TORT LAW

TONY WEIR

Fellow of Trinity College, Cambridge

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Preface

People who claim to have suffered harm or an invasion of their rights often seek satisfaction—usually money—from the party they suppose responsible. The aim of this little book is to show how the courts react to such claims. This involves a description of the different kinds of complaint and the different ways the law deals with them.

The book, is not, however, purely descriptive. Sometimes it is quite critical, both of decisions by the courts and of the statutory rules they purport to apply. If the criticisms occasionally seem severe, it should be remembered that, as Hobbes said, it is not wisdom but authority that makes a law, and no one is questioning the authority of our courts or Parliament. As to the authority of particular decisions, however, it should be borne in mind that many of them are, or would be, reversed on appeal, that the final decision may be overturned by legislation, that a good few of the decisions still on the books were reached by a majority as slim as that which permitted the ratification of the Treaty on European Union (Maastricht Treaty), and that—not to put too fine a point on it—everything is in flux, not least because of that Treaty, among others.

The criticisms are not based on the view that 'tort' is a single unit to which some specific purpose may be imputed. The Dean of an American Law School once asked me over lunch 'And what is your normative theory of tort?' It was rather a poor lunch and, as I thought, a very stupid question. Tort is what is in the tort books, and the only thing holding it together is the binding. In contract matters the courts may be predominantly a debt-collection agency (it can now be done on the Internet), but, in tort they function as a complaints department—though the claimant, unlike the customer, is not always right. The complaints are of such different kinds that very different reactions may be appropriate, and though there are horses for courses, the tort course sports quite a lot of horses, and they are of very different breeds and speeds. In any case before producing a 'normative theory' or even discussing the purpose of 'tort', it is surely desirable to become familiar with what that ragbag actually contains: otherwise we shall be like adolescents spending all night discussing the meaning of life before, perhaps instead of, experiencing it.

It is therefore not in relation to any supposed purpose of the tort

shambles, much less any single purpose, that criticisms are ventured here, but in terms of whether the results in particular situations seem sensible, whether the rule laid down is one which can be applied by country solicitors in such a way as to reduce unjustified hopes and tiresome litigation, and whether it is in line with values surfacing here and there in the system and approved by society—values which do not, as yet, embrace the view that every harm or grievance calls for official assuagement or that citizens can properly expect the state, like God after Armageddon, to wipe all tears from their eyes.

There are many excellent textbooks on tort, some very large. Of their rich contents this Introduction can do no more than give a foretaste: a condensation would be highly indigestible, like a bouillon cube. Likewise, constraints of space make it impossible to attach to every statement the qualifications and modifications which would be required if it were a statutory provision; this is doubtless an advantage, for otherwise the book would be as unreadable (and unread) as statutes usually are. Greater coverage could probably have been obtained if certain cases were treated less frequently or at lesser length; but it seems sensible to get as much as possible out of a single decision, and one may have to squeeze fairly hard in order to extract all the *jus*.

While the facts presented are, I hope, more or less up-to-date (to February 2002), I recognize that the opinions and their expression may be felt to be not quite *à la mode*, as they used to say in the United States as they piled ice-cream on the pie.

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Trinity College, Cambridge
7 March 2002

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Abbreviations

The following abbreviations are used in the footnotes.

