

OXFORD

TORT LAW

TEXT, CASES,
AND MATERIALS

THIRD EDITION

JENNY STEELE



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TORT LAW

This book is dedicated to the memory of Thomas Steele

PREFACE

In previous editions of this book, I have noted that my first ambition was to guide students through the subject by explaining the current state of the law as clearly as I could. Its second was to explore the interesting uncertainties and sometimes fundamental disagreements that remain. These ambitions remain at the heart of this third edition, which still aims to combine the best features of a textbook and a Cases and Materials book in one volume, with a greater emphasis on explanation than is typically found in either. It is true that the text does not always avoid taking sides as might be traditional for collections of cases and materials, but it is hoped that the text and materials are woven together into a coherent and readable account, the underlying philosophy of which is that clarity and directness of exposition will ultimately equip students to tackle difficult questions independently. The views put forward here are therefore easily seen as only a starting point, from which students may develop in their own direction. While clarity is sometimes best served by a concise treatment, this is not always the case. As with all legal subjects, some of the most important issues of principle are also issues of detail. This text does not cast a veil over matters of detail of this sort, but seeks to follow them through so far as is necessary.

The text itself is organized around extracts from cases, statutes, academic writings, and other materials. The key focus is on case law and statutes from England and Wales and to some extent Scotland, though materials from other jurisdictions are included where they have had a particular impact on English law – as, for example, is the case in relation to vicarious liability. A particular mention should be made of the intention behind including extracts from judicial decisions. In my opinion and, I imagine, the opinion of the majority of teachers of law, there is no substitute for reading the cases themselves. The goal of this text is not to dissuade students from turning to the cases, which can now be accessed with a great deal more ease through online resources. Quite the reverse: it is hoped and intended that students who use this text will realize the importance of reading the precise arguments put by judges in reaching their decisions, and the precise words with which they express those conclusions. The aim is to help students to navigate the forest of judicial decisions and other sources, to help bring the details of legal principle to life, and to equip students to read cases more deeply and more successfully for themselves. Reading and understanding the primary materials is the best route to success in appraising rival academic arguments.

For most of those who use this book, this edition will be the first, and probably the only one that they consult. From their point of view, it is important that the structure and balance of the book should reflect the law as it stands, with a focus on issues of real current significance. For those updating a textbook or, in the same way, their course materials, the challenge is to keep track not only of updates, but also of shifts in the shape and emphasis of the developing law. Efforts have been made to reflect the law's development in this broader sense in the course of updating the text for this third edition. It is interesting, from this point of view, that the most significant developments have occurred away from what students of twenty or thirty years ago might have thought of as the 'doctrinal core' of the law of tort, such as evolutions in the recoverability of economic losses in negligence (though interesting developments do continue here in a smaller way); or in the general approach to the 'duty of care'. Rather, key changes incorporated into this edition have concerned judicial developments in the intentional torts and particularly false imprisonment; the principles of 'cause

in fact' and particularly the evolving notion of 'material contribution'; the recognition of 'non-delegable duties' in the new context of education authorities and their pupils; and the proper role of public interest arguments in the law of private nuisance. More notable still is that legislative developments have had a particularly important role to play in adjusting and reshaping tort law. In 2013 alone the law of defamation has been reformed by legislation which has nevertheless built on the achievements of the courts; the costs regime applicable to civil litigation as a whole has been significantly altered, again representing a partnership between judiciary and legislature; and a century or more of developments in strict liability for breach of statutory safety provisions has been swept away with the intention of limiting recovery to cases where there is fault.

At the same time, the relationship between the law of tort, and the civil liabilities created by an earlier statute – the Human Rights Act 1998 – continues to evolve and to create new complexities in the law of public authority liability. The last edition noted clear and apparently consistent judicial resistance in the House of Lords to adapting the principles of liability in response to the statute; but, in various ways, a softening of this position in its successor the Supreme Court is identified in this edition. For these reasons, though perhaps in new ways, the two challenges identified in Chapter 1 – the costs of tort, and its relationship with the Human Rights Act – continue to provide an appropriate focus in this new edition. Generally speaking, the focus of the changes just noted appears to strengthen choices made in earlier editions: to cover a wider spectrum of torts than will fit into most undergraduate courses, and thus to support teachers of law who wish to shift their attention to different areas at different times; to cover some of the most challenging and still unfolding current developments in the law of causation in a separate chapter; and to include rather fuller treatment of damages, costs, limitation, and the process of litigation than is typically provided by most tort texts. A fuller list of new developments covered in this edition follows this Preface.

