影印版法学基础系列

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ESSENTIAL TORT LAW

理查德·欧文
Richard Owen

（第三版）
（Third Edition）

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本书导读

以英国法上侵权诉讼的发展进程为线索，我们可以将这本书的内容分为三个部分。原告在起诉之前必须确认被告侵权行为的类型，以便于向法院提起诉讼，所以，本书第一至七章介绍了英国法上侵权行为的各种类型。第二个部分是被告的一般抗辩事由，第八章对此进行了详细的论述。在前面几种不同的侵权行为类型诉讼的第一个阶段，原告提供各种证据以证实被告实施的侵权行为，如果被告不想承担法律责任，就必须提出对抗原告赔偿请求的理由，即抗辩事由。一旦被告的抗辩事由不被采纳，经法院判决其必须承担侵权责任，则应考虑如何对原告所受到的损害提供法律救济，以恢复到他没有遭受损害之前的状态，这就是侵权诉讼的第三部分的内容——救济措施，即本书的第九章。

过失侵权是英国侵权法中最主要的一种侵权行为类型，在本书第一章中，作者介绍了过失侵权行为中一些基本要素，如谨慎义务、违反谨慎义务（谨慎的标准）、行为与损害后果之间的因果关系，以及遥远的损害后果等。第二章主要介绍了土地及房屋占有人的责任。占有人的责任分为两种，一种为对参观者的责任，对于普通参观者和特殊参观者，如儿童、专业人士等，占有人的责任程度有所不同，另一种为侵入者，普通法上的规则为不能故意或过失地伤害侵入者。第三章介绍了雇主的责任，包括雇主对雇员的责任以及雇主的替代责任，前者包括提供胜任职员的责任、提供安全的车间及设备的责任、提供安全工作地点的责任以及提供安全工作系统的责任，后者主要是指雇员在工作中侵害他人权利时雇主应承担的替代责任。第四章为违反制定法上的义务所产生的责任，作者主要介绍了构成这种侵权类型的要素，一是制定法对被告施加了责任，二是被告而不是他人对原告负有责任。另外，作者还介绍了这类侵权行为的特殊抗辩事由，包括原告自愿承担风险、共同过失和第三人的行为。第五章为故意侵害他人人身，这类行为主要包括三种，一是殴打，二是恐吓，三是非法拘禁，并分别介绍了构成这三种侵权行为的要素和标准。故意侵害他人人身也有一些特有的抗辩事由，包括惩戒（主要是对儿童或是海轮上的乘客）、合法的拘捕和搜查、紧急避险、原告同意、自卫、法律授权以及共同过失等几种。第六章是与土地有关的各种侵权行为，本章首先介绍了私人公害与公共公害，其次介绍在 Rylands 诉

Fletcher 一案中适用的严格责任原则，即无论被告是否存在过错，都应对原告的损害承担赔偿责任的原则。本书介绍的最后一种侵权行为类型为诽谤，作者论述了口头诽谤和书面诽谤的区别、诽谤的构成要素、抗辩事由以及诽谤案审理的一种特殊程序——快速通道。

本书第八章介绍了英国法上侵权行为的一般抗辩事由。一般情况下，共同过失可以成为被告减轻责任的理由。原告同意可能成为故意侵权行为的抗辩事由，“同意不生损害”主要适用于原告自愿承担风险的过失侵权。正在从事非法行为的原告可能因“违背道德的契约不产生诉权”这一古老法谚而得不到民事赔偿，所以原告的非法行为可能成为被告的抗辩事由之一。法律授权和诉讼时效也是侵权行为的一般抗辩事由。

在第九章中，作者指出赔偿的目的在于恢复到他没有遭受损害之前的状态，并介绍了英国法上的各种损害赔偿金的类型，包括藐视性损害赔偿金、超额损害赔偿金、惩罚性损害赔偿金、象征性损害赔偿金等。另外，作者在这一章中还介绍了一次性支付和结构式支付等两种损害赔偿金的支付形式。

本书相关内容的翻译者为武汉大学博士研究生冯兴俊。若有谬误之处，敬请学界前辈、同仁及读者批评指正。

译　者

2004 年 4 月

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

Each book in the series follows a uniform format of a checklist of the areas covered in each chapter, followed by expanded treatment of 'Essential' issues looking at examination topics in depth.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne AM
General Editor, Essential Series
Conservative Member for Mid and West Wales

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Duty of care

Duty situations

The tests for determining the existence of a duty of care have changed. Prior to 1932, there were numerous incidents of liability for negligence but there was no connecting principle formulated which could be regarded as the basis of all of them. These were referred to as 'duty situations'.

The 'neighbour' principle

The first attempt to create a rationale for all the discrete duty situations was made by Brett MR in *Heaven v Pender* (1883), but the most important formulation of a general principle is that of Lord Atkin in *Donoghue v Stevenson* (1932). This is known as the 'neighbour principle':

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee are likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.