A 2d	Atlantic Reporter (Second Series) (from 1938)
AC	Law Reports Appeal Cases (from 1891)
All ER	All England Law Reports (from 1936)
App Cas	Law Reports Appeal Cases (1875–1890)
BLR	Building Law Reports (from 1976)
BMLR	Butterworths Medico-legal Reports (from 1992)
Ch	Law Reports Chancery (from 1891)
CMLR	Common Market Law Reports (from 1962)
EHRR	European Human Rights Reports (from 1979)
EMLR	Entertainment and Media Law Reports (from 1993)
Env LR	Environmental Law Reports (from 1992)
ER	English Reports (to 1865)
FLR	Family Law Reports (from 1980)
FSR	Fleet Street Reports (from 1978)
ICR	Industrial Cases Reports (from 1973)
IRLR	Industrial Relations Law Reports (from 1972)
KB	Law Reports King's Bench (1901–1952)
LGR	Knight's Local Government Reports (1922–1998)
Lloyd's Rep	Lloyd's Law Reports (from 1970)
LR # CP	Law Reports Common Pleas (1865–1875)
LR # Exch	Law Reports Exchequer (1865–1875)
LR # HL	Law Reports House of Lords ((1866–1875)
LR # QB	Law Report Queen's Bench (1865–1875)
LTJ	Law Times (1843–1965)
NE2d	North-Eastern Reporter (Second Series) (from 1934)
NLJ	New Law Journal (from 1965)
QB	Law Reports Queen's Bench (1891–1900, 1952 to date)
QBD	Law Reports Queen's Bench (1875–1890)
RPC	Reports of Patent, Design and Trade Mark Cases (from 1981)
RTR	Road Traffic Reports (from 1970)
SC	Court of Session Cases (Scotland) (from 1821)
SJ	Solicitors' Journal (from 1857)
SLT	Scots Law Times (from 1893)

TLR	Times Law Reports (from 1990)
US	United States Supreme Court Reports
WLR	Weekly Law Reports (from 1953)

Note: The citation [year] EWCA Civ ## denotes decision no ## in [year] by the Civil Division of the Court of Appeal for England and Wales. This identifies the decision but not its earthly location: the text is in cyberspace whence it can be retrieved.

1

Introduction

Suppose a motorist knocks you off your bicycle; can you sue him for 'damages' (monetary compensation)? If a policeman stops you in the street for no good reason, is this a wrong you can sue him for? Your neighbours keep making an intolerable noise; can you get a court to stop them (injunction)? To find the answer you look in a book on tort law. If the courts would accept your claim, we say that the defendants are 'tort-feasors' and 'liable' to you. So the law of tort is about when 'liability' exists (leaving aside any other ground of liability, such as breach of contract), and 'a tort' is conduct which renders the defendant liable unless he has some defence.

All systems of law from the earliest times onwards seem to have afforded a person injured by someone else a claim to some reparation, subject to whatever conditions seemed appropriate in that society. At any rate all modern legal systems have a chapter on tort: in Scotland and Germany it is called 'delict', from the Latin, while the French, from whom we get our word, call it 'responsabilité civile', that is civil (not criminal) liability, or, more suggestively, civic responsibility. Tort is a part of the law of obligations, which tells us when others are liable to us, usually to pay us money. The other parts are contract and unjust enrichment ('restitution'). Underlying each of them is an idea about how people in society should behave towards each other, but the actual legal rules cannot simply be inferred from the idea, as the natural lawyers thought: the legal scope of each is limited. This is right. The understandable urge to bring legal standards up to those of delicate morality should be resisted, or there would be no room for generosity or for people to go beyond the call of legal duty. For example, one issue on which strong views are held is this: is there, or should there be, a legal duty to try to help a stranger in mortal danger when one could do so without risk to oneself? In our legal system, unlike many others, the answer is 'No': you may ignore an infant drowning in a pond unless it is your infant or your pond or you are the lifeguard. The point was quite well put by Lord Atkin in 1932: '. . .liability is no doubt based upon a general public

sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour . . .'.[1]

