R.M. 629. It established that recourse to the Constitution should not be had where that right is effectively protected by another branch of the law. In the *Hanrahan* case the right was one protected by both the tort of nuisance and the right to property pursuant to Art.40.3 of the Constitution. Henchy J. made it clear that once a sufficient remedy existed in the area of tort the claimant was bound to confine his/her action to that area. He stated that once a plaintiff "... founds his action on an existing tort he is normally confined to the limitations of that tort ... [unless] ... it could be shown that the tort in question is basically ineffective to protect his constitutional rights".

This finding has also found support in the case of *W v Ireland (No. 2)* [1997] 2 I.R. 141. Here Costello J. stated that there were two types of rights within the Constitution:

- The first were protected by law, either by statute or in tort. In such instances the courts would not impose a remedy under the Constitution unless it could be established that existing remedies were ineffective (see also Barrington J. in *Meskell v CIÉ*, who delivered a similar judgment). However, if a breach in tort is also a breach of a constitutional right it may be a reason to grant exemplary damages.
- The second were not protected by laws outside of the Constitution and would result in a remedy of damages for breach of a constitutional right.

1.3.2 Tort law and European law

A few words on the source of European rights might be useful before we begin our discussion of what McMahon and Binchy have termed "euro-torts". Sources of European rights include Treaty articles, directives, and regulations. It is the area of directives with which we are primarily concerned. While directives are drafted and implemented on a European level, individuals cannot rely on them until one of the following occurs: the Member State has implemented the directive in the form of an Act or other instrument in the Member State; or, alternatively, where the date for doing so has elapsed. In some instances the Member State fails to implement the directive on time, leading to a loss on the part of an individual. In *Francovich and Bonifaci v Italy* [1991] E.C.R. I-5357, the ECJ held that a Member State was obliged to pay compensation for any damages arising from such a failure.

In terms of identifying a breach and its link to the damage caused, the process is very similar to that which occurs in the tort of negligence. There must be damage brought about by the breach of the State's duty to implement a law. In the case of *Tate v Minister for Social Welfare* [1995] 1 I.L.R.M. 507, Carroll J. held that "there is nothing strange in describing the State's failure to fulfil its obligations under the Treaty as a tort".

1.3.3 Tort law and criminal law

Unlike the situation that arises under constitutional law, an action can be pursued under both criminal and tort law for the same wrong or offence, albeit in entirely different ways. Not only will the nature

of the action be very different but the resulting remedy will also fulfil an entirely different function. Crimes are generally seen as offences against the pubic at large, *e.g.* murder, dangerous driving or malicious injury to property. As such they are the subject of prosecution by the State, following which if the defendant is found guilty the punishment will be imprisonment or a fine payable to the State. While the criminal law may provide for compensation to be paid to the victim under recent initiatives introduced by legislation such as the Criminal Justice Act 1993, this is not fundamentally the purpose of criminal law. On the other hand, offences that are crimes can also be the subject of tort actions. For example, an incident of assault can give rise to a criminal prosecution by the State and also a claim for damages by the victim of the assault. The purpose of the remedy in tort is not fundamentally to punish but rather to provide compensation to the victim in the form of damages or, as stated earlier, an injunction.

1.3.4 Tort law and contract law

Despite the fact that contract and tort both occupy the realm of private law, there are still significant differences between the two. In the first instance, an action in contract is only possible where "privity of contract" exists, *i.e.* where you are a party to the contract. As was established by the case of *Donoghue v Stevenson* [1932] A.C. 562, no such requirement exists in tort. The terms of a contract are those agreed by the parties while the principles of tort are those established by the courts. As is correctly pointed out by Quill, this is of lesser relevance today as numerous terms are implied by statute, particularly in the case of employment contracts, without any express agreement by the parties concerned. There are also differences in burdens of proof and different limitation periods apply. The position in relation to damages also differs (compensation for damage versus loss of future expectations). The right to be heard by a jury in tort but not in contract cases had also existed prior to the Courts Act 1988, but this is no longer the case, with the exception of defamation cases in the High Court and actions for intentional trespass to the person.

Where a plaintiff has an action in both contract and tort he or she may take the action under both. In the case of *Finlay v Murtagh* [1979] I.R. 249, the claimant, who sought to bring a professional negligence action in tort against the defendant solicitor, was not debarred from doing so simply because a contract existed.

A contract may, however, override the duty in tort where such a provision is clearly stated in the contract. So where, for instance, a contract states that no liability will arise in a particular instance or where the contract clearly excludes the right to bring an action, the courts will not override this provision if it is deemed to have been a clear term of the contract. As stated by O'Flaherty J. in *Pat O'Donnell & Co Ltd v Truck & Machinery Sales Ltd,* Supreme Court, February 18, 1997:

> "The general duty in tort cannot be manipulated so as to override the contractual allocation of responsibility between the parties. Thus if, for instance, a contract provides—whether expressly or by necessary implication—that the defendant is not liable for a particular risk, then the law of tort should not be allowed to contradict it."

2. CAUSATION AND REMOTENESS

2.1 Introduction

To receive a remedy in tort the plaintiff must show that the defendant "caused" the injury or damage complained of (causation) and that the resulting injury is not one so far removed from the act of the defendant that s/he cannot be held liable for it (remoteness). In other words, there must exist a chain of causation between the tort committed by the plaintiff and the damage caused. Causation is an essential element of all torts for which damage is a necessary element (*i.e.* for torts which are not actionable *per se*).

This chapter will examine three issues. First, who must prove causation and how do the courts determine whether the defendant caused, in a factual sense, the damage complained of (factual causation)? Secondly, is there an intervening act, a *novus actus interveniens,* which will break the chain of causation and free the initial defendant from liability? Finally, how do the courts determine the damage for which the defendant will be liable (remoteness)? The first is a question of fact and throws up a pool of potential defendants who can be linked factually to the damage. These defendants, however, may not ultimately be held to be the legal cause of the injury. It falls to the latter two issues to determine legal causation, *i.e.* who will be held legally liable for the loss that occurs.

However, it may be more useful, particularly in the case of multiple causes, to view the courts' approach as more of a common sense approach guided by policy considerations than as any set test or formula.

2.2 Who must prove causation?

It is for the plaintiff to demonstrate, on the balance of probabilities, that the defendant caused the damage. In some instances this will prove to be straightforward and may not impose too great a hardship. In other cases it may be much more onerous and may in fact be impossible for the plaintiff to prove. Given the potential difficulty of proving causation, ought the burden of proof in some instances be reversed? The courts have consistently held that it ought not, as stated by Murphy J. in the case of *Cosgrave v Ryan and the Electricity Supply Board* [2003] 1 I.L.R.M. 544: "Causation must