



**Peter D Aeberli**  
**Barrister - Arbitrator - Mediator – Adjudicator**



**KINGS COLLEGE LONDON**  
**CENTRE OF CONSTRUCTION LAW AND MANAGEMENT**  
**MSc/DIPLOMA IN CONSTRUCTION LAW AND ARBITRATION: PART A**

**THE LAW OF TORTS**

**SECTION I: THE NATURE AND CLASSIFICATIONS OF TORTS**

**1. Basic definitions: The distinction between tort and contract**

1.1 Definitions

A tort is a breach of a legal duty owed by one person to another person. It is an infringement of a private right. There are many different torts, all with their own principles of liability. In order to make sense of these distinctions it is essential to understand the concept of the cause of action: the elements of the tort that must be proved to establish liability.

1.2 How tort differs from contract

1.2.1 In tort the duties owed by one party to another are fixed by law, that is either by statute e.g. the Occupiers Liability Act 1957 (which says that an occupier owes a duty of care to his lawful visitors) or by the common law e.g. Rylands v. Fletcher liability for the escape of dangerous substances.

In contract, subject to implied terms, the duties of each party are established by the contract itself.

1.2.2 An action in tort aims at the prevention of (by an injunction), or compensation for, harm (by action for damages).

An action in contract aims at the enforcement of certain promises.

1.2.3 In general, only the parties to a contract may sue on it. In tort, obligations can be owed to a range of persons or to persons generally

1.2.4 A claim (for damages) in tort is for un-liquidated damages i.e. P seeks to recover such amount as the court in its discretion may award. A claim in contract will often be for a pre-determined amount (liquidated damages): e.g. the contract price or interest due at the contract rate.

1.2.5 As to the kind of damage that can be compensated the rules as to remoteness of damage in contract and tort are different. In contract Hadley v. Baxendale

(1854) 9 Exch 341 defines what kind of damage that is recoverable. Furthermore, only damage that was "not unlikely to occur" is recoverable. In tort the test of remoteness depends on the nature of the tort and is either foreseeability of kind of harm or directness of damage.

1.2.6 As to the purpose of damages, this is the same in contract and in tort. It is to provide a sum of money that will put the injured person in the same position he would have been in had the breach of duty or the wrongful act not occurred, a principle which applies in contract and tort.

(a) In contract the question is, what position would the plaintiff have been in if the contract had been fulfilled? In tort the question is, what position would the plaintiff have been in if the wrongful act had not occurred?

(b) In both contract and tort, there is an obligation on the plaintiff to take reasonable steps to mitigate his loss.

1.2.7 The limitation periods are different in contract and tort. In contract, they are 6 years from breach (and 12 years where the contract is under seal). In tort the 6 years starts to run from the date when the cause of action accrued although there are special rules applicable to personal injuries and death (3 year extendable periods) and to latent damage, see The Latent Damage Act 1986. These rules are discussed in more detail below.

### 1.3 Overlapping Liability in tort and contract

Concurrent liability in contract and tort, particularly negligence, may arise out of the same facts, Henderson v. Merrett Syndicates Ltd [1994] 3 WLR 761, rejecting the contrary view in Tai Hing Cotton Mill v. Liu Chong Haing Bank [1986] AC 80, 107 (PC). But the existence of a contract may qualify the nature and extent of any duty owed in negligence, see, for example Greater Nottingham Co-op v. Cementation [1989] QB 71, Norwich City Council v. Harvey [1989] 1 WLR 828.

### 1.4 Tort and Crime

A crime is a public wrong against society as a whole for which the guilty party may be prosecuted and punished. The same wrongful act may also be a tort, for which the injured party may sue the wrongdoer for compensation (damages). For example D may be sued after a road accident in respect of P's injuries and also prosecuted for careless driving. In a rape case, the DPP did not prosecute; but the complainant successfully brought a tort action for trespass to the person.

### 1.5 Tort and Human Rights

There is an emerging line of authority in which the common law elements of various torts appear to be undergoing modification to provide protection for rights, specifically those under Article 8 of the Convention on Human Rights (right to respect for property), given effect to by the Human Rights Act 1998 (HRA 1998). The Act may also, if the common law fails to provide a sufficient remedy, give rights actionable in damages. See the discussion in Marcic v. Thames Water [2002] 3WLR 932 (CA<sup>1</sup>); McKenna v. British Aluminium, Times 25<sup>th</sup> April 2002<sup>2</sup>.

<sup>1</sup> **Marcic**: The common law was found to be sufficient to provide the claimant with just satisfaction for the wrong he had suffered. This displaced any right he might otherwise have had to damages under the HRA 1998, in particular under s. 5 of the Act and article 8 of the convention. The CA did, however, consider that there would have been such a right.

<sup>2</sup> **McKenna**: The court, in refusing to summarily dismiss a claim, considered it arguable that the property requirement for a wrong to be actionable in nuisance should be extended in the light of the HRA 1998.

## 2. General Characteristics of Tortious Liability

### 2.1 Fault

In some cases, liability is based on fault. Sometimes an intention to injure is required. Often negligence alone is sufficient. In other cases there is strict liability, i.e. independent of fault, e.g. civil liabilities created under the Environmental Protection Act 1991.

### 2.2 Motive and Malice

Motive means the reason for conduct.

Malice may mean evil motive or may mean wrongful intention. Motive is usually irrelevant, i.e. if conduct is unlawful a good motive is no defence for D. If conduct is lawful a bad motive alone will not make D liable, Bradford Corporation v. Pickles (1895).

Malice is a more important factor when considering certain defences, e.g. fair comment and qualified privilege in libel and slander.

## 3. Vicarious Liability in Tort

3.1 Masters/employers are liable for the torts of their servants/employees committed during the course of their employment.

3.2 The control test is useful, but is not conclusive evidence that the relationship of master/servant exists.

See Denning LJ in Stevenson, Jordan & Harrison v. MacDonald [1952] 1 TLR 101: One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business, is not integrated into it, but is only accessory to it.

See the distinctions proposed by McKenna J. in Ready Mixed Concrete v. Minister of Pensions and National Insurance [1968] 2 QB 497.

3.2.1 The servant agrees that, for a wage, he will provide his own skill in the performance of some service for his master;

3.2.2 The servant agrees he will be subject to the other's control;

3.2.3 Are the other provisions of the agreement consistent with a contract of service or a contract for services? Consider factors such as:

a) Does he provide his own equipment?

b) Does he hire his own helpers?

c) What degree of risk does he take?

3.3 An employee is acting in the course of his employment when he is doing what he is employed to do, or something reasonably incidental to it. He is unlikely to be in the course of his employment travelling to work, but he might be if he was doing a job for

his employer and travelled directly to his destination from home. Everything will depend on the circumstances; whether or not he is being paid is a factor, although not decisive. See Nancollas v. Insurance Officer [1985] 1 All ER 833 at 836. For a recent application of this principle, see Smith v. Stages [1989] AC 928.