Lord Atkin was speaking of the tort of negligence, but his point can be expanded. Thus while contract is based on the notion that you should do what you said you would, you can only be *sued* for not doing what you said you would if you asked for something in return (consideration), though you may be *estopped* (prevented) from exercising your rights if you said you wouldn't, even if you asked for nothing in return. Restitution is based on the idea that you shouldn't take unfair advantage, as by keeping what you weren't supposed to have, for example, what has been given to you by mistake, but here again there is a limiting requirement: there must be an 'unjust' factor in the situation. Likewise in tort: although the underlying notion is that you shouldn't harm other people, you don't always have to pay for the harm you do: in many cases you only have to pay if you were at fault—at least careless—in causing it. Other systems, too, sometimes require fault and sometimes do not. In France, for example, the basic article in the *Code Civil* of 1804 (art 1382) makes you liable for any harm you are at fault in causing, but then comes another article (art 1384(1)) which makes you liable, even if you are not at fault, for harm done by any thing under your control. Thus in France if you are injured by a car under someone else's control, he is automatically liable to you. Germany is different. It has no general principle of liability without fault for damage done by things, but it does allow victims of highway accidents to recover damages without proving fault. Britain is very unusual in holding that victims of traffic accidents get no damages at all unless they can find someone to blame, someone at fault; victims of industrial accidents, however, can quite often obtain damages without proving that their employer or the person in control of their workplace was in any way to blame. These two classes of accidents form the bulk of tort litigation, though courts are increasingly having to deal with accidents in hospitals, schools, and on holiday.

[1] *Donoghue v Stevenson* [1932] AC 580.

DEVELOPMENT

This is no place for a detailed history of the law of tort in England, but the general trend must be noted. The development has been almost uniformly in favour of claimants, doubtless because a society is thought to be progressive to the extent that it increasingly meets its citizens' complaints, that is, gives judgment for the claimant, in tort, at any rate. This is clear if we consider what has happened in the last hundred years. Until 1934 you couldn't sue if the tortfeasor died (and this was regrettable since quite often the driver who injured you killed himself in the process); till 1945 you couldn't sue the tortfeasor if you were at all to blame for your injury (and this was regrettable since most accidents can be avoided if the victim takes greater care); till 1947 you couldn't sue central (as opposed to local) government (this was not too regrettable since most harmful activities are delegated by central to local government); till 1948 you couldn't sue your employer if a fellow-employee injured you, as was often the case; till 1957 it was hard for a guest to sue the host on whose premises he was injured; till 1960 you couldn't sue the highway authority unless it had actually made the road worse than it was; till 1962 you couldn't sue your spouse even if he injured you by bad driving; till 1964 you couldn't sue the Chief Constable for the torts of lesser constables; till 1971 you couldn't sue a farmer who carelessly let his beasts escape on to the highway and cause an accident; till 1972 you couldn't sue the landlord for culpable failure to repair the premises on which you were injured; till 1977 your claim might be barred because the defendant had exempted himself from liability; till 1997 you couldn't claim for harassment, unless you were threatened with immediate violence. And now we have the Human Rights Act 1998 which allows you to sue public authorities for invading the manifold rights it contains, or even failing to protect them from invasion by others.

Thus ever since 1846, when for the first time widows and orphans were allowed to sue the person who tortiously killed their husband and father, the trend has been almost entirely in the direction of increased liability. These changes were all brought about by statute; the legislature intervened because the judges refused to modify a rule which their predecessors had laid down, even though it had become unacceptable. Sometimes, however, the courts themselves have imposed liability where none had existed before. In 1789 they held that a liar was answerable for the harm caused by his deceit although he obtained nothing by his false pretences. In 1862 they held it tortious knowingly to persuade a person to break his

contract with the plaintiff. In 1866 they held the occupier of premises liable for failing to make them reasonably safe for people who came there on business. In 1891 they allowed injured workmen to sue for breaches of safety legislation. In 1897 they held it tortious to play a nasty practical joke which made the victim ill. In recent years the courts have increasingly held defendants liable for failing to protect people against third parties, or even themselves; this really started in 1940 when an occupier was held liable to his next door neighbour for not defusing a danger created on his property by a trespasser, and it has since been expanded to many other cases where the defendant could and arguably should have prevented the occurrence of the harm, though he had done nothing to contribute to the danger.

