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TORT

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Series Introduction

New Nutshells present the essential facts of law. Written in clear, uncomplicated language, they explain basic principles and highlight key cases and statutes.

New Nutshells meet a dual need for students of law or related disciplines. They provide a concise introduction to the central issues surrounding a subject, preparing the reader for detailed complementary textbooks. Then, they act as indispensable revision aids.

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Tort examines the scope of this branch of law, before dealing, in turn, with damage, behaviour, causation and duty. Later chapters look at injury to person and to property, financial loss, interference with the person and with real property, interference with goods and, finally, at responsibility.

Author's Preface

Tort is less a collection of rules and more a subject of principle. Accordingly this *New Nutshell* has used half the allotted space in attempting to give some kind of overview—essential for a proper analysis of tort exam problems.

January 1979

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CHAPTER 1

SCOPE OF THE LAW OF TORT

Definition and Background

1. "Tort" is an Anglo-French word meaning wrong; in the context of English law the word means civil wrong. However a more precise definition of tort can only be achieved by examining the nature of claims in tort actions and distinguishing the subject from other branches of the law.

2. Most claims in tort are for damages; the plaintiff is seeking compensation for an injury done to his/her person, property, reputation, pocket or other "interest" protected by the law. However, in some situations—mainly nuisance—a plaintiff might be seeking a court order to stop the defendant from doing something (see, *e.g. Hubbard* v. *Pitt* (1975); *Miller* v. *Jackson* (1977)); in other situations the plaintiff might be seeking a return of a piece of his property or its value (see, *e.g. Ingram* v. *Little* (1961)).

3. Thus, from a remedies point of view, claims in tort can be for (i) damages and/or (ii) injunction and/or (iii) property or its value. These claims are very different from, *e.g.* debt (which are claims for a specific amount of money and are to be found primarily in contract ór unjust enrichment); or recission of a transaction (usually an equitable/unjust enrichment claim); or rectification of a document (equity).

4. However not all compensation actions are tortious; many can be contractual (see, *e.g. The Moorcock* (1889)). Thus tort must be distinguished from contract. From a factual point of view contract is usually about transactions while tort is about collisions; from a legal point of view contract is about actions arising from breach of enforceable agreements while tort is about invasions arising from the breach of other recognised

duties. Furthermore the nature of the damage is usually different: contract claims tend to be about lost expectations (financial), tort about invasions (physical). This is not to say however that the two cannot overlap (see, *e.g. Sole* v. *Hallt* (1973)) and in the area of misstatement they often do; see *Esso Petroleum* v. *Mardon* (1976).

5. The law has not always made a clear distinction between obligations arising in contract and obligations arising in tort. Historically compensation actions had their foundation in the old Writ of Trespass and its offshoot the Action on the Case (see below paras. 22–25); and the important distinction here was not between "contract" and "tort" but between direct and indirect damage (*Reynolds* v. *Clarke* (1726))—a distinction that is still reflected in modern aspects of tort (see, *e.g. Harnett* v. *Bond* (1925); *Re Polemis* (1921)). Another distinction of historical importance was the distinction between misfeasance and non-feasance; this arose out of the medieval idea that "Not Doing is no Trespass" (*cf.* Milsom [1954] C.L.J. 105). Liability for nonfeasance was only achieved by the shifting of the focal point of liability from the *act* to the *undertaking* (see below Chap. 3, para. 11), and it was this shift that gave rise not only to the idea of contractual obligations but also left us with the notion of duty so familiar to the tort of negligence (Winfield (1934) 34 Columbia L. Rev. 41 and see Chap. 5, para. 2). The distinction between misfeasance and nonfeasance can still cause trouble for the tort lawyer: *East Suffolk Rivers Catchment Board* v. *Kent* (1941); *cf. Anns* v. *London Borough of Merton* (1977).