- 3.4 An employee will be in the course of his employment where he commits a wrong expressly or by implication authorised by his master, or the wrong is the result of an unauthorised way of doing something authorised or necessarily incidental to doing something the employee is employed to do, see Century Insurance v. N. Ireland Road Transport [1942] AC 509.
- 3.5 The “unauthorised way of doing something authorised” test was doubted in Lister v. Hesley Hall [2000] 2 All ER 765 (HL) where it was said that the real issue was the closeness of the connection between the employee’s wrongful act and his employment<sup>3</sup>.
- 3.6 The master may recover from the employee some/all the damages he has been required to pay to P because of the servant’s wrong, see Lister v. Romford Ice & Cold Storage Co. [1957] AC 555.
- 3.7 The general rule is that an employer is not liable for the torts of his independent contractors. But the employer will be liable where he himself owes a duty of care to the victim which is non-delegable. Non-delegable duties can arise by statute or at common law. For example:
  - 3.7.1 Where two houses are entitled to mutual support the owner of one cannot escape responsibility for the consequences of withdrawing support by entrusting the task of rebuilding his house to a contractor;
  - 3.7.2 Extra hazardous activities; see, for example, Alcock v. Wraith [1991] 59 Build LR 16<sup>4</sup>);
  - 3.7.3 Where a person causes operations to be undertaken on the highway, which operations may cause danger to persons using the highway, he is liable for damage resulting from the negligence of an independent contractor in carrying out the operations.
- 3.8 A main contractor does not take on a non-delegable duty to ensure that a building is free from dangerous defects, so that he will not be liable in negligence for plastering work executed negligently by a sub-contractor. Neither will a duty to supervise be imposed to enable this rule to be circumvented, see D&F Estates Ltd v. Church Commissioners [1988] 2 All ER 992 (HL).
- 3.9 One person may also be liable for the tort of another through authorisation or ratification of the tortious act.

#### 4. Joint Tortfeasors

- 4.1 Generally, a tortfeasor is liable for the damage which he causes to person suffering loss.

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<sup>3</sup> **Lister:** Sexual abuse by warden of boys in special school. Was employer vicariously liable. Mere fact that employment gave employee the opportunity to commit the tort, did not mean it was done in course of employment, some greater connection was required. While time and place of the tortious action was relevant, it was not necessarily conclusive. While the fact that the tort was committed outside working hours and away from place of work might suggest it was outside the scope of employment, the mere fact it occurred in work place in working course did not necessarily mean that was committed in course of employment. But it was relatively easy to demonstrate a sufficient connection between the tortious conduct of the employee and his where, as here, the employer had been entrusted with a duty to a thing or person and delegated it to an employee.

<sup>4</sup> **Alcock:** Work by a builder on a party wall, causing damp and dry rot in next door property.

- 4.2 Persons are joint tortfeasors when they participate together in the commission of a tort and their respective acts are done in furtherance of a common design. They are jointly and severally responsible for the whole amount of the damage caused by the tort, irrespective of the extent of their individual participation.
- 4.3 Persons are several tortfeasors where they cause similar damage to a person by unrelated acts. They are liable only for the damage that they have caused.
- 4.4 The Civil Liability (Contribution) Act 1978 governs contribution, *inter alia*, between joint and between several tortfeasors. Under the Act any person who is liable in respect of damage suffered by another can recover from any other person liable in respect of the same damage, whether jointly with him or otherwise, a just and equitable contribution.

## 5. Some General Defences

- 5.1 *Volenti non fit injuria* (willingness or consent).  
P has no remedy in tort where P consents or assents to the doing of the act which causes him harm, e.g. necessary injury sustained as part of a lawful operation or injury sustained as a result of an act of negligence that was expressly or by implication consented to, compare Dann v. Hamilton [1939] 1 KB 509 with Morris v. Murry [1990] 3 All ER 801.
- 5.2 *Ex turpi causa* (no duty of care exists between participants in a crime).  
P has no remedy in tort where the act complained of is a step in the execution of a common illegal purpose, see Pitts v. Hunt [1990] 3 WLR 542.
- 5.3 Contributory Negligence  
At common law, contributory negligence by the plaintiff generally released the defendant from liability. This was altered by statute such that where any person suffers damage as a result partly the fault of any other person or persons, a claim in respect of that damage is not defeated by reason of the fault of the person suffering the damage but the damages recoverable are reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage, s. 1(1) the Law Reform (Contributory Negligence) Act 1945.
  - 5.3.1 It is not necessary to show that the injured person owed a duty to the wrongdoer. All that has to be proved is that he failed to take reasonable precautions for his own safety in respect of the particular danger which occurred and thereby contributed to his own injury. The nature of the defence was considered by Denning LJ in Jones v. Livox Quarries Ltd [1952] 2 QB 608:  
  
 "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably, prudent man, he might hurt himself, and in his reckonings he must take into account the possibility of others being careless."
  - 5.3.2 Contributory negligence, if established, serves to reduce the damages payable to the plaintiff.
  - 5.3.3 The most difficult issue is by what proportion the plaintiff's damages should be reduced. In certain situations the relationship between the plaintiff's conduct

and the occurrence of the accident can be the best guide, in other situations, the relationship between that conduct and the damage suffered, consider Jones v. Livox Quarries [1952] 2 QB 608; Froom v. Butcher [1976] QB 286.

#### 5.4 Statutory Authority

Where the exercise of a power authorised by statute causes damage, the plaintiff who suffers damage is left without redress unless the statute makes some provision for compensation. However, work causing substantial interference with neighbouring property will not normally be intra vires the statute unless that interference is the inevitable consequence of the work.

Compare Metropolitan Asylum v. Hill (1881) 6 App. Cas. 193, Allen v. Gulf Oil Refining [1980] QB 156.

#### 5.5 Exclusion notices or terms

These may be valid at common law either to restrict liability or exclude a duty. There are, however, various statutory controls over their effectiveness, see for instance The Unfair Contract Terms Act 1977.

#### 5.6 Limitation

The availability of a remedy in tort may be statute barred if it is not brought within the periods allowed by the Limitation Act 1980, as amended by the Latent Damage Act 1986.

5.6.1 Section 2 of the 1980 Act provides that an action founded in tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

5.6.2 Section 11 of the 1980 Act provides that where the damages claimed by the plaintiff consist of, or include, damages in respect of personal injuries then the relevant period is three years from the date the cause of action accrued or the date of knowledge (if later) of the person injured. There are provisions that enable this period to be extended in certain circumstances.

5.6.3 The amendments made by the Latent Damage Act 1986 only concern claims in negligence, and are considered in Section 2.

### 6. General Remedies

6.1 The two principal remedies available against a tortfeasor are the injunction and damages.

#### 6.2 The injunction

6.2.1 The injunction is an equitable remedy granted either to prevent the commission, continuance or repetition of an injury where damages is not an adequate remedy, in particular, where a proprietary interest is affected..

6.2.2 All torts except assault and battery, negligence, false imprisonment and malicious prosecution can be restrained by injunction, but not if the defendant is the Crown, see s. 21(1) the Crown Proceedings Act 1947.