The 'two stage' test

The 'neighbour principle' is a test based on reasonable foresight and is unquestionably too wide. It needed further defining.

In the 1970s, there were attempts to extend it by defining it as a general principle. In *Home Office v Dorset Yacht Co Ltd* (1970), Lord Reid said '[the neighbour principle] ought to apply unless there is some justification or valid explanation for its exclusion'. This led to Lord Wilberforce's 'two stage' test in the case of *Anns v Merton LBC* (1977):

> First, one has to ask whether ... there is a sufficient relationship of proximity ... in which case a *prima facie* duty arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any policy considerations which ought to negative, or to reduce or limit the scope of the duty.

Lord Wilberforce's emphasis on *prima facie* duties led to a large potential increase in the areas where a duty will be owed, particularly in the area of economic loss. See *Junior Books Ltd v Veitchi Co Ltd* (1983). Note how

Lord Wilberforce uses this expression 'proximity', he equates it to foreseeability, this approach has not been followed in more recent cases and 'proximity' currently takes into account the type of situation and policy.

Criticism of the 'two stage' test

Criticisms of the test were as follows:

- policy and proximity are traditionally considered together;
- the test obscured the difference between misfeasance and non-feasance;
- the test involved too rapid an extension to the tort of negligence;
- judges disliked the express consideration of policy.

The 'three stage' test

Lord Wilberforce's general principle soon came in for heavy criticism. This began with Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* (1985) when he said that in addition to proximity the court must decide whether it is 'fair, just and reasonable' to impose a duty of care.

The case of *Murphy v Brentwood DC* (1990) marked the death knell for the 'two stage' test by overruling *Anns*. *Murphy* talked of adopting an 'incremental' approach to determining the existence of a duty of care. Following the case of *Caparo Industries plc v Dickman* (1990), there is now a 'three stage' test, with the following criteria being taken into account:

- reasonable foreseeability;
- proximity;
- is it 'fair, just and reasonable' to impose a duty?

The reaction against the 'two stage' test was primarily focused on the fact that it created a massive extension to the tort of negligence. The 'incremental' approach avoids such an increase, instead, the tort of negligence is developed by analogy with existing cases. Any novel type of situation would have to show that it is analogous to an existing situation where a duty is owed.

Policy considerations

Policy plays a vital role in determining the existence of a duty of care. It can be defined as the departure from established legal principle for

pragmatic purposes. Cases such as *Donoghue v Stevenson* and *Anns* consider policy expressly, whereas the approach followed in *Caparo* and *Murphy* is to impliedly consider policy and merge it into other considerations such as 'proximity' and whether it is 'fair, just and reasonable' to impose a duty.

What issues of policy are commonly raised?

- *To allow an action would open the 'floodgates' and expose the defendant to an indeterminate liability*

  The courts are always keen to limit liability to a determinate amount to a determinate class of persons. For example, in *Weller & Co v Foot and Mouth Disease Research Institute* (1986), the plaintiffs were auctioneers who lost money on account of being unable to hold their auctions as a result of the defendant's negligence in allowing the foot and mouth virus to escape, which lead to restrictions on the movement of cattle. It was said by the court that their damage was 'foreseeable', but so was the damage to 'countless other enterprises'. It would have been equally foreseeable that cafés, newsagents, etc, in the market town would also lose money. The burden on one pair of defendant's shoulders would be insupportable and policy had to act to limit liability.

- *The imposition of a duty would prevent the defendant from doing his job properly*

  This leads to a class of what have been termed 'protected parties' – persons who enjoy immunity from suit:

  (a) judges and witnesses in judicial proceedings enjoy immunity on grounds of 'public policy';

  (b) barristers – it was held in *Rondel v Worsley* (1969) that barristers were immune from civil action. It was further held in *Saif Ali v Sydney Mitchell and Co* (1980) that the immunity extended to pre-trial work. In *Kelley v Corston* (1997), the defendant, who was a barrister advised the plaintiff to compromise a claim for ancillary relief in divorce proceedings. The court later confirmed the settlement as a consent order. The plaintiff subsequently sued the defendant on the basis of negligent advice. The court held that the plaintiff's claim fell within the immunity extended to advocates;

  (c) solicitors enjoy immunity when acting as advocates;

(d) there is a public policy immunity for the carrying out of public duties by public bodies, unless that public body has assumed a responsibility to the individual. It is thought that, to impose a duty, in this situation, would interfere with the way in which public bodies carry out their tasks. The immunity originates with the case of *Hill v Chief Constable of West Yorkshire* (1989). The mother of the last victim of the Yorkshire Ripper sought to sue the police for negligence in failing to apprehend him earlier. There was found to be no special relationship between the police and the victim and consequently no duty could arise. It was felt that to impose a duty would be damaging to police operations. They would deploy their resources defensively on the basis of how they could best avoid civil liability, rather than on the basis of their professional judgment.