6. Tort must also be distinguished from crime. However this is by no means an easy task because originally the common law made little distinction between crime and tort and today some crimes like assault, theft and public nusance can also be torts. Thus, as Glanville Williams has pointed out, "it is impossible to divide the two branches of the law by reference to the type of act" ([1955] C.L.P. 107, 116); the difference lies in the function

of the court. In a tort action the function of the court is to grant a remedy that will compensate a plaintiff for harm suffered as a result of the defendant's wrongful behaviour or act (although this remedy can have a punitive aspect: see *Rookes* v. *Barnard* (1964) *per* Lord Devlin); in a criminal action the function of the court is to impose a punishment with the aim of influencing behaviour (although compensation can also be ordered: *Powers of the Criminal Courts Act 1973* s. 35). From the standpoint of "wrongs" it is sometimes said that the criminal law deals with wrongs against society in general, while tort is concerned with wrongs against individuals; this definition however tends to be rather unrealistic for it is historically unhelpful and fails to highlight the considerable overlap.

7. We shall see that before a court orders one party to compensate another for an interest invaded the court has to find a reason for so doing. Originally the old lawyers were happy to just look to the damage and causation and ask questions like: Was the damage direct? As the law developed however the judges looked more and more to behaviour: Had the defendant acted intentionally or carelessly when injuring the plaintiff? With the rise of capitalism and its attendant philosophy of liberalism and individualism fault became a way of limiting liability for the growing number of accidents that inevitably followed technological development; thus by the end of the nineteenth century behaviour had become an important focal point in tort (see Chap. 3). And the importance of the famous case of *Donoghue* v. *Stevenson* (1932) was that it shifted the emphasis off the thing that did the damage (*viz.* Was the chattel dangerous?) and on to behaviour (Was the manufacturer in breach of his duty of care?). Consequently it might appear that much of the law of tort, like crime, is now involved with states of mine (or *culpa* as the Romans termed it); but, needless to say, the shrewd student should be sceptical: see *e.g.* *Henderson* v. *Jenkins* (1970); *Nettleship* v. *Weston* (1971); *Morgans* v. *Launchbury* (1973).

Aims of the Law of Tort

8. From the plaintiff's point of view the purpose of the law of tort is to provide compensation for the invasion of a legally recognised interest; from the defendant's point of view it is to protect his freedom to act without incurring liability when he has done no wrong. From society's point of view the aim of the law of tort is to prevent one person damaging another (*cf.* Lord Wilberforce in *Cassell & Co. Ltd.* v. *Broome* (1972)).

9. Tort has other aims as well. Trespass is useful for protecting constitutional rights (*Christie* v. *Leachinsky* (1947)); conversion for protecting property rights (*Moorgate Mercantile* v. *Twitchings* (1976)). There is also the moral question: tort no doubt has a role in attempting to define rightful from wrongful conduct (see *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* (1957)).

10. These aims, however, can conflict and so one role of the court in a tort action is to try and reconcile all the competing aims in order to achieve a sense of fairness. For a century now English law has found the focal point of reconciliation in the concept of fault; but a plaintiff who is unable to recover because of a "misadventure" (*per* Denning L.J. in *Roe* v. *Min. of Health* (1954); and see also *Bolton* v. *Stone* (1951)) is still left with perhaps a serious disability to serve as a reminder of the limitations of our tort system (*cf. Pearson Report on Civil Liability and Compensation for Personal Injury*, 1978, Cmnd. 7054–1).

11. Consequently tort is not the only method of compensation for accidents. The National Health System and Criminal Injuries Compensation Scheme go far in relieving some of the acute problems of personal injury; private insurance and the social security system also help spread the financial burdens. Accidents at work—a major source of tort litigation—are covered by an industrial compensation scheme, and the *Pearson* Committee (Cmnd. 7054–1 Chap. 18) have recommended similar provisions for the other major source of tort litigation, accidents on the road.

