

TORT LAW – COMPLETE SYLLABUS

Introduction to tort

- Tort is part of the law of obligations.
- Tort as a civil wrong - basic remedy is claim for damages (compensation)
 - E.g. negligence, defamation
 - Steele: *'Torts are 'wrongs'. To be slightly more precise, torts are civil wrongs for which law will provide a remedy.'*
 - Winfield and Jolowicz: *'At a very general level ... we can say that tort is concerned with the allocation of responsibility for losses, which are bound to occur in our society.'*
- Tort and contract:
 - Winfield's definition: *'Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.'* (*The Province of the Law of Tort* (Cambridge, CUP, 1931) 32.
 - Contrast with contract which is all about the duties that parties have taken upon themselves by agreement (i.e. not fixed by law)
 - BUT – unusual situations where tort duties depend on prior dealing/agreement between the 2 parties
- Tort and property
 - Property is about acquisition/right to control property
 - BUT wrong might be committed in respect of property – tort deals with that because it's a wrong
- Tort and crime
 - Both concerned with people behaving in a wrongful way
 - See tort of assault and battery – identical to the crimes
 - BUT the focus of the 2 is very different – criminal law is concerned with punishment while tort is concerned with compensation
 - Difference in outcome – fine/imprisonment vs damages/injunction
 - There are questions about whether tort and crime ought to have more in common e.g. might tort also seek to punish/deter wrongdoings?

Glanville Williams, 'The Aims of the Law of Tort' [1951] CLP 137 – Appeasement; Justice; Deterrence; Compensation

- Argues the law of tort should have a punitive role
- Controversial position
- Aims of tort as per Williams:
 - Appeasement – prevent the disruption of society by disputes arising from the infliction of injury
 - Justice – retribution + compensation to the victim
 - Criticism of this – tort law looks backwards to a wrong that needs to be redressed => corrective justice / contrasted with distributive justice
 - Deterrence – as for criminal law; tort damages are a punishment too – secure obedience to rules
 - Posner – argued that economic efficiency is the foundation of all moral imperatives and hence the main meaning of justice itself – criticised by Dworkin
 - Compensation – reparative theory; the one who has caused injury to another must make good the damage whether he was at fault or not (does not require culpability like ethical compensation => justifies strict liability)

What counts as a tort?

- Tort doesn't set out to provide a complete coverage of all losses that might arise
- *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993 [100]: '*the world is full of harm for which the law furnishes no remedy.*' (Lord Rodger)

Where do torts come from?

- Torts like negligence & defamation have medieval origins – slowly developed over time
- Newer torts have been recognised e.g. law of nuisance – tort of harassment
- Evolvement potential of tort law: how should we make sense of this legal category?
 - Winfield – tort has to be seen in 2 ways: collection of specific wrongs + a longer-term historical sense of the way tort developed => law is aspiring to respond to social pressures and needs
 - Issue – tort is very focused on relationship between C and D – Q: is tort only about this or should it allow questions of public policy to enter into liability assessment?
 - Compensation culture – too many people can sue for damages – academic view that these concerns tend to be overstated
 - *Tomlinson v Congleton Borough Council* – Lord Hobhouse and Lord Scott addressed concerns that the deterrent effect of potential tort liability might lead to the undesirable withdrawal of services of value to the community at large
 - Struck out against the dilution of individual responsibility that can result if tort law is too ready to accord the injury victim a remedy
 - US, Australia and Ireland – tort reform refers to restrictions on the scope of liability in tort or the ability to sue for damages – true in the UK as well, BUT some of the recent tort reforms have actually increased the cost of compensation/ significant transfer of the cost from the public to the private sector
 - Insurance – should it make a difference to whether a D is made to pay compensation that he had insurance against the damage that has occurred? E.g. motor insurance is compulsory => is it more appropriate to recognise liability in these cases?
 - judicial attitude – the insurance position of the parties should have no influence on the adjudication of individual cases
 - Question whether the development of liability insurance has been instrumental in bringing about major structural changes in tort law doctrine in the interests of loss distribution – 2 diametrically opposed points of view
 - No, limited influence of insurance: courts very rarely point to C's ability to protect himself by purchasing insurance as a reason for absolving D from liability
 - Main impact of insurance on tort may have been on the law of damages rather than the principles of liability – e.g. damages paid periodically rather than in lump sum
 - Impact of insurance on liability rules hard to establish in the UK because tort is fault-based / as opposed to France which moved in the direction of strict liability
 - HRA 1998 – should HRA shape the content of duties in tort?
 - S.3 HRA requirement that a court interprets legislation in accordance with Convention rights + s.6 making it unlawful for a public authority to act in a manner that is incompatible with the Convention rights => this applies even in actions between 2 private individuals?
 - Trespass to the person – Art 2 (right to life) and Art 5 (right to liberty and security) – concerned with similar subject matter –