Both the legislature and the courts have been very loth to restrict liability. Very rarely has an existing liability been abolished. In 1970 a husband lost his right to sue a third party for harbouring, enticing away, or committing adultery with his wife or (perhaps prematurely) seducing his children—but then all law goes peculiar when a family is involved. In 1982 an Act abolished the claim for the mere fact that one's life had been shortened, though one can still claim damages for feeling bad about it. For their part, the courts decided in 1991 that they had gone too far thirteen years earlier when they had imposed liability on a local authority for failing to save the buyer of a jerry-built house from his unfortunate purchase,[2] and in 1964 they made the mistake, while expanding liability for intentionally causing economic harm, of restricting the use of damages in order to punish the defendant rather than compensate the claimant.[3] Nevertheless the trend has pretty uniformly been in the direction of expanding rather than restricting liability in tort.

Without question, however, the two major steps taken by the courts to increase the range of liability were taken in 1932 and 1963, in the cases of *Donoghue v Stevenson* (snail in ginger beer)[4] and *Hedley Byrne & Co v Heller and Partners* (misleading banker's reference).[5] The former decision generalized the conditions of liability for unreasonably dangerous conduct and the latter, somewhat less generally, extended this to conduct which was not dangerous at all (in the sense of being likely to damage person or property), but only damaging to the claimant's pocket. They call for extended discussion later.

[2] *Murphy v Brentwood District Council* [1990] 2 All ER 269.
[3] *Rookes v Barnard* [1964] 1 All ER 367.
[4] [1932] AC 580. [5] [1963] 2 All ER 575.

TORT AND CONTRACT

The increase in tort liability is matched by a decline in the potency of contract. In the nineteenth century it was axiomatic that individuals should be free to organize their lives within the limits of the practicable and acceptable, and this they did by doing deals with each other in the hope of mutual gain. Such contracts were to be upheld, almost as 'sacrosanct'. In 1875 it was famously said that 'if there is one thing more than another which public policy requires, it is that ... contracts, when entered into freely and voluntarily, shall be held sacred. . .'.[6] Bargains, even bad bargains, were bargains. 'Vous l'avez voulu, Georges Dandin' as the man said. The courts were so reluctant to strike down agreements as being unreasonable, unfair, or 'contrary to public policy' that they allowed parties to exempt themselves from liability in tort, or at any rate liability in negligence: unless such 'exemption clauses' could be misconstrued—and the courts were quite good at misconstruing contracts, given their practice with statutes—they were upheld and the plaintiff lost his claim in tort. In 1977 the legislature intervened by enacting the Unfair Contract Terms Act, a statute rather wider than its title, which makes it impossible for any agreement or notice to insulate people from liability if they have caused personal injury or death by negligence.

This dramatizes the triumph of tort law over contract. Nowadays 'the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied. . .',[7] and the almost subsidiary role of contract was emphasized by Lord Goff in a decision which held, effectively, that every negligent breach of contract is automatically a tort: he said that 'The law of tort is the general law, out of which the parties can, if they wish, contract',[8] but failed to add that the extent to which they can contract out of the law of tort is now very limited, though very occasionally the courts will refuse to impose liability for negligence where that would perturb the sensible arrangements of the parties. Individual human beings who deal with a business can now avoid not only exemption clauses but a much wider range of 'unfair' clauses; indeed, they can often change their mind about whole contracts already formed. Such 'consumer protection', largely emanating from Brussels, can be seen as mirroring the extensive protection offered by the law of tort to victims of

[6] *Printing and Numerical Registering Co* (1875) LR 19 Eq 462 at 465.
[7] *X v Bedfordshire County Council* [1995] 3 All ER 353 at 380.
[8] *Henderson v Merrett Syndicates* [1994] 3 All ER 506 at 532.

personal injury, seeing that in both the dispute is almost always between an individual and a company, be it a supplier, an employer or an insurer.