6.2.3 Injunctions can be either prohibitory or mandatory. The former restrains the defendant from doing something. The latter requires him to do something. They must be precisely drawn, in particular the latter.

- 6.2.4 Injunctions can be either interlocutory or perpetual:
- (a) Interlocutory injunctions are of provisional effect until the hearing of the action, and are intended to preserve the status quo until that time. Normally the applicant will have to give an undertaking in damages, see American Cyanamid v. Ethicon Ltd. [1975] AC 396, Kirklees MBC v. Wickes Building Supplies [1991] 3 WLR 981;
  - (b) Perpetual injunctions are given once the matter has been finally determined; see Redland Bricks v. Morris [1970] AC 652.
- 6.2.5 A court has jurisdiction deriving from Lord Cairns' Act 1858, where it might grant an injunction, to award damages in substitution or in addition to the injunction.
- 6.2.6 Injunctions will not be granted where compliance is impossible, or where the applicant has failed to come promptly to the court (laches), see Surrey County Council v. Bredero Homes [1992] 3 All ER 302;
- 6.2.7 A *quia timet* injunction may be granted to prevent an immanent or very probable injury, consider Midland Bank Plc. v. Bargrove Property Services. It may be that damages could be awarded in lieu of such an injunction under Lord Cairn's Act or in support of the plaintiff's right to enter onto the defendant's land to abate the nuisance. See discussion in Bar-Gur v. Squire [1993] EGCS 151.

### 6.3 Damages

The basic principle is that damages are compensatory. The plaintiff should be put in the same position, so far as money can do so, as if the tort had not been committed, see Watts v. Morrow [1991] 4 All ER 937. Recovery is, however, circumscribed by the requirement that the damage must not be too remote.

- 6.3.1 For torts such as negligence, nuisance and Rylands v. Fletcher the test of remoteness is reasonable foresight. Was some kind of damage such as that actually suffered reasonably foreseeable at the time that the wrongful act was done? The Wagon Mound [1961] AC 388, Hughes v. Lord Advocate [1966] 1 WLR 1369, Cambridge Water v. Eastern Leather [1994] 2 WLR 53 (HL).
- 6.3.2 For the tort of deceit, the remoteness test is one of directness. Was the damage the direct and natural result of the wrongful act? See Doyle v. Olby [1969] 2 QB 158.
- 6.4 The extent of recovery is limited by the requirement that the plaintiff takes reasonable steps to mitigate his loss. This might include pursuing alternative remedies, Walker v. Medicott & Son, The Times, 25 November 1998.
- 6.5 Exemplary damages are available but only where there has been oppressive and unconstitutional action by a servant of the Government, where the defendant's wrongful conduct was calculated by him to realise a profit for himself which might well exceed the compensation payable to the claimant, and in any case where such damages are authorised by statute, Rooks v. Bernard [1964] 1 All ER 367 (HL), 369. Exemplary damages are not available in the tort of negligence, nuisance, strict liability or breach of statutory duty (unless provided for by the statute). They may not be available against a person whose only liability is vicarious, Kuddus v. CC of Leicestershire [2002] 2 All ER 193 (HL).

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**THE LAW OF TORTS**

**SECTION II: THE LAW OF NEGLIGENCE**

**1. General Definitions**

- 1.1 Negligence is the breach by the defendant of a legal duty to take reasonable care that results in damage to the claimant. Damage is the gist of the action (compare contract, where the cause of action arises on breach).
- 1.2 It is traditionally composed of four basic ingredients:
- 1.2.1 A duty of care owed by the defendant, the wrongdoer/tortfeasor, to the claimant to avoid the type of damage suffered by the claimant;
  - 1.2.2 A breach of that duty;
  - 1.2.3 A causal relationship between the breach of duty and the damage suffered;
  - 1.2.4 Damage to the claimant, which is not too remote.
  - 1.2.5 Consideration must also be given to any defences available to the defendant.

**2. Duty of Care**

- 2.1 Not all carelessness will be a breach of duty of care. The law recognises certain categories of situations in which a duty of care generally arises but it is not the case that a duty of care cannot arise outside these categories, for the law will recognise new duty situations that are analogous with the existing categories. On the other hand, the view that there is a general duty of care owed to all persons in all circumstances is much too wide.
- 2.2 One of the earliest general tests for deciding whether or not a duty of care exists is found in the speech of Lord Atkin in Donoghue v. Stevenson [1932] AC 562.

"There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances ... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

- 2.3 The nineteen-seventies saw a movement towards a test which would have been as simple as "if there is reasonable foreseeability of harm to the Plaintiff, there will be liability, unless there is some good reason, grounded in policy, why there should not be



liability". (per Lord Wilberforce, Ann's v. Merton London Borough Council [1978] AC 728. But in the late 1980s there was a retreat from this generalist view and Ann's was departed from in Murphy v. Brentwood D.C. [1990] 3 WLR 414.

- 2.4 For a period of time, the courts preferred to identify various categories of duty of care situations. In each of these, there was an interrelationship between the kind of harm to which the duty of care related and the requirements that had to be satisfied for a duty to care to arise. In the various categories different weight is given to the two requirements that Lord Atkin considered necessary for a duty of care: foreseeability of harm and a neighbourhood relationship (now usually called proximity). This approach was favoured by Lord Bridge in Caparo Industries Plc v. Dickman [1990] 2 AC 605:

"While recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as a guide to the existence, the scope and limits of the varied duties of care which the law imposes."

- 2.5 More recently there has been a return to a generalist approach using a duty of care test composed of three elements, foreseeability, proximity, and a residual just and reasonable test, Marc Rich v. Bishop Park Marine [1995] 3 WLR 227 (HL) (a three stage test!). Thus Lord Styne, while reiterating that the law of negligence developed incrementally, adopted and approved the following passage from Savill LJ's judgement in the Court of Appeal.

"... whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by enquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course ... these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed. ... Again, in most cases of the direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question of whether a duty of care should be imposed in any given case."

- 2.6 The principles relevant to each element of the three stage test are as follows.

2.6.1 Foreseeability of kind of harm: Was it reasonably foreseeable at the time of the relevant conduct that it would, if done carelessly, be likely to cause harm to the injured person of the kind sustained by him, Donoghue v. Stevenson?

2.6.2 Proximity of relationship: Was there, at the time of the relevant conduct, a sufficient relationship between the alleged wrongdoer and the injured person such that the former ought reasonably to have had the latter in contemplation as being so affected by that conduct, if done carelessly? A useful explanation is found in Sutherland Shire Council v. Haeman (1985) 60 ALR 1:

"It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant,

circumstantial proximity such as an overriding relationship ... of professional man and client and what might (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular course of conduct and the loss or injury sustained."

- 2.6.3 Is it just and reasonable, in all the circumstances of the case, to impose the duty of care for which the injured person contends? This involves the exercise of judicial pragmatism considering matters such as the relative risk exposure of the parties and the extent to which they had the opportunity to manage their respective risk exposure by contractual mechanisms or whether their relationship was governed by well established legal principles that should not be disrupted by the imposition of a duty of care, consider Pacific Associates Inc. v. Baxter [1990] 1 QB 993.