question whether the remedies provided in tort are sufficient to satisfy the obligations thereby imposed upon the state

- Obligation imposed may be one of positive action i.e. state may be liable for failing to take steps to ensure a party did not contravene another's Convention rights
- Negligence and the right to a court under Art 6 – *Osman v UK* – ECtHR ruled that applicants had a right under Art 6 to have their allegations of negligence against the police heard in full trial – decision cast doubt over the compatibility with the Convention of English law's basic approach to the tort of negligence
 - *Z v UK* appeared to relapse from the earlier decision in *Osman*
- Defamation, privacy and Art 8 and 10 – right under Art 8 to privacy wider than the tort of defamation which protects only reputation; English law does not recognise a liability for invasion of privacy – *Wainwright v Home Office* (even post-HRA)
 - Competing right to freedom of expression in Art 10

D Nolan, "Negligence and Human Rights Law: The Case for Separate Development" (2013) 76 *Modern Law Review* 286.

- Nolan's position – tort law should maintain its own values and should resist to bring in HR values to determine the scope of liability
- Negligence law should not be affected by HR law
- Since the HRA remedy should itself ensure compliance with art 13 any necessity for CL development is eliminated => HRA has weakened the argument for convergence of the CL and Convention legal order, not strengthened it
- False assumptions underlying the argument for convergence: 1) negligence law and HR law serve the same purposes and 2) the norms of HR and law are more important than those of negligence law
 - While HR law is a set of public law norms which gives citizens rights good against the state, negligence law is a set of private law norms which gives everyone rights good against all
 - Second assumption has no obvious foundation – HRA not different from any other legislation + while HR only bind the state, private law rights are universal and bind all legal persons
- Convergence would make negligence law less coherent – e.g. by introducing novel principles in common law like procedural propriety or 'natural justice'

Is tort law effective?

- If the role is to ensure that people who suffer injury receive compensation, tort does work but in an inefficient and costly way (litigation etc)
- The greater the success of the negligence principle in expanding the reach of tort law, the more its inadequacies were exposed – reformers including Atiyah sought to pursue compensation by other means
- Alternatives to tort / alternatives to negligence?
 - New Zealand's Accident Compensation Scheme – doesn't require proof of fault; compensation paid out of a government fund maintained by taxation
 - See Ch 18

ASSAULT AND BATTERY

L&O pp.42-57, 78-79, 85-89

the old form of action for trespass to the person was classified into 3 separate causes of action: assault, battery and false imprisonment – all of which survive the modern law

substantive distinction between trespass and negligence: trespass required an intentional wrong and negligence an unintentional wrong

c.f. *Fowler v Lanning* [1959] 1 QB 426 – not enough for C to plead neither intention nor negligence but merely directness ('D shot me'). it was up to C to prove intention or negligence on D's part => D should know the exact nature of the claim to promote procedural fairness

c.f. *Letang v Cooper* [1965] QB 232:

facts: C was sunbathing in the car park of a hotel when she was run over by D's car. As the time for her to bring an action in negligence had expired, she framed her action in trespass, seeking to benefit from the longer limitation period for this cause of action.

held: claim failed. supported *Fowler* + added that when the injury is not inflicted intentionally, but negligently, the only cause of action is negligence and not trespass bc trespass is actionable without proof of damage.

