Heading 1 LLB Tort Lecture Outlines: Negligence

Lecture One:

OVERVIEW OF THE LAW OF TORT; INTRODUCTION TO THE CONCEPTS OF DUTY AND BREACH

What is Tort?

A civil wrong – from the old Norman French word for wrong

The etymology links tort to twisting and torsion, just as wrong is linked to wring – so it is something twisted out of the 'right' shape.

"The breach of a duty primarily fixed by law" (Rogers, Winfield & Jolowicz on Tort)

The law here is mainly common law not statute.

The law is therefore generally found in the cases – decisions of the House of Lords/Supreme Court and of the Court of Appeal, together with some decisions of the High Court. Tort is the last bastion of the traditional common law in this respect.

Statute has intervened in relation to a number of areas – Occupiers Liability and Defamation are two which you will be studying - but rarely in a way which completely replaces the common law.

There is also some involvement of EU law – most notably in relation to the Consumer Protection Act, which creates a statutory tort of strict liability in relation to defective products and which is based on the EU Consumer Protection Directive. However most of this involvement is in specific areas which we do not study in detail.

The Objectives of Tort

Compensation – for harm to people, property and purse

Loss distribution

Protection of interests in - land, property, bodily integrity

Deterrence

Retribution

Vindication

Tort or Torts?

There are many named torts, but all come within the basic definition.

Tort and Contract

How does it differ from Contract Law?

The relationship between the parties.

The scope of the obligation.

The way in which damages are assessed.

The issue of fault (liability without fault is commoner in contract) but note: Henderson v Merrett Syndicate Ltd [1994] 3 All ER 506 – can be concurrent liability and claimant can choose whether to sue in contract or tort.

Limitation periods.

Many contractual duties are duties to take reasonable care, which is the same standard as in the tort of negligence.

Tort and Criminal Law

How does it differ from Criminal Law?

Some situations may give rise to both criminal prosecutions and to tort actions.

Different burden of proof.

Criminal prosecution brought by State.

Action in tort brought by individual affected.

Different objectives - compensation and punishment

Parties

- Claimant
- Defendant/Tortfeasor
- Third Party

General Defences

We look at these in detail later. For now, just be aware – consent and illegality may be complete defences to a claim; the claimant's contributory negligence may be a partial defence.

Negligence – the main tort in terms of numbers of claims

Overview of the elements of negligence

Duty

Breach

Causation

Remoteness

The function of these elements

Floodgates argument

Policy considerations moral/practical/public policy.

E.g. liability of the police/emergency services

E.g. pure economic loss

E.g. psychiatric harm to secondary victims

Negligence: Duty of Care

Generally based on an existing duty, already recognised, arising out of a specific relationship, e.g.:

Doctor/Patient – including other health care professionals

Road users one to another – including pedestrians and roadside property

Employer/Employee

Manufacturer/Consumer

OCCASIONALLY new situations need to be considered, but we will look at this later

In the great majority of cases there is no real discussion of duty, it is so obvious a point that it is taken as read.

Reading:

Giliker Chapter 1

Breach of Duty

The question here is whether the defendant has measured up to the standard expected of her/him in the circumstances. The court answers this question by means of a two-step process.

What, as a matter of law, is the standard of care required of the defendant in the circumstances?

As a matter of fact, has the defendant attained that standard? i.e.: Can the claimant prove the defendant's breach of duty in this case?

Standard of Care.

Introduction.

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do."
>
> per Alderson B, Blyth v Birmingham Waterworks Co (1856) 11 Exch 781

The standard is objective.

Nettleship v Weston [1971] 2 QB 291

"All the circumstances."

In establishing the standard of care as a matter of law, the court takes all the circumstances into account. In assessing these circumstances, the following factors may (although not exclusively) be relevant:

The state of knowledge at the time.

Roe v Minister of Health [1954] 2 QB 66

The magnitude of the risk.

Bolton v Stone [1951] AC 850

The importance of the defendant's objective.

Watt v Hertfordshire County Council [1954] 1 WLR 835

The practicality / expense of taking precautionary steps.

Paris v Stepney BC [1951] AC 367

NB: Section 1 of the Compensation Act 2006 states that in considering a claim in negligence, a court may, in determining whether the defendant should have taken particular steps to meet the standard of care, have regard to whether a requirement to take those steps might prevent an activity which is desirable from taking place ...

Lecture Two: Negligence - Breach of Duty and Causation

Defendants professing special skills.

Note that, although many of the leading cases concern medical professionals, the principles also apply to lawyers, architects, engineers and other professionals.

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . . Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice merely because there is a body of opinion that takes a contrary view." per McNair J in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118

Initially it was considered that this approach applied to all aspects of the doctor's duty:

- Diagnosis
- Advice as to treatment options
- Treatment and management

It still applies to the first and third. These are essentially matters of medical skill and judgment. The court reserves the right to intervene if it considers that the approach taken lacks a proper and rational basis: Bolitho v City and Hackney H.A [1997] 4 ALL ER 771. However, this will be rare, although it did occur in Edward Wong Finance v Johnson Stokes & Master [1984] AC 296, where the Privy Council considered a long established aspect of Hong Kong conveyancing practice was not proper and rational, because it created a clear risk of loss.