12. It should be noted however that many of these alternative schemes are concerned only with personal injury; this indicates the surely undoubted truism that invasion of one's person is a greater burden than invasion of one's property or bank account. Does the tort system recognise this? The answer to this question is undoubtedly yes; but the recognition often tends to be at the operational, rather than at the formal, level. Thus judges may interpret causation rules more favourably in a case of personal injury than in one involving only property damage (compare *Carslogie S.S. Co.* v. *Royal Norwegian Govt.* (1952) with *Baker* v. *Willoughby* (1970)); or the rescuer who intervenes to save life and limb might find that he is treated with more sympathy (*Haynes* v. *Harwood* (1935)) than the rescuer who intervenes only where property is threatened (*Cutler* v. *United Dairies* (1933)). However, there is one rule in the tort of negligence that more openly discriminates in regard to the type of damage: a plaintiff who suffers only pure financial loss as a result of the defendant's act (as opposed to statement) will have no action (*Weller* v. *Foot & Mouth Disease Research Institute* (1966)). This rule has been under attack from those who feel it to be curious anomaly, but is has nevertheless survived (*Spartan Steel & Alloys Ltd.* v. *Martin & Co.* (1973)); money, it would seem, is still less important than people despite the efforts of multi-nationals to have us think otherwise: see generally: Weir [Michaelmas 1974] C.L.L.R. 15.

13. This distinction between physical and financial loss made by the tort of negligence raises questions as to the kinds of interests the law of tort aims to protect. Are these interests static or is the law prepared to recognise new ones? Much depends not only on the area involved but also as to how the problem is formulated. Thus the courts have been reluctant to enter into the question of what is reasonable behaviour in the world of business (*Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1892)) unless they can view the problem as one of "property" (*Bollinger* v. *Costa Brava Wine Co. Ltd.* (1960); *Ex parte Island*

Records (1978)). The same applies to interference with a person's privacy: defamation aside, there must usually be an actual invasion of a plaintiff's property right before the court will grant a remedy (*Bernstein* v. *Skyviews* (1977); and see *Perera* v. *Vandiyar* (1953)); nevertheless by stressing that the very unreasonableness of the behaviour itself amounts to a property tort then the result might be different (*Hollywood Silver Fox Farm* v. *Emmett* (1936)). In the area of negligence, however, the courts have been much more adventurous (see *e.g. Hedley Byrne & Co.* v. *Heller & Partners Ltd.* (1964); *Dutton* v. *Bognor Regis U.D.C.* (1972); *Anns* v. *London Borough of Merton* (1977); *Saif Ali* v. *Sydney Mitchell & Co.* (1978)) and so also in the area of economic torts (*Rookes* v. *Barnard* (1964); *Torquay Hotel Co.* v. *Cousins* (1969)).

Tort or Torts?

14. The allowing of new actions in tort is sometimes cited as evidence that there is a law of tort rather than a law of torts—*i.e.* that the subject is now founded upon a general principle of liability rather than just being a subject consisting of specific categories. This controversy was the basis of a great debate in the early part of this century between Salmond, who supported the torts theory, and Pollock and Winfield, who supported the tort theory; Glanville Williams adopted a middle approach (7 C.L.J. 111).

15. It is probably true to say that *Donoghue* v. *Stevenson* (1932) gave stimulus to the tort argument in as much as it provided an important focal point—*viz.* fault—in regard to some types of compensation claims, most notably personal injury (see *Read* v. *J. Lyons & Co. Ltd.* (1947)). On the other hand there has since *Rylands* v. *Fletcher* (1866–1868) (see below Chap. 3, paras. 8–9) been another—parallel—focal point of liability in the concept of risk; thus the actual isolation of a general principle becomes elusive. Anyway, whatever theory

one adheres to; "the actual problems remain the same" (Zweigert and Kotz).