2.7 The duty of care categories

The weight given to these elements depends on the circumstances of the case, but existing duty of care situations remain be a useful predictive device.

The duty of care situations can best be categorised by reference to the various kinds of harm, or damage, which are actionable in the tort of negligence (the gist of the action). Actionable harm can be contrasted with consequential loss. Once liability in negligence in respect of a kind of harm is established, then the wrongdoer will also be liable for consequential losses that flow from the harm in respect of which the duty was owed. This distinction between actionable harm and consequential loss is illustrated by Spartan Steel & Alloys Ltd v. Martin & Co (Contractors) Ltd [1973] 1 QB 27.

2.8 The existing duty of care situations are as follows:

- 2.8.1 Physical injury to the person: This is an obvious form of recognised damage. Where damages are due for physical injury the sum awarded may include a modest sum for mental suffering consequent upon physical inconvenience or discomfort.

Generally foreseeability of harm is sufficient to establish a duty of care, see Donoghue v. Stevenson. Nevertheless, the concept of proximity may sometimes relevant to curtail the extent of liability where the actual damage is caused by a third party, see Topp v. London County Bus [1993] WLR 976 (CA); contrast Perrett v. Collins [1998] 2 Lloyd's Rep 255 (CA).

- 2.8.2 Nervous Shock (psychological injury to the person): This is often seen as merely part of the physical injury category but, in practice, more limited duties of care are owed. Probably because the courts mistrust psychiatrists!

The damage must be a recognised psychiatric illness, mere mental distress is not sufficient.

The principal requirements for a duty of care are foreseeability of harm and proximity.

There are two foreseeability tests which are referred to in the cases.

- The "impact" theory: As long as it was reasonably foreseeable that the defendant's conduct would inflict injury on the plaintiff by actual impact of some sort, the plaintiff can recover for illness resulting from shock, even

though he sustained no injury through impact, see the majority view in Bourhill v. Young [1943] AC 92.

- The "shock" theory (this gives rise to a wider duty of care and prevails today): As long as it was reasonably foreseeable that the defendant's conduct would have caused even only shock to an ordinarily strong-nerved person, situated in the position of Plaintiff, then the plaintiff can recover in respect of the shock to him, see Hinz v. Berry [1970] 1 QB 40.
- But now consider Page v. Smith [1996] 1 AC 115, reasonable foreseeability of physical injury is sufficient to found a claim by a person who only suffered psychiatric harm, if that person is a primary victim, one who was owed a duty of care to avoid physical injury. But if he is a secondary victim, one not exposed to danger or in reasonable fear of danger, there are additional controls on liability, Frost v. Chief Constable of South Yorkshire [1998] 3 WLR<sup>5</sup> 1509 (HL).

Where, the person suffering psychiatric harm is a secondary victim, one not exposed to danger or in reasonable fear of danger, the foreseeability test imposes additional restrictions on liability. In law, it is only reasonably foreseeable that persons will suffer nervous shock if they have a relationship involving close ties of love and affection with the person, or occasionally the property, that has suffered injury or been put in peril by the wrongdoer's conduct. The existence of such relationship is a question of fact, although in certain categories of relationship it may be presumed, see Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310, Attia v. British Gas [1988] QB 304.

The proximity test requires that the nervous shock must come through seeing or hearing the incident involving the loved one, or property, or coming upon the immediate aftermath, see McLoughlin v. O'Brian [1983] AC 410, Ravenscroft v. Rederiaktie-bolaget Transatlantic [1992] 2 All ER 470.

- 2.8.3 Rescuers: If someone (or property) is put into a position of peril it may be reasonably foreseeable that out of common humanity someone will attempt a rescue. Hence a duty of care is, generally, owed to such persons, Baker v. Hopkins [1959] 1 WLR 966, contrast Crossley v. Rawlinson [1982] 1 WLR 369. This duty is independent of that owed to the victim.

Similar principles apply where the rescuer suffers nervous shock without physical injury and since rescuers are primary victims, the Alcock control factors do not apply; see discussion in Frost v. Chief Constable of South Yorkshire [1998] 3 WLR 1509 (HL).

- 2.8.4 Physical Damage to other property: Again, this is an obvious form of recognised damage. But the plaintiff must have a proprietary right in the thing damaged - either ownership or possession see Leigh & Sullivan v. Aliakmon Shipping [1986] AC 785 (HL). (Note the Carriage of Goods by Sea Act 1992 and the exception created by section 3 of The Latent Damage Act 1986. A subsequent owner of (certain types of?) property may sue in respect of damage that occurred during the ownership of a predecessor, but remained undiscovered).

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<sup>5</sup> Frost v. Chief Constable of West Yorkshire [1998] 3 WLR 1509 (HL), CC's duty to officers similar to employer's duty to employees but did not extend to protect employees from psychiatric harm where no breach of duty to protect from physical harm, ie no liability to those not involved in the disaster a rescuers. Nor were Ps primary victims as not exposed to physical danger and did not believe they were.

The property damaged must be other than that supplied by the tortfeasor. There is a crucial distinction between damage caused by a defective thing to some other thing, and a defect in a thing which makes it less valuable than it would otherwise be. The latter type of damage is pure economic loss, not recoverable under this category but under a separate category, discussed below, see D & F Estates v. Church Commissioners [1988] 3 WLR 368, Murphy v. Brentwood D.C. [1990] 3 WLR 414.

Where the wrongdoer's work is incorporated into another product, the distinction between property supplied by the wrongdoer and other property can lead to difficulties. This has led to the development of the complex structure theory, see Murphy v. Brentwood D.C. [1990] 3 WLR 414.

If these requirements are satisfied then the test for a duty of care is foreseeability of loss as for the personal injury category, see Marc Rich v. Bishop Park Marine [1995] 3 WLR 227 (HL) for an application of the proximity test.

- 2.8.5 Pure Economic Loss: This is generally a failure to make an expected profit or a diminution in value in property resulting from the alleged carelessness of another's conduct.

Until the 1960's it was thought that economic loss was outside the purview of negligence, see Candler v. Crane Christmas [1951] 2 KB 164, Weller v. Foot and Mouth Research Institute [1966] 1 QB 569, The first breach of this general principle occurred when the House of Lords held that pure economic loss resulting from a negligent misstatement was recoverable, Hedley Byrne & Co. Ltd v. Heller & Partners [1964] AC 465 where there was a special relationship between the parties. Thus, Lord Morris considered that:

"it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others can reasonably rely upon his judgement or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to or, or allows his information or advice to be passed on to another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

All three elements of the three stage test must be considered in deciding whether or not a duty is owed. But most attention focuses on proximity, with justice and reasonableness as a potentially limiting actor of uncertain ambit.