Lord Denning favoured the abolition of the action for 'negligent trespass' because trespass connotes intention. Lord Diplock concurred, but more circumspect: label did not matter as long as the procedural consequences did not vary depending on the label i.e. no benefit to C from framing their action as 'negligent trespass'

once claim established – C does not have to prove damage has been caused to them by assault or battery; trespass is actionable *per se* – c.f. negligence

BUT if C has suffered damage, they're entitled to claim for that damage and they don't need to show the damage falls within any remoteness rules (as opposed to negligence or nuisance) – they only need to show the damage was caused by that assault/battery.

BATTERY

battery = unlawful, direct and deliberate touching of C by D (per Blackstone); e.g. punching, kicking

i. requirement of aggression/hostility? no

Wilson v Pringle [1987] QB 237 – overturned in *F v West Berkshire Health Authority*

facts: 2 schoolboys were messing around in a school corridor and one of them got hurt. C sued D for battery. D argued horseplay with no intention to inflict injury could not amount to trespass. C contended there merely had to be an intentional

application of force, such as horseplay, regardless of whether it was intended to cause injury.

held: claim failed, hostility was necessary + there was implied consent to such touching. hostility is a question of fact, not limited to ill-will or malevolence. e.g. in *Collins v Wilcock*, police officer touched a woman deliberately but without an intention to do more than restrain her temporarily and this amounted to hostility.

^ unhelpful bc any unlawful touching will amount to battery and will therefore be hostile

F v West Berkshire Health Authority [1990] 2 AC 1 – Lord Goff: the correct definition of battery is that it does not require hostility. battery includes any unconsented touching that was not acceptable in everyday life (e.g. unwanted kiss, unconsented surgery).

ii. positive act required? yes

Innes v Wylie (1844) 1 Car & Kir 257:

facts: policeman prevented C from entering a room where a society which wanted to expel him was dining. C brought a claim in battery.

held: a positive act is required for liability. if the person stood still in the way but took no positive steps to make contact with C – no battery.

iii. directness – not part of criminal law + difficult to pin down what it means in tort

contact must be the result of the act – BUT this is still the case even if achieved through the use of an intervening object: *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890

directness does not mean instantaneous BUT there must be a short interval of time between D's act and the resulting touching:

spitting (*R v Cotesworth* (1704) 3 Mod 172, 87 ER 928), throwing water (*Hopper v Reeve* (1817) 7 Taunt 698, 129 ER 278), or throwing a chair so as to make contact with another person all amount to batteries

BUT c.f. *Breslin v McKevitt* [2011] NICA 33 – terrorists who planted a bomb were liable in battery to the victims injured when it exploded 40 mins later.

ASSAULT

assault = D put C in reasonable fear of immediate unlawful touching (per Blackstone)

i. immediacy – question of fact

Stephens v Myers (1830) 4 C & P 349 (note: old case, decided by jury)

facts: C was the chairman at a parish meeting. the meeting voted to expel D because he was being disruptive. D advanced towards C saying he was going to pull him out of his chair but was stopped by one of the churchwardens. C sued for assault.

issue: whether D was within range of C (if he was close, C could have been put in fear of immediate battery even though the attack was stopped).

held: C had been put in fear of immediate battery because D was within striking distance – but very little value of damages awarded.

Mbasogo v Logo Ltd [2007] QB 846:

facts: the claimant, the head of state of Equatorial Guinea, alleged assault against a group of mercenaries. The mercenaries were an advance party of a larger group whose aim was to overthrow the government but the plot was foiled.

held: the claim was rightly struck out; it was not clear that the advance group was even armed, still less that it had the capacity to carry out an immediate attack

- ii. **reasonable apprehension/fear** – crucial to look at the context bc apprehension can be caused in many ways

no assault if there is no means to put that threat into effect but whether this is so should not solely be governed by hindsight (*Stephen v Myers, R v Ireland*)

apprehension must be related to an overt act of D

R v Ireland [1998] AC 147 (criminal case for assault occasioning ABH) – words or silent phone calls will suffice.

facts: D was obsessed with V who rejected his advances. D responded by starting to harass and stalk her. he ringed her and hanged up as soon as she answered, not saying anything.

issue: whether making silent phone calls amounted to assault

held: yes, crucial that V did not know where D was, his body language etc => she reasonably feared he might be about to break into her home and attack her.