This immunity was held to apply in the case of *Osman v Ferguson* (1992), even where it was known to the police that the plaintiff was being harassed by an identified individual. A school teacher had become obsessed with one of his pupils. He had threatened to do a 'thing like the Hungerford massacre' because of the obsession. Complaints had been made by the plaintiff's family to the police. The same individual eventually shot and injured the plaintiff and also killed his father but there was no duty on grounds of public policy immunity.

However, the police may be liable where there is a special relationship between the police and an informant (*Swinney v Chief Constable of Northumbria Police* (1996)). The police do not have a blanket immunity, there are other considerations of public policy which also carry weight. Hirst LJ gave examples such as the need to protect springs of information, to protect informers, and to encourage them to come forward without an undue fear of the risk that their identity will become known to the suspect or to his associates. The facts of the case were that the plaintiff passed on to the police certain information concerning the unlawful killing of a police officer. The suspect was known to be violent. The informant requested that contact with her be made in confidence. The document containing the information supplied together with the informant's name was left in an unattended police car. The vehicle was broken into and the suspect obtained the document. It was arguable that a special relationship existed.

The House of Lords held that a policewoman who alleged that the defendant commissioner had been negligent in failing to prevent her victimisation by fellow officers had an arguable case in *Waters v Commissioner of Police of the Metropolis* (2000). The claimant had complained to her superior of a sexual assault by a fellow officer. Afterwards, her fellow officers reviled her for having made the complaint. The public policy immunity did not apply. The claimant was not suing as a member of the public. Lord Halton said it was in the public interest to allow the claim; otherwise, citizens would be discouraged from joining the police.

The immunity also did not arise in *Welton v North Cornwall DC* (1996). An environmental health officer, acting on behalf of a local authority, negligently required the owner of food premises to undertake extensive works to comply with the Food Act 1990. It was argued that the officer exercised a police or quasi-police function and there should be an immunity. This was rejected as the officer had assumed responsibility and hence a duty of care was owed.

The same public policy immunity for the discharge of public duties, unless responsibility had exceptionally been assumed to a particular defendant, also applies to the Crown Prosecution Service (*Elguzouli-Daf v Commissioner of Police of the Metropolis* (1994)) and the fire brigade (*Church of Jesus Christ of Latter Day Saints (Great Britain) v Yorkshire Fire and Civil Defence Authority* (1996); *John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority* (1996); *Nelson Holdings Ltd v British Gas plc* (1996)). However, a distinction was made between a positive act of negligence for which there would be liability on the part of the fire brigade and a negligent omission for which there would be no liability in *Capital Counties plc v Hampshire CC* (1997). *Latter Days Saints* and *Munroe* were preferred in *Nelson*.

The public policy immunities have recently been scrutinised by the European Court of Human Rights in *Osman v UK* (1998). A challenge was made under Arts 2, 6 and 8 of the European Convention on Human Rights. The case arose out of the facts of *Osman v Ferguson* (see above). Article 2 protects right to life; Art 6 protects the right to justice and Art 8 provides for respect for private and family life. There was held to be no breach of Art 2 as the State was not in breach of its positive obligation to take preventative measures to protect an individual whose life was at risk from

another. The police did not know or ought to have known that there was a threat to life. For similar reasons, there was no breach of Art 8.

There was a breach of Art 6(1). The exclusionary rule which prevented a full hearing of the applicant's case laid down in *Hill* constituted a disproportionate interference with a person's right to have a determination on the merits of an action and prevented the court from considering competing interests.

- *It is against public policy to claim that you should not have been born* (McKay v Essex AHA *(1982))*
- *The courts will not impose a duty where there is an alternative system of compensation*

  See *Hill v Chief Constable of West Yorkshire*, where compensation was payable under the Criminal Injuries Compensation Scheme. However, the existence of an alternative remedy will not exclude liability, if the elements of foreseeability and proximity are present (*Langley v Dray* (1998)).
- *Constitutional relationship between Parliament and the courts*

  The courts are reluctant to impose a duty where none existed before, as they see this as the constitutional role of Parliament.

Duty in fact

The issue of the existence of a duty will only arise in novel cases or where it is sought to overrule an existing precedent against liability. This is referred to as a 'notional duty' and looks at the question from an abstracted level.

In most cases, it will be a question of fact, whether the defendant owes the plaintiff a duty of care on the particular facts of the case. This is referred to as a 'duty in fact'. The existence of that particular duty is not in issue, what is in issue is whether a duty is owed in that particular case. For example, *Bourhill v Young* (1942), where it was held that the plaintiff was not foreseeable.

Particular aspects of the duty of care

Physical injury

The meaning of the term 'proximity' varies according to who is using the term, when it is being used and the type of injury that has been suffered. As far as physical injury is concerned, the courts will readily