Necessarily, updating and additions have to be balanced by deletions. I have continued to work by considering whether, if this was the first edition rather than the second or now the third, the issues covered would appear to be of sufficient currency to be included. Some will notice that the previous extended treatment of *Chester v Afshar* has now been removed from Chapter 4, making way for fuller coverage of 'material contribution', which has been debated by the courts in a number of recent decisions and will doubtless continue to be of great significance. *Chester v Afshar* now appears a relatively free-standing decision which has not (so far at least) led to a trail of other developments. The discussion published in the second edition will now be found in its entirety through the Online Resource Centre that accompanies this book. Of course, the law of tort has the capacity to throw up new shoots from apparently dead wood – as witnessed by the Privy Council's recent decision in *Crawford Adjusters* that malicious *civil* prosecution can be the basis of liability, for example – and it is always possible that *Chester* will one day resume its initial promise of significance.

Finally, the team at Oxford University Press should be thanked especially fulsomely given the many delays to this edition, and I would especially thank Carol Barber for her forbearance during the writing process, and her efficiency in bringing the book to production so quickly. I am also extremely grateful to those reviewers who made detailed and constructive comments on the previous edition. Thoughts passed on in this way are invaluable in shaping the approach to be taken to a new edition. In particular, I have followed the advice of reviewers and worked towards shorter extracts for the most part, strengthening the degree to which the text leads the extracts and not vice versa. As always, I would like to thank Adrian, Joe, and Theo, for sharing me with another work in progress.

I have done my best to state the law as it stood in February 2014. However, some later additions have been possible, including notably the Supreme Court's decision in *Lawrence v Coventry*, without which Chapter 10 would have been seriously out of date before even entering production. As was the case with the second edition, the text is now also accompanied by an Online Resource Centre, where updates and additional materials and links are available.

Jenny Steele
York
April 2014

NEW TO THIS EDITION

Key new materials and cases covered in this third edition include:

- Discussion of the basis of false imprisonment and rejection of vindictory damages by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* (Chapter 2);
- Recognition by the Privy Council of actions for malicious *civil* prosecution in *Crawford Adjusters v Sagcor* (Chapter 2);
- Further development in the notion of ‘material contribution’ as a causal link, and key decisions in the asbestos litigation (*Sienkiewicz v Greif; The Trigger Litigation*) (Chapter 4);
- The missed opportunity to reconsider non-recovery of ‘relational’ economic losses in *Shell v Total UK Ltd* (Chapter 6);
- Evolution in the influence of the Human Rights Act 1998 on actions against public authorities, particularly in relation to positive duties to protect life (*Rabone v Pennine NHS Trust; Smith v Ministry of Defence*) (Chapter 6);
- The reform of civil costs in 2013 after the Jackson Review; continuing issues of under-compensation of personal injury claimants associated with the ‘discount rate’; and developing understanding of how to assess damages under the Human Rights Act (Chapter 8);
- Development of the ‘close connection’ test and vicarious liability for non-employees in *JGE and Various Claimants v Institute of the Brothers of Christian Schools* (Chapter 9);
- Recognition of significant new ‘non-delegable duties’ by the Supreme Court in *Woodland v Essex* (Chapter 9);
- The Supreme Court’s far-reaching decision in *Coventry v Lawrence*, affecting a number of areas of the tort of private nuisance and particularly the role of public interest and of planning permission in liability and the choice of remedy (Chapter 10);
- Further restriction of *Rylands v Fletcher* liability, in relation to fire (Chapter 11);
- Enactment of the provisions of the Defamation Act 2013, seeking to ‘rebalance’ the law of defamation, building on decisions of the Courts (Chapter 13);
- Further development of injunctive remedies for violations of privacy, and the courts’ attempts to retain public confidence in the openness of the law; decisions of the European Court of Human Rights in *Moseley v UK* and the second *Van Hannover* decision (Chapter 14);
- Sweeping legislative restriction to recoverability of damages for breach of safety legislation and regulations (Chapter 16).

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