In cases involving negligent advice the proximity test involves considering knowledge of reliance and reasonableness of reliance, see Caparo Industries v. Dickman [1990] 2 AC 605. A useful summary is provided in McNaughton Papers v. Hicks [1991] 1 All ER 134 where Neill LJ identified the following factors as relevant:

- a) The purpose for which the statement was made;
- b) The purpose for which the statement was communicated;

- c) The relationship between the maker and the recipient and any relevant third party;
- d) The size of the class to which the recipient belongs;
- e) The maker's state of knowledge of purpose for which statement communicated to recipient and of the type of reliance by the latter;
- f) Whether there was and/or ought to have been reliance by the recipient.

Some of the cases refer to a "voluntary undertaking of responsibility". It was suggested that this was not a useful concept as the courts may impose a duty of care even where the requirement is not met, see Smith v. Eric Bush [1990] 1 AC 851, but it is relevant where the negligence relates to an act, not a statement. Thus in Henderson v. Merrett Syndicates [1994] 3 WLR 761, Lord Goff stated:

"if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages (to) that other in respect of economic loss which flows from the negligent performance of those services. ... in some circumstances, for example where the undertaking to furnish the relevant service is given on an informal occasion, there may be no assumption of responsibility and, likewise, that an assumption of responsibility may be negated by an appropriate disclaimer. I wish to add in parenthesis that ... an assumption of responsibility by, for example, a professional man may give rise to liability in respect of negligent omissions as much as negligent acts of commission."

2.8.6 Are there other categories? Consider Junior Books Ltd. v. Veitchi [1983] 1 AC 520, Ministry of Housing and Local Government v. Sharp [1979] 2 QB 223, White v. Jones [1995] AC 207<sup>6</sup>.

2.9 Under any of the categories, the duty can relate either to the doing of an act or to the making of a statement. Where the act relates to the provision of a potentially dangerous object the duty may include a continuing obligation to warn the recipient of the danger as and when it becomes known, consider Hobbs v. Baxenden Chemical [1992] 1 Lloyd's Rep. 54.

2.10 Dependants, a special case

At common law that actions in tort did not, generally, survive for the benefit of the deceased's estate nor could damages be recovered for the death of another. The position is now governed by two statutes. Under the Law Reform (Miscellaneous Provisions) Act 1934, an action in tort will survive for the benefit of the estate, although the estate cannot maintain an action for income that the deceased would have earned but for his premature death (the lost years claim). Under what is now s. 1 of the Fatal Accidents Act 1976 an action may be brought by the estate against any person who wrongfully caused the death of a person, for the benefit of the dependants (a defined term) of that person. Apart from a statutory entitlement to a fixed sum by way of bereavement damages, the principal claim in such an action will be for loss of financial support. A claim can only be maintained if and to the extent that the deceased, had he lived, would have had a claim.

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<sup>6</sup> White v. Jones: Solicitor owed duty of care to beneficiary of will to see that testator's wishes properly carried out. See also Garham v. British Telecommunications Plc [2000] 4 All ER 807, duty of care owed by person offering pensions and life cover advice, to dependants of customer, not to give his customer negligence advice that will adversely affect the interests that the customer intended those dependants to have.

2.11 Policy and other restrictions of liability. There are a number of situations in which either because of historical circumstances, or from a fear of the floodgates argument the court refuses to impose duties of care in situations in which, having regard to the kind of harm that has occurred, it might be expected to do so.

2.11.1 Thus, in the absence of special circumstances, vendors of real property do not owe duties in negligence to purchasers, *caveat emptor* prevails. Similarly a landlord owes no duties of care in negligence to its tenant as regards the state of the demised premises, except in relation to work done by it on the premises see, for instance, Targett v. Torfaen BC [1991] HLR 164.

2.11.2 Another situation is where the alleged wrongful act is committed by someone carrying out statutory functions. Here issues of breach of statutory duty, negligence, and policy become mixed up in a veritable witches brew. But the court often distinguishes between policy decisions, in respect to which no duties in negligence arise, and failures at the operational level, which can give rise to an action in negligence, consider East Suffolk Rivers Catchment Board v. Kent [1941] AC 74, Dorset Yacht v. Home Office [1970] AC 1004.

### 3. **Statutory extensions and codification of duties of care**

#### 3.1 Dangerous premises - visitors

The Occupiers' Liability Act 1957 replaces the duty of care in negligence owed by an occupier at common law to his invitees or licensees by the "common duty of care" owed to his lawful visitors in respect of his premises, or any fixed or movable structure. An occupier is a person with control over the premises in question, Wheat v. Lacon & Co. [1966] AC 552.

3.1.1 Under Section 2(1) of the Act the "common duty of care" is "a duty to take such care as in all the circumstances of the case is reasonable to see that the lawful visitor will be reasonably safe in using the premises (or structure) for the purpose(s) for which he is invited or permitted to be there". A number of circumstances that may be relevant are listed s. 2, such as the whether visitor was a child and whether the visitor had knowledge of the danger.

3.1.2 Under Section 2(4) of the Act "Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken reasonable steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done".

3.1.3 Under Section 2(1) of the Act an occupier can exclude or modify his duty by agreement or otherwise, but see The Unfair Contract Terms Act 1977.

#### 3.2 Dangerous premises - non-visitors

The Occupiers' Liability Act 1984, s. 1(3) has replaced the "duty of common humanity" owed to trespassers and other non-visitors at common law, see British Railway Board v. Herrington [1972] AC 877, in respect of risk of injury on premises (including fixed or movable structures), see Titchener v. BRB [1983] 1 WLR 1427 (HL).

- 3.2.1 This duty, which is less onerous than that operating in favour of visitors under the 1957 Act, arises if the occupier is aware of or has reasonable grounds to believe that a danger on his premises exists, that trespassers are or may come into the vicinity of the danger, and the risk of injury from it is a risk from which, in all the circumstances, he might reasonably be expected to offer some protection.
- 3.2.2 The duty can be discharged by taking reasonable steps to warn of the danger or to discourage persons from incurring the risk. A notice saying "danger keep out" would not be sufficient for either of these purposes.

### 3.3 Uninhabitable dwellings

There is under this Act a statutory duty, actionable in damages, to see that work taken in connection with the provision of (including conversion to) a dwelling is done in a workmanlike manner or a professional manner, as appropriate, so that as regards that work the building is fit for habitation when completed. The duty is owed by a person who takes on such work, for example; developers, suppliers of goods, local authorities and possibly DIY enthusiasts. The claim can, subject to a six-year limitation period, be brought by the current owner of the dwelling.

The scope of the Act is narrow. "Provision of a dwelling" does not encompass rectification works to an existing dwelling. Also, the gist of the action is unfitness for habitation at date of completion, Andrews v Schooling [1993] 1 All ER 723 (CA), Thompson v. Clive Alexander and Partners (1992) CILL 755. There is a limited defence for those who follow instructions.

### 3.4 Defective products

The Consumer Protection Act 1987 imposes strict liability for specified categories of damage caused by defective products.