Lord Steyn: ‘The proposition that a gesture may amount to an assault but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done.’

Lord Hope: if V had just been in the room with D and he sat silently doing nothing, there would be no basis there for an assault; instead he was 'deliberately exploiting the uncertainty of the situation in order to put V in fear of immediate battery' => all will depend on the circumstances

Read v Coker (1853) 13 CB 850 – threat of violence exhibiting an intention to assault + ability to carry the threat into execution = assault

facts: the plaintiff was told to leave premises where he conducted his business. He refused, whereupon the defendant collected together some of his workmen, who stood near the plaintiff with their sleeves and aprons tucked up and told the plaintiff they would break his neck if he did not leave.

held: action for assault successful.

BUT c.f. *Tuberville v Savage* (1669) 1 Mod 3 – not every conditional assault will be actionable. crucial to look at whether the conduct creates an apprehension of immediate force.

facts: the defendant put his hand on his sword and said to the plaintiff: 'If it were not assize time I would not take such language from you.'

held: this amounted to a declaration that the plaintiff would not be assaulted; hence there was no action.

INTENTION = D must intend the consequences that constitute the conduct of the tort

battery: unlawful contact must be intended (e.g. intentionally firing a gun not a battery if there is no one in sight, but sufficient if the gun is aimed at another who gets hit)

assault: D must intend the acts that, objectively, cause apprehension of an imminent infliction of force (e.g. throwing a punch when alone is no assault but may be so if another is in range of the blow).

BUT intention does not connote wrongfulness or fault; re: D need not intend to cause harm to C – liability in the trespass torts is strict

+ *R v St George*, *Logdon v DPP*, *Blake v Barnard* – pointing an unloaded gun at another may amount to an assault as long as C does not know the gun is unloaded

recklessness – not clear whether recklessness as to consequences can amount to 'intention'

Iqbal v Prison Officers Association [2009] EWCA Civ 1312, [2010] QB 732 at [70]-[74] (Smith LJ) – false imprisonment case. one judge thought that recklessness should be sufficient for intention.

"73. How far must the claimant go in proving intent? Does he need to show the defendant positively wished to imprison him or is it sufficient if he shows

that the defendant foresaw that imprisonment would be the consequence of his action? Is recklessness as to the consequence sufficient? In my view, mere foresight of the likely consequences would not be sufficient. However, in the criminal law, a reckless disregard of the consequences is taken as sufficient to satisfy the requirement of intention. I think that a similar standard should be applied in the tort of false imprisonment. So I would hold that, if the defendant realises that the likely consequence of his act or omission will be that the claimant is imprisoned and carries on with that act (or omission - see above) regardless of that likely consequence, that will amount to false imprisonment, provided of course that the other requirements are satisfied."

US cases suggest recklessness cannot amount to intention – *O (A Child) v Rhodes* [2016] AC 219

c.f. NI – recklessness could satisfy the intention requirement for battery in *Breslin v McKevitt* [2011] NICA 33

NOTE where C has suffered physical injury, reckless conduct might be categorised as negligent and thus a remedy provided

transferred intent – A, seeking to hit B, actually hits C => test for intention is satisfied bc identity doesn't matter

James v Campbell (1832) 5 C & P 372 – D liable for hitting C even though he intended to hit a third person and did not know he had struck C. judge held this matter went to damages and not to the commission of battery.

DEFENCES

NOTE that per *Murphy v Culhane* [1977] 1 QB 94, contributory negligence, volenti and illegality might also arise in an action for intentional interference with the person

i) **consent** – complete defence to battery and assault

lack of consent must be pleaded and proved by C – *Freeman v Home Office (No 2)* [1984] QB 524

3 requirements:

1. person giving consent needs to have capacity

Gillick v West Norfolk Health Authority [1986] AC 112: in considering the capacity of teenage girls to consent to contraceptive treatment, Lord Scarman said that the child's understanding would have to go further than a simple appreciation of the doctor's reasons for touching the child and the purposes behind the touching; the child would have to have an understanding of the wider social and moral implications of the contraceptive treatment.