16. However the most positive aspect of the tort/torts debate is that it raises the question of rationalisation. What is the basis of tort law? Is it, *e.g.* about acts or activities; or is it about things—cars, factories, houses, animals, airplanes, nuclear plants? Perhaps each investigator of the law reports or tort casebook will come up with their own answer on this point; but a warning is necessary in that the common law is capable of perpetrating what one tort expert has called a "confidence trick." For example the tort of negligence may well in theory be concerned "not with activities but with acts" (Scott L.J. in *Read* v. *J. Lyons & Co.* (1945) (C.A.)), but by sleight of hand with the rules of evidence it can soon become the opposite in practice (*Henderson* v. *Jenkins* (1970)).

17. For the student faced with the task of having to analyse tort problems the best rationalisation—and the one adopted in this book—is probably that advocated by writers like Weir: that "division could well be made with reference to the type of damage suffered by the plaintiff" (37 Tulane L. Rev. 573, 606). From here one can then move to the other focal points.

Focal Points of Tort

18. Having started with the type of damage incurred by the plaintiff (*viz.* personal, property or financial harm etc.), the next step is to move onto *causation* (see Chap. 4): What, or who, actually caused the damage complained of; and/or who, if anyone, was in *control* of the agent that did the harm? From here one can then move to the question of *behaviour* (Chap. 3) of the parties concerned; and then on to the *relationship* (Chap. 5) between them. Furthermore, it may be important when looking at this latter point to ask *where* the damage was inflicted; this may well help define the relationship between the parties (see, *e.g. Ward* v. *Tesco Stores* (1976)—occupier and invitee; *Mint* v. *Good* (1951)—highway).

19. The analysis of a tort problem in this way should make the main issues clearer. Thus if the complainant has suffered only *pure economic loss* as a result of someone's careless behaviour, then the tort of negligence should be inapplicable (*Margarine Union G.m.b.H.* v. *Cambay Prince S.S. Co.* (1969)); yet if the careless behaviour took place in the street it *might* be arguable that the careless person should be liable in public nuisance (*Harper* v. *Haden & Sons* (1933)). On the other hand if the complainant has suffered *personal injury* as a result of say an unreasonable obstruction on the highway, he will probably have to show carelessness before he can succeed: *Dymond* v. *Pearce* (1972) *per* Edmund Davies L.J.; below Chap. 2, paras 10–12.

20. This book will assume then that the key to understanding tort lies not so much in the rules of the particular torts but in the type of injury suffered. This is not to say however that the technical devices like duty, causation or risk are not important; for it is these devices that are utilised on the formal level for allowing or refusing a remedy. Thus in *Bourhill* v. *Young* (1943) Mrs. Bourhill failed in her claim because no duty was owed to her by the defendant; of course had she been hit by a piece of flying motor-cycle, she would have recovered. In *Dymond* v. *Pearce* the actual device utilised for refusing the plaintiff a remedy was causation; but the same result could have been achieved by using say *volenti non fit injuria* (*I.C.I.* v. *Shatwell* (1965)).

Procedure v. *Substance*

21. The foregoing should indicate that some of the difficulties of tort arise from the dichotomy between technical form and factual substance. This was particularly true of the past when the common law was dominated by the procedural Forms of Action; and to understand the problem it is accordingly necessary to pay some attention to legal history.

22. Originally the common law was much concerned with procedure—that is with the forms in which one obtained a remedy. After the Norman invasion the French were keen to centralise their authority and one of the ways of doing this was to centralise justice; there grew up as a result the royal writ system. Briefly this meant that there were a limited number of procedural writs concerned with the main kinds of claim/damage and in order to begin at law a plaintiff had to bring the facts of his case within one of the specific formulae which made up each writ. Thus the Writ of Trespass—one of the most important of the early writs—lay originally only for the *direct* invasion of the plaintiff's possessory interest by force of arms. There were of course other writs, like Debt, Detinue and Nuisance, but these too were thin in scope and thick in procedural defects.