- 3.4.1 The primary liability is imposed on the producer of the defective product but also, in specified circumstances, on those who add their brand name to a product or who import it. Suppliers may also be liable if they fail, upon request, to reveal the identify of the producer.
- 3.4.2 A product is defective if, in all the circumstances, its safety is not such as persons are generally are entitled to expect.
- 3.4.3 Claims can only be brought where the loss exceeds a specified minimum amount and the damage suffered is either personal injury or damage to property, other than the defective product, which is ordinarily intended for private use and is intended by the person suffering the loss mainly for his private use.
- 3.4.4 A number of statutory defences are provided including that the damage suffered was due to misuse of the product and that the state of scientific or technical knowledge at the relevant time was not such that a producer might be expected to have discovered the defect.

## 4. Breach of Duty

- 4.1 The standard of care set by law is normally that of a reasonable and prudent man. "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 man would not do" (per Alderson B in Blyth v. Birmingham Waterworks Co. (1856) 11 Ex 781).

- 4.2 The hypothetical reasonable man is "the man on the Clapham omnibus". He is not perfect.
- 4.3 Where he exercises a particular calling e.g. a surgeon, he must exercise such care and skill as accords with the standards of reasonable competent medical men at the time. The standard relates to the position held, or the expertise claimed, see Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582, Wilsher v. Essex Area Health Authority [1977] QB 730 (reversed on different point by HL at [1988] 2 WLR 557), Knight v. Home Office [1990] 3 All ER 237.

See also Nettleship v. Weston [1971] 2 QB 691:

"The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in mind and limb, who makes no errors of judgement, has good eyesight and hearing, and is free from infirmity".

- 4.4 The degree of care to be expected depends on a consideration of what a reasonable man, careful for the safety of his neighbour, would do. This requires consideration of the balance between the degree of likelihood that harm will occur, and the cost and practicability of measures needed to avoid it, the seriousness of the consequences, the end to be achieved, including the importance and social utility of the activity in question, and the exigencies of an emergency, dilemma or sport, see Boulton v. Stone [1951] AC 850.
  - 4.4.1 The likelihood of harm:  
This is gauged with reference to the state of knowledge that could be attributed to the defendant at the time of the occurrence, Roe v. Minister of Health [1954] 2 QB 66. It will also depend on any abnormality of the plaintiff of which the defendant knew or ought to have known, see Haley v. LEB [1965] AC 778
  - 4.4.2 Cost and practicability of elimination:  
See Latimer v. AEC [1953] AC 643 per Denning LJ "In every case of a foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it." Note also Leaky v. National Trust [1980] QB 485 (CA), a more subjective test, taking account of available resources, seeking assistance from affected persons, were duty concerns condition of natural features on land.
  - 4.4.3 The seriousness of consequences:  
See Glasgow Corporation v. Muir [1943] AC 448, Lord Macmillan: "Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life."
  - 4.4.4 The end to be achieved:  
The degree of risk should also be balanced against the end to be achieved by the activity in question, including its importance and social utility, The Wagon Mound (No.2) [1967] 1 AC 617.
  - 4.4.5 Emergencies:  
A person who takes a reasonable decision as to a course of action in an emergency, not of his making, will not be treated as having acted negligently, if



not responsible for being in that position, if the course of action decided upon turns out to have been the wrong one, Jones v. Boyce (1816) 1 Stark 493.

4.4.6 Sport:

See Wilks v. Cheltenham Cycle Club [1971] 1 WLR 668, it is negligence if harm is caused by an error of judgement that a reasonable competitor, being the reasonable man of the sporting world, would not have made.

4.5 Proof of breach

The burden of proving negligence lies on the plaintiff. If harm occurs it is not for the alleged wrongdoer to prove the harm was not due to carelessness on his part. The plaintiff must show, on balance of probabilities, that the accident was caused by the defendant.

4.6 Res Ipsa Loquitur

This means that the facts speak for themselves. There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care, Erle CJ in Scott v. London Docks [1865] 3 H & C 596, see Ward v. Tesco Stores Ltd. [1976] 1 All ER 219 (C.A.)

## 5. Causation

In order to succeed in a claim in negligence the plaintiff must establish on balance of probabilities that the damage was caused in fact and in law by the wrongful act.

5.1 The most common test for causation in fact is the "but for" test. Would the damage have occurred but for the wrongful act. But the courts adopt a common sense approach to deal with logical difficulties created by this test, particular problems of concurrent and consecutive causation, see Baker v. Willoughby [1970] AC 467 and Jobling v. Associated Dairies [1982] AC 794.

5.2 Causation in fact is not, however, sufficient. There must also be causation in law. It is notoriously difficult to abstract principles from the decided cases. Notions of proximity, directness or dominance are sometimes used, but are of little practical help. It is arguable, however, that there is no causation in law where there is:

(i) Voluntary and deliberate conduct by a third party that was intended to exploit the situation created by the wrongful act and which was not foreseeable or intended by the defendant, unless the defendant was under a duty to prevent such a voluntary third party intervention,;

(ii) There was a coincidence, an abnormal conjunction of events occurring at the same time or after the wrongful act and which were not foreseeable or intended by the defendant unless the defendant was under a duty to guard against the possibility of such a coincidence (see Hart and Honore, Causation in the Law).

5.3 Where the intervening event appears, on a common sense view, to relegate the consequences of the wrongful conduct to a mere background occurrence, it is sometimes described as a *novus actus interveniens*. As such it is regarded as having broken the chain of causation between the wrongful event and the damage, see Lamb v. Camden London BC [1981] 2 All ER 408.

- 5.4 In cases where a duty is owed to avoid the risk of an occurrence, the but for test may be modified to a test based on whether the defendant's wrong has materially increased the risk in respect of which the duty was owed, Fairchild v. Glenhaven [2002] 3 WLR 89 (HL<sup>7</sup>).

## 6. Damage

- 6.1 There are two issues to consider under this heading. First, for what kinds of damage should the alleged wrongdoer be responsible (the remoteness test)? Secondly how should the recoverable damage be quantified.
- 6.2 The test of remoteness in the tort of negligence is that of reasonable foreseeability. This means that the tortfeasor is liable only for damage which was intended by him or which, although not intended, was of a kind, although not necessarily of an extent, that was the natural and probable consequence of his wrongful act, Overseas Tankship etc. v. Morts Docks [1961] AC 388 ("The Wagon Mound").
- 6.3 At one time, it was felt that the test was that of direct consequences. If a reasonable man would have foreseen any damage to the plaintiff as likely to result from his act, the defendant is liable for all direct consequences of that act whether a reasonable man would have foreseen that kind of consequence or not, Re Polemis & Furness, Withy & Co. Ltd. [1921] 3 KB 560.
- 6.4 Today the Wagon Mound is the governing authority but the principle of reasonable foreseeability relates to the kind of damage, not to its extent. Consider Hughes v. Lord Advocate [1963] AC 837 and the "egg shell rule", Smith v. Leech Brain & Co. Ltd [1962] 2 QB 405.
- 6.5 When quantifying damages consideration also has to be given general principles of causation and by the rule that the defendant is not liable for losses which are unrelated to the kind of harm in respect of which the duty of care was owed, consider Watts v. Morrow [1991] 1 WLR 1421, Smith v. Leech Brain & Co. Ltd [1962] 2 QB 405 (might have developed cancer anyway). The injured person is also expected to take reasonable steps to mitigate the damage suffered.
- 6.6 Where damages are awarded they are usually categorised as general damages, those assessed by the court in order to compensate the injured person for non-monetary damage such as distress, inconvenience or loss of amenity, as appropriate, and special damages, to compensate for monetary losses and expenses.