The standard expected is not personal to the individual, but is that to be expected of someone holding that post, so a house officer or registrar does not have to achieve the standards of a consultant: Wilsher v Essex Area Health Authority [1988] 1 All ER 871

In relation to the second aspect, the position is very different. The obligation of the doctor is to provide the information which is required to enable the patient to give informed consent by making an informed choice between the options available. This is not, essentially, a matter of medical expertise. The autonomy of the patient must be respected, and different patients will place different weight on quality as against quality of life, and whether a particular risk is worth running. The leading authority is now Montgomery v Lanarkshire Health Board [2015] UKSC 11. The minority approach of Lord Scarman in Sidaway v Bethlem Royal Hospital Governors [1985] 1 All ER 643 was approved and that of the majority disapproved. This is a similar approach to that in Chester v Afshar [2005] 1 AC 134.

The proof of negligence.

Always a question of fact

The precise circumstances will always be examined, bearing in mind that there may be more than one reasonable course of action.

The defendant as obliged to act reasonably. This does not mean that he must meet the very highest standards. A handyman must perform DIY tasks reasonably, but not necessarily to the standard of a qualified professional tradesman: Wells v Cooper [1958] 2 QB 265

No precedent of fact

In Qualcast (Wolverhampton) Ltd v Haynes [i959] AC 743 Lord Somervell and Lord Denning pointed out that, although judges do give reasons for why, after considering all the evidence and the circumstances, they do or do not find that there has been a breach, these reasons should not be seen as propositions of law which can be relied on in later cases. This warning has been repeated in Jolley v Sutton LBC [2000] 3 All ER 400 and in a Practice Statement on citation of authority ([2001] 1 WLR 1001).

Civil Evidence Act 1968 S.11.

Reversal of burden of proof where there is a relevant conviction (e.g. careless driving).

The facts speak for themselves.

Often called, in Latin, *res ipsa loquitur.*

This will ONLY apply where the cause of the harm is not known. Where it does apply, an inference of breach of duty is raised against the defendant. The doctrine will only apply where the situation in which damage arises is 'under the control of the defendant'.

Gee v Metropolitan Railway Co (1873) LRF QB 161

Easson v LNE Railway Co [1944] KB 421

The events giving rise to the damage must also be such as would not normally arise without negligence.

Scott v London and St Katherine's Docks Co (1865) 3 Hurl & C 596 Exch

The doctrine will also only be applicable where there is an absence of explanatory evidence available to the claimant: e.g. foreign bodies in foodstuffs

Causation and Remoteness

Defendant's breach of duty must have caused the claimant's harm as a matter of fact and law. We use causation for the first and remoteness for the second.

Causation is always relevant and often the determining factor. Carelessness without consequences is not actionable.

SINGLE POSSIBLE CAUSE

The 'But For' Test

Barnett & Chelsea and Kensington Hospital [1969] 1 QB 428

MULTIPLE CAUSES

SUCCESSIVE INDEPENDENT CAUSES.

> Performance Cars v Abrahams [1962] 1 QB 33
>
> Baker v Willoughby [1969] 3 All ER 1528
>
> Jobling v Associated Dairies [1982] AC 794
>
> Hotson v East Berkshire AHA [1987] AC 750

SIMULTANEOUS INDEPENDENT CAUSES

> Wilsher v Essex AHA [1988] AC 1074
>
> Fitzgerald v Lane [1989] 1 AC 328

SUCCESSIVE CUMULATIVE CAUSES

Holtby v Brigham & Cowan Ltd [2000] 3 ALL ER 421

SIMULTANEOUS CUMULATIVE CAUSES

Bonnington Castings Ltd v Wardlaw [1956] AC 613

MATERIAL INCREASE IN RISK

This is a different approach; it is limited to cases where the 'ordinary' rules do not apply, typically where there is a single agent

McGhee v National Coal Board [1973] 1 WLR 1

Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32

Barker v Corus & Saint Gobain Pipelines plc [2006] UKHL 20

Compensation Act 2006

Karen Sienkiewicz v Grief (UK) Ltd [2009] EWCA Civ 1159

Sienkiewicz held that it was irrelevant that the deceased had been exposed to asbestos in the general atmosphere as well as through tortious exposure at work. The test applied in Fairchild was the correct one and she only needed to prove material increase in the risk of harm.

Fairchild also considered in Grace Sanderson v Donna Marie Hull [2008] EWCA Civ 1211

Held: Fairchild only applied where medical knowledge meant that causation was impossible to satisfy with the but for test. It did not apply just because it was difficult to prove causation.

A CASE STUDY:

Bailey v (1) M.O.D (2) Portsmouth Hospitals NHS Trust [2008] EWCA CIV 883

Claimant was treated in the first defendant's hospital where she received negligent post-operative care, which weakened her. She was then moved to a hospital owned by the second defendant. There she suffered pancreatitis. She vomited, and because she was too weak to protect her airway she inhaled the vomit, suffering cardiac arrest that resulted in brain damage.

The main issue was one of causation- was the claimant's weakness due to the negligent post-operative care by the first defendant, or because of the non-negligent pancreatitis.

Held: Had she been looked after properly she would not have been in a weakened state when she vomited while in the care of the second defendant. The negligence had made a more than minimal contribution to the weakness, and the weakness was a direct cause of the injury, therefore she succeeded in full.

Waller LJ summarised the rules of causation as follows:-

If the evidence shows that on the balance of probabilities the injury would have occurred as a result of a non-tortious cause, the claimant will fail. E.g. Hotson.

If the claimant can show that but for the negligence the injury would probably not have occurred, they satisfy the but- for test and will succeed.

In a case where medical science cannot satisfy the 'but for test' but can show that the contribution of the negligent cause was more than negligible, the claimant can succeed.

This seems to make it easier for claimants where the medical condition is not well understood.

Multiple Causes - Breaks in the Chain of Causation/ *Novus Actus Interveniens.*

> "To break the chain of causation, it must be shown that there is … a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic." per Lord Wright The Oropesa [1943] p32