23. However by the beginning of the fourteenth century—possibly as a result of the *Statute of Westminster II 1285*—the rigid formal system became more flexible with the development of the Action on the Case. The gist of these actions was not so much the specific procedural formulae but the damage suffered by the plaintiff: where a person had sustained harm in a way that was similar to, but not exactly within, an existing writ the Chancery clerks would issue an analogous writ. Thus if a plaintiff had incurred an *indirect* invasion of his person or property he could bring an action on the case for trespass. By shifting the focal point off the form and onto the substance of the action (*i.e.* the damage) the gate had been opened for major legal development; and it was within the action on the case that much of our modern law of contract, tort and unjust enrichment was forged.

24. Despite the potential flexibility of Case procedural form still dominated the law. Thus if a plaintiff sued in trespass when he should have framed his claim in Case the action might well fail (see *Reynolds* v. *Clarke* (1726)); although in fairness it should be said that some of these procedural disputes often masked issues that could still cause trouble today: see, *e.g. Scott*

v. *Shepherd* (1773)—where the procedural difficulty centred around causation, a difficult topic still.

25. Another blow was dealt to the dominance of procedure in legal thinking when the Forms of Action were abolished by the *Common Law Procedure Act 1852*. The principal effect of this abolition was that a plaintiff no longer had to attach a label to his cause of action right from the beginning of proceedings; however a plaintiff still had to show a cause of action. And for a long time—indeed even today—these causes of action tended to follow the old writs. Thus trespass, with its requirement of directness, survived to become one of the modern causes of action: see Chap. 9, paras. 4–19; Chap. 10, paras. 3–7; Chap. 11, para. 3; *Letang* v. *Cooper* (1965), *per* Diplock L.J.

26. Despite the changes of the nineteenth century, procedure can still, and often does, play an important part in legal thinking. But much really depends upon the attitude and intellectual qualities of the courts involved: thus even before 1852 Case allowed the more progressive judges to escape procedural restraints if they really wished to achieve a certain result; while in the theoretically flexible system of today some choice examples of procedural thinking are still to be found: see, *e.g. Esso Petroleum* v. *Southport Corporation* (1956) (H.L.); but *cf. Sterman* v. *E. W. & J. Moore* (1970).

27. Perhaps the main advantage of the nineteenth century reforms is that they cleared the way for twentieth century development in much the same way as Case had allowed for post-thirteenth century evolution. Thus it has become easier for the courts to recognise new torts (see, *e.g. Donoghue* v. *Stevenson* (1932) and para. 13, *supra*). But this should also serve as a warning: tort, unlike some other legal subjects, is still "young" in that the effects of the abolition of the forms of action have not yet been fully appreciated; and so cases like *Fowler* v. *Lanning* (1959) and *Letang* v. *Cooper* (1965)—cases that examine the relationship of the old torts with the new—will have—indeed have already—an important historical significance.

Legislation and the Law of Tort

28. Although tort is primarily a common law subject, statute is increasingly replacing certain areas. Occupiers' liability, torts to chattels, animals, contributory negligence, contribution (more unjust enrichment than tort) and actions by dependent relatives of tort victims are some of the main topics which have attracted legislative attention.

29. However, some of this legislation is, in various degrees, dependent upon the pre-existing common law. The *Occupiers' Liability Act 1957* for example talks about the "common duty of care;" while the *Torts (Interference with Goods) Act 1977* assumes the existence of the tort of conversion. The *Animals Act 1971,* while actually replacing the common law, nevertheless preserves some old distinctions; while the *Defective Premises Act 1972,* amongst other things, eradicates other common law distinctions. Thus in order to understand new legislation a knowledge of the old common law is often essential.

Chapter 2

DAMAGE

1. At very abstract level, if one had to isolate three requirements for a successful action in tort they might be as follows: (a) an interference with, or an invasion of, an interest which the law recognises and protects; (b) the requisite degree of fault; (c) damage suffered as a result. Most of this book will be concerned with these requirements but it is necessary at an early stage to say something of (c) for, as has been suggested, it is the starting point of many tort issues.