Although a person's consent now plays a much reduced role in the law of tort, it is not yet entirely irrelevant. If you agree to go to the police station, you cannot sue for arrest, you cannot sue a surgeon for cutting you open if you have agreed to the operation, and if you go into the boxing ring you cannot sue your opponent for fairly and squarely hitting you. Consent is thus a defence to a claim in *trespass*, but where the defendant has been *negligent*, the general principle that one cannot claim for a harm to which one has consented is increasingly being disregarded. In one astonishing case a quite sane prisoner on remand strangled himself with his shirt in the police cell; although he very clearly intended to kill himself, the House of Lords held the police liable, for though they had kept him under almost constant surveillance they had been very slightly negligent in not closing a flap in the door of the cell.[9] Whether or not one regrets it, it is undeniable that the progressive socialization of harm diminishes the responsibility, indeed the autonomy, of the individual.

STATUTE AND JUDGE-MADE LAW

It will be seen that the interplay between legislation and judicial decision has been very important in tort law, and since tort is commonly one of the first subjects to which law students are exposed, it may not be out of place to make some general observations about the way rules from these two sources differ.

Britons seem to find cases much easier to deal with than statutes, doubtless because in cases, referred to by the names of the parties, recognizable judges who are professionally trained to be persuasive tell a story in dramatic terms, whereas statutes deal in abstract categories and are drafted by anonymous civil servants in a cryptic, almost impenetrable manner. It is, however, *essential* to overcome one's understandable distaste for legislation, for almost all tort problems involve the application of some statute or other. These include, for example, all cases involving death, injury on another's premises, contributory fault on the part of the victim and multiple tortfeasors, as well as claims for damage done by animals, airplanes, or radiation. Statutes may not play a great part in civil liability for highway accidents, unless the highway authority itself is being sued, but in industrial injury cases statutes (or worse still, statutory

[9] *Reeves v Commissioner of Police* [1999] 3 All ER 897.

instruments) are very important indeed. That is not to suggest that they are invariably well-conceived or executed.

STATUTES

Statutes are very diverse. Some impose liability quite openly. For example, the Animals Act 1971 provides that 'When a dog causes damage by killing or injuring livestock, any person who is a keeper of the dog is liable for the damage . . .'. Other statutes which do not speak openly of civil liability require or prohibit specified conduct, sometimes providing that there is a duty to do it, sometimes making it an offence to do it and laying down a penalty for contravention. Whether the infringement of such a statute generates a liability in tort is a very vexed question which will be attended to later. Yet other statutes, rather than imposing a duty, confer a power on a body to do something it would otherwise not be able to do. Most public bodies owe their powers, indeed their very existence, to statute, and it is an even more vexed question whether such a body (typically a local authority which has extensive powers as regards planning, education, social services, especially child-care, and highways) is liable for the harm resulting from failure to exercise its powers properly or at all.

Just as a visitor to an art gallery should not rush past a picture which the painter took years to perfect, or a reader scurry through a sonnet over which the poet laboured long and hard, one must read statutes with something approaching the meticulous care taken by the draftsman. For example, the Defective Premises Act of 1972 imposes liability (though it speaks in terms of 'duty') on 'A person taking on work for or in connection with the provision of a dwelling'. This does *not* mean 'a person taking on work in connection with a building', for by its terms, which cannot be extended by interpretation, it applies only where the work is in connection with the *provision* of a dwelling, and the building must be a *dwelling*, that is, a building for human beings to live in: the statute is simply inapplicable to kennels or office blocks, or to mere repairs to an existing home. One must therefore scrutinize the precise wording of the statute in order to see whether the facts of one's case fall within its purview: interpretation is not so much a matter of eliciting meaning as of ascertaining coverage.