R v JA [2011] 2 SCR 440 (Canada): advance consent cannot be given to sexual contact that takes place while the party who gives consent is unconscious

Mental Capacity Act 2005 s.3

1. Does C have the ability to comprehend and retain the relevant information?
2. Is C able to weigh up that information?
3. Is C able to communicate that decision?

^ problems will arise if C isn't able to process information about the touching
e.g. lost consciousness

2. **consent needs to be real/genuine** i.e. must not have been brought about by threat/inappropriate pressure

Chatterton v Gerson [1981] QB 432 – missing information won't suffice to invalidate consent

facts: the plaintiff complained that the defendant surgeon did not advise her as to the possible side effects of the course of treatment he was proposing for her. The plaintiff claimed in both trespass to the person and negligence.

issue: whether failure to inform her about the potential risks had destroyed valid consent.

held: claim failed. mere failure to inform C about some aspect of a touching wouldn't inevitably make C's apparent consent ineffective. once the patient is informed in broad terms of the nature of the procedure and gives her consent, that consent is real unless information is withheld in bad faith.

^ BUT reasoning is troubling even if decision was correct: Bristow LJ referred to circumstances where consent to sex was brought by fraud and said in this instance, consent would be vitiated, which is not accurate: *R v Clarence & R v Dica* – consent to sex wasn't destroyed by missing information when D had not informed V about his HIV positive status.

Reibl v Hughes (1981) 114 DLR 3d 1 (Canada SC): unless there was fraud or misrepresentation to secure the consent, a failure to advise of risks, however serious, went to negligence and not battery.

threat of physical violence will vitiate consent, BUT the courts have been reluctant to treat less immediate pressures the same way:

Freeman v Home Office No 2 [1984] QB 524 – upheld a prisoner's apparent consent to medical treatment, ruling that the institutional pressures did not affect its genuineness

3. **consent must cover the touching or the apprehension which has occurred;** i.e. consent to one kind of touching is not consent to all kinds

unreported case: boy went to hospital to have his tonsils removed but he was circumcised instead => clear battery.

consent forms usually signed BUT not a requirement for valid consent that it has to be written down or articulated expressly; consent can be implied from the circumstances.

Blake v Galloway [2004] 1 WLR 2844, [1]-[7], [20]-[24] – consent presumed for horseplay/ games/ sports

facts: C and D were 15 and went on a lunch break. they engaged in horseplay which involved throwing twigs and pieces of bark chipping at each other. D struck C in the eye, causing a significant injury. C sued in battery (and negligence) and D sought to rely on consent.

held: claim failed. in situations such as games or contact sports there is no requirement for each player to give others express consent – simply playing the game gives rise to an implicit consent to contact

21. “In a sport which inevitably involves the risk of some physical contact, the participants are taken impliedly to consent to those contacts which can reasonably be expected to occur in the course of the game, and to assume the risk of injury from such contacts. Thus, for example, in the context of a fight with fists, ordinarily neither party has a cause of action for any injury suffered during the fight. But they do not assume “the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence”

- ii) **self-defence** – if D’s actions were reasonably necessary to protect himself or others, no liability in battery

Ashley v Chief Constable of Sussex Police [2008] UKHL 25, [2008] 1 A.C. 962 – if D overestimates the threat posed by C, he cannot raise self-defence unless his belief was reasonable

facts: the deceased was shot and killed by an officer of the defendant when they raided the deceased’s flat in the early hours of the morning to execute a warrant to search for drugs. The deceased was naked and unarmed at the time of the shooting but the police officer who shot him alleged the shooting was an act of self-defence. The deceased’s estate brought actions against the police for assault and battery, negligence and false imprisonment.

issue: whether a mistaken but reasonable belief that the officer was under attack could found a defence of self-defence

held: not enough for D genuinely to believe that there is a threat, that belief must be reasonably held – note the approach in tort is different from the one in criminal law where the concern is punishment. the need to balance the