

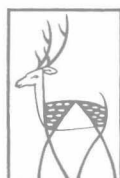


LANDMARK CASES IN THE LAW OF TORT

Edited by Charles Mitchell and Paul Mitchell

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Preface

Landmark Cases in the Law of Tort is the third volume in our series of collected essays on leading cases in the common law. The present volume uses the same techniques as the two earlier volumes (on restitution and contract). Each author was given a free choice of case and method of approach. The essays were presented and discussed at a symposium at King's College London in April 2009, and subsequently revised in the light of that discussion. We are grateful to all the symposium participants for their contributions, and to the King's Law School for supporting the event.

As with our previous volumes, there were no competing demands from authors to write on the same case—which reflects both the sheer number of important decisions in the law of obligations and the differences of scholarly emphasis.

Readers will doubtless have their own views about which authorities should be dealt with in a collection of this kind, and perhaps will be disappointed to find a personal favourite overlooked. However, we should make it clear that none of these volumes ever set out to define the most important cases in a particular area. That would be an extremely difficult, and ultimately rather pointless, task—rather like compiling a list of the ten greatest novels of all time. Rather, the aim has always been to cast new light on some of the many important cases that make up the law of obligations.

Among the thirteen cases dealt with here, readers of the earlier collections will recognise certain familiar themes. If it is true, as Lord Goff once said, that judicial work is 'an educated reflex to facts',¹ then both the facts and the nature of the judge's reflex to them can be profoundly influential. Investigation may reveal that the facts are more nuanced, or more extreme, than the bare, laconic accounts in the law reports suggest. Furthermore, the contemporary context—which very rarely appears in the reports—can give those facts a resonance which is appreciated by the judge, but missed by later readers of his judgment. Conversely, legal principles may compel judges to deal with situations in a deliberately stylised way, where important contextual material is excluded. In such situations the legal process provides an inadequate method for resolving social conflicts. The essays on *Burón v Denman*, *Goldman v Hargrave* and *Hunter v Canary Wharf Ltd* offer powerful illustrations of the importance of a full appreciation of the facts to which the judge is responding.

The facts are, of course, only the starting point. The nature of the 'educated reflex' turns on many other factors. One of the most powerful is

¹ R Goff, 'Judge, Jurist and Legislature' [1987] *Denning Law Journal* 79, 82.

the judge's conception of his own role. In some cases judges have felt obliged, or inclined, to go beyond the immediate facts, so as to lay down broad principles for the future. The essay on *Alcock* (among others) explores some of the motivations behind such expansiveness, and the limits which judges feel themselves bound by. The nature of the response may also be coloured by what legal materials are perceived as relevant. As the essay on *Fairchild* demonstrates, the judges' request in that case to hear argument about the position in European jurisdictions produced an original and distinctive analysis, with a hint that future harmonisation would be welcome. The essay on *Smith v Littlewoods*, by contrast, highlights the delicate issues involved in actually bringing about a convergence of the Scots and English law on liability for the acts of a third party. A further factor influencing the 'educated reflex' may even be the judge's own education (see the essay on *Hedley Byrne*).

The part of a judge's educated reflex that will be furthest removed from the facts involves the use of legal theory. The decision in *Tate & Lyle*, it is argued, made a far-sighted use of the concept of rights, which was ahead of its time. *George v Skivington*, both as decided and as subsequently interpreted by courts and textbook writers, was capable of being understood in a variety of ways, which all raised fundamental questions about the limits of negligence liability. Perhaps most strikingly, several of the cases reveal concerns about legal categories: what should the role of the law of negligence be in relation to the law of nuisance or the law of contract, and what should the role of tort be in relation to a wider regulatory scheme? More broadly, there is an engagement with the question, what is the law of tort for? We believe that the essays collected here illuminate the process of judicial law making generally, and also cast some light on these broader questions.

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August 2009

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