It is not, however, the original wording of the statute which is critical, but rather what the courts have made of it in the process of application, so that it is essential to discover and read the cases in which the enactment has been construed. Until recently our judges did not ask what the

legislator meant to say but what was meant by what he did say; as one judge pungently observed, 'the courts are not so much concerned with what the legislature aims at as with what it fairly and squarely hits'.[10] Since 1972, however, when that remark was made, our courts have been very much influenced by the methods of statutory interpretation prevalent on the Continent, where legislation is regarded as primary (and rational) and the courts interpret it in a manner less logical than teleological (purposive). Indeed, our judges are now instructed by the Human Rights Act 1998 to interpret statutes compatibly with the European Convention on Human Rights 'so far as it is possible to do so', a provision which shows that several different interpretations are possible, that their number is not unlimited and that a particular one is to be adopted.[11]

JUDGE-MADE LAW

As to cases the technique of eliciting the rule is quite different. Whereas in a statute every word is law, the precise words of judges are not law at all, but merely an indication of it. After all, one can hardly imagine a statute enacted in five different wordings, but it is quite normal in the House of Lords for there to be five concurring opinions, all very differently expressed, as happened, for example, in *Hedley Byrne & Co v Heller and Partners*.[12] In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides (*obiter dicta*). The aim is to ascertain the rule (the *ratio decidendi*) that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand. As an example of distinction, we can take cases relating to the question of whether a local authority could be sued for the unreasonable exercise of its child-care powers. In 1995, the House of Lords held that that it would not be 'fair, just and reasonable' to impose liability in this delicate area where Parliament had conferred discretion on the authority. In that case the local authority knew that a child was being abused at home,[13] but failed to take any action. Four years later that

[10] *Charter v Race Relations Board* [1972] 1 All ER 556 at 566.
[11] *R v A* [2001] 3 All ER 1.
[12] [1963] 2 All ER 575.
[13] *X v Bedfordshire County Council* [1995] 3 All ER 353.

decision was 'distinguished': in the later case the authority had actually taken the child into care, and it was held that there might be liability.[14]

Not all decisions are of equal authority. Apart from the status of the court in question and perhaps the age of the decision, one must take note of the litigational context. If the decision was made on facts established at trial it is of considerable value, but it can be distinguished if a particular and critical argument was not addressed to the court. Quite often, however, the decision is rendered on facts which have been merely alleged, not established by proof. In some ways this makes it easier to ascertain the scope of the decision, since the precise allegations are taken as being true; indeed, many leading cases (including *Donoghue v Stevenson* itself) were decided in this way, prior to any trial. Often, however, such a case is remitted for trial on the basis that the claimant's case is 'arguable' and that therefore the pleadings should not be 'struck out' or summary judgment given. Since many argued cases are lost, 'arguable' clearly does not mean 'bound to succeed', so such a decision must be treated with caution. Thus in a case where a woman returning from shopping saw her house afire and allegedly suffered a disabling shock, the Court of Appeal held it arguable that the men who were installing a gas fire in her home would, if shown to be negligent, be liable to her for the shock.[15] This case is no authority for the wide proposition that one can recover for shock occasioned by seeing one's property damaged, but even if it were, it might be inapplicable to a case where you saw your dog run over by a careless motorist, for in the case of the burning house the parties were not total strangers but were in a special relationship, namely occupier and visitors, and this might well be treated as a distinguishing feature.

Courts are increasingly ready to disregard a precedent on the ground that, though the case in front of them is not really distinguishable from it on the facts, they have been persuaded by an argument not raised in the earlier case. This indicates the important role of counsel in English litigation. Not only are counsel commonly specialists in the area, addressing a judge who, prior to elevation, was perhaps a specialist in some quite different area, but the judges are to a great extent forced to deal with the case in terms of the arguments addressed to them, and those arguments may well be constrained by the original pleadings, drafted possibly by a young barrister still wet behind the ears or a solicitor with nothing between them. Even so a decision may be right although the reasons

[14] *Barrett v Enfield London Borough Council* [1999] 3 All ER 193.
[15] *Attia v British Gas* [1987] 3 All ER 455.