## 7. Immunities

The principal immunities from actions in negligence apply to persons involved in court or arbitration hearings, whether as witnesses, advocates, judges or arbitrators. These immunities are founded on issues of public policy concerned with the proper administration of justice and are, generally, lifted where bad faith is shown.

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<sup>7</sup> **Fairchild:** Employee exposed by different employers to asbestos, all had duty to protect him from the risk of mesothelioma. The risk eventuated, but was not possible to relate it to a specific wrongful exposure to asbestos. Cases such as Wiltshire v. EHA [1988] AC 1974 were distinguished. In that case a baby was given excessive oxygen, became blind. But blindness could have resulted from a number of factors and excessive oxygen was not more likely than the others to have caused it. The claim failed.

### 7.1 Barristers

Barristers, like other professionals, are subject to a duties of care as regards the exercise of their skill. But, until recently, there were regarded as immune from actions in respect of the conduct and management of cases in court, and pre-trial work that was sufficiently closely connected with the conduct of a case in court that it could "be fairly said to be a preliminary decision affecting the way that case is to be conducted with it comes to a hearing", Rondel v. Worsley [1969] 1 AC 191. By the Courts and Legal Services Act 1991, this immunity was extended to certain other advocates.

This immunity was removed, both in civil and criminal proceedings, by Arthur Hall v. Simmons [2000] 3 WLR 543 (HL).

### 7.2 Witnesses

Witnesses, whether of fact or opinion, continue to have a similar immunity to that formerly accorded to barristers, Arthur Hall v. Simmons [2000] 3 WLR 543 (HL). Thus, an expert witness is immune for suit as regards the giving of evidence in court and preparatory work closely associated with the giving of such evidence, Stanton v. Calaghan [1999] BLR 172 (CA). For the immunity of witnesses of fact see Taylor v. Director of the Serious Fraud Office [1999] 2 AC 177 (HL).

### 7.3 Judges, arbitrators and construction adjudicators

Judges are immune as regards their conduct of court proceedings and it is generally considered to be the case that at common law arbitrators, at least where exercising judicial functions, have a similar immunity. Under the Arbitration Act 1996, s. 29 "an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith". The Act also gives certain statutory immunities to bodies that appoint arbitrators.

Adjudicators acting pursuant to s. 108 of the Housing Grants, Construction and Regeneration Act 1996 appear to have a contractual immunity from suit by the parties to the contract under which they are appointed.

## 8. Defences

8.1 The defences of *volenti non fit injuria*, *ex turpi causa*, and contributory negligence are available. These have been considered previously, but note the position of rescuers. Since they act under a compulsion and a duty of care is owed directly to them, they are never *volens*, but may be contributorily negligent.

## 9. Limitation of actions

9.1 Limitation is governed by The Limitation Act 1980 as amended by The Latent Damage Act 1986. The general rules have been considered previously. The amendments introduced by the Latent Damage Act 1986 relate only to actions in tortious negligence.

9.2 Section 14A of the 1980 Act, inserted by the 1986 Act, provides (by a very tortuous route) that where the earliest date on which the plaintiff, or any person in whom the cause of action was vested before him, first had both the knowledge required for bringing an action and a right to bring such an action after the accrual of the cause of action, the limitation period is either:

9.2.1 Six years from the date on which the cause of action accrued (the normal rule);  
or

- 9.2.2 Three years from the starting date if that period expires after the six years.
- 9.3 Section 14B of the 1980 Act, inserted by the 1986 Act, provides a 15 year long stop. No action is permitted to be commenced more than 15 years from the date on which there occurred any act or omission:
- 9.3.1 Which is alleged to constitute negligence; and
- 9.3.2 To which the damage, in respect of which damages are claimed, is alleged to be attributable (in whole or in part).
- 9.3.3 There are special rules to enable the transfer of a right on action in negligence to successors in title to the damaged property.
- 9.4 The Act also provides for the transference of rights of action to successors.

## 10. **Accrual of the cause of action**

- 10.1 A cause of action in negligence accrues not when the negligent act or omission occurs but when that act or omission causes damage. This is so even where the damage has not been discovered, see Pirelli General Cable Works Ltd v. Oscar Faber & Partners [1983] 2 AC 1.
- 10.2 Establishing the date of which damage occurs can give rise to difficulties, see Bromley LBC v. Rush & Tompkins (1985) CILL 179, Nitrigin Eireann v. Inco Alloys [1992] 1 WLR 498.
- 10.3 "Doomed from the start". In Pirelli, Lord Fraser said:
- "There may perhaps be cases where the defect is so gross that the building is doomed from the start, and where the owner's cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional".
- But see Ketteman v. Hansel Properties Ltd [1984] 1 WLR 1274 (affirmed [1987] AC 189) where Lawton LJ said:
- "Lord Fraser's reference to buildings which were doomed from the start was not necessary for the decision he made. I would regard it as a cautionary dictum so as to leave for future consideration problems which might arise in exceptional cases".
- 10.4 A concept similar to that of "doomed from the start" sometimes finds favour where the claim is for pure economic loss resulting from careless professional advice, see Foster v. Outred [1982] 1 WLR 86, contrast First National Commercial Bank v. Humberts [1995] 2 All ER 673.

**KINGS COLLEGE LONDON**  
**CENTRE OF CONSTRUCTION LAW AND MANAGEMENT**  
**MSc/DIPLOMA IN CONSTRUCTION LAW AND ARBITRATION: PART A**

**THE LAW OF TORTS**

**SECTION III: TORTS OTHER THAN NEGLIGENCE**

**1. INTRODUCTION**

- 1.1 The torts of nuisance and Rylands v. Fletcher regulate at common law of activities affecting individual rights in or over real property and protect public rights (rights common to all).
- 1.1.1 They are incapable of exact definition as they involve a balance of conflicting interests in the use of land.
- 1.1.2 They have been partially superseded by statutory regulation of development, construction and use of the environment.
- 1.1.3 They overlap with other areas of liability in tort such as:
- (a) Negligence - failure to take reasonable care to avoid foreseeable harm to other persons or property;
  - (b) Trespass - unjustifiable intrusion upon land possessed by another;
  - (c) Statutory torts - eg. environmental law.
- 1.2 If the right affected belongs to someone as a member of the public, the remedy lies in Public Nuisance.
- 1.3 If the right affected relates to the enjoyment of land or interests in land the remedy lies in Private Nuisance.

**2. PUBLIC NUISANCE**

**2.1 Basis of liability**

A public nuisance is an act or omission which materially effects the life, health, property, morals or comfort of the public in the exercise or enjoyment or rights common to all.

- 2.1.1 It is a question of fact whether the number of person affected is sufficiently large to amount to "the public".
- 2.1.2 It is not necessary to prove that all are injuriously affected, or all to the same extent, consider AG v PYA Quarries Ltd. [1957] 2 QB 169 and British Celanese v. Hunt (Capacitors) Ltd. [1969] 1 WLR 959.
- 2.1.3 Examples include obstructing public highways or navigable rivers, carrying on offensive trades, holding a badly organised pop festival.

## 2.2 **Remedies**

- 2.2.1 A public nuisance is an indictable offence, a crime, at common law.
- 2.2.2 It can be restrained by injunction sought by the Attorney General, at his discretion.
- 2.2.3 It is a civil wrong actionable by individuals who have suffered particular damage, over and beyond the general inconvenience and injury suffered by the public:
- (a) The individual need not have a property interest, and personal injury is actionable, Dymond v. Pearce [1972] 1 QB 496;
  - (b) The rules for establishing liability and assessing damages are similar to those applicable to private nuisance;
  - (c) Defences are generally similar to those available in private nuisance.
- 2.2.4 Certain nuisances are subject to statutory control, see Part III of the Environmental Protection Act 1991, Sandwell BC v. Bujok [1990] 1 WLR 1350 (HL). A public (or private) nuisance may constitute a Statutory Nuisance: eg. premises; noise, fumes or gases from premises; dust, smells, steam or other effluvia arising on industrial, trade or business premises; that, in all cases, are prejudicial to health, or a nuisance.
- (a) The local authority can seek the abatement of the nuisance by notice or, if appropriate, its cessation by injunction, Kirklees MBC v Wickes Building Supplies [1991] 3 WLR 981.
  - (b) Aggrieved individuals can apply to the Magistrates Court for an abatement notice.
  - (c) Subject to various statutory defences failure to comply with an abatement notice is an offence.

## 3. **PRIVATE NUISANCE**

### 3.1 **Basis of liability**

A private nuisance is an unlawful (unreasonable?) interference with a person's use or enjoyment of land, or some right over or in connection with land.

- 3.1.1 The unlawful interference will usually result from the effect of human activity but consider:
- (a) Tree roots, Davy v. Harrow Corporation [1958] 1 QB 60. Consider also Sead, Construction Law (1999) 10(2), pp. 26-28. For a recent example, see Delaware Mansions v. Westminster CC [2991] 3 WLR 1007 (HL<sup>8</sup>).

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<sup>8</sup> **Delaware**: Cracking, due to tree roots, first occurred prior to Claimant's ownership. But held that there was a continuing nuisance even though, possibly, no further cracking during Claimant's ownership. The nuisance comprised the interference with the load bearing quality of residential land, having regard to the proximity of the trees, the damage was reasonably foreseeable. The issue was one of reasonableness between neighbours. Having been notified of the damage, Westminster failed to abate it by felling the trees. There might not have been liability if Westminster had not been notified of the damage and given an opportunity to abate it. Aspects of the reasoning in this case come close to a Leaky v. National Trust, type negligence.

- (b) Natural events, eg. landslip, Leakey v. National Trust [1980] 2 WLR 65; Holbeck Hall Hotel v. Scarborough BC (No 2) [2000] 2 WLR 1396 (CA<sup>9</sup>).
- 3.1.2 There are three principal categories of interference that may give rise to an action in private nuisance.
- (a) Interference with property rights in or over land; eg. easements, profits a prendre, riparian rights. Liability is established by proving substantial interference with the land or interest. Locality is irrelevant, Horton's Estate v. James Beattie Ltd [1927] 1 Ch 76.
- (b) Causing physical damage to land or structure or vegetation on land; eg. flooding, killing trees, subsidence. Liability is established by showing material injury, Midland Bank Plc. v. Bargrove Property Services (1992) 60 BLR 1, locality irrelevant, St. Helens Smelting v. Tipping (1865) 11 HLC 642. One-off incidents causing damage may be actionable if they arise from a continuing state of affairs, British Celanese v. Hunt Ltd. [1969] 1 WLR 959.
- (c) Undue interference with the comfort and convenient enjoyment of land; eg. smells, noise and vibration. Liability is established by showing significant annoyance and discomfort. But the interference must be objectively unreasonable in all the circumstances, St. Helens Smelting v. Tipping. A locality test is applied, consider:
- The situation of the land affected, the character of the surrounding neighbourhood, Sturges v. Bridgman (1879) 11 ChD 852. But character may change by grant of planning permission, Gillingham BC v. Medway (Chatham) Dock Co. [1991] 3 WLR 449;
- The general benefit to the community of the activity, e.g. milk deliveries acceptable;
- The duration and time of day of the activity. It is harder to obtain relief where the nuisance is temporary or occasional unless substantial interference, Matania v. National Provincial Bank Ltd. [1936] 2 All ER 633;
- The intent with which activity was carried out, Hollywood Silver Fox Farm Ltd. v. Emmett [1936] 2 KB 468, but see Bradford Corporation v. Pickles [1895] AC 587.
- 3.1.3 The law tries to balance the legitimate activities of neighbours, a give and take. Thus, noise and dust caused by demolition and rebuilding are not actionable if operations are reasonably conducted with all reasonable, proper steps taken to ensure no undue inconvenience is caused, Harrison v. Southwark & Vauxhall Water Co. [1891] 2 Ch. 409;
- 3.1.4 The standard is the comfort or convenience of the average man using his land for normal activities. The law does not take account of abnormal sensitivity, Heath v. Mayor of Brighton (1908) 98 LT 718. But if nuisance proved, the remedy will extend to delicate and sensitive operations, McKinnon Industries v. Walker [1951] 3 DLR 577.

<sup>9</sup> **Holbeck.** Landslip. A measured duty of care owed by lower land owner to higher land owner in respect of risks that were foreseeable. Might be capable of discharge by an appropriate warning. Discharge did not necessarily require extensive preventative works. Liability was not appropriate in this case as the risks were apparent to both parties.

### 3.2 Is liability in nuisance strict or fault based?

- 3.2.1 Strict liability: liability without proof of "negligence" (carelessness), possibly liability for acts of independent third parties, trespassers, sub-contractors.
- 3.2.2 Fault based: liability based on "negligence", generally no liability for acts of independent third parties.
- 3.2.3 There is a tendency in the law to allow the expansion of fault based liabilities, such as negligence, and to restrict the scope of strict liability torts. In consequence, it is necessary to treat the older cases with caution. But negligence and nuisance are not synonymous, but note some of the comments, which suggest a merging of concepts, in Delaware Mansions v. Westminster CC [2001] 3 WLR 1007 (HL). Consider the following:
- (a) Lord Wilberforce, Goldman v Hargrave [1967] 1 AC 645, 657: "the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive." In that case, a natural accident case, decisive.
  - (b) Lord Denning MR, Miller v. Jackson [1977] QB 966, 980: "It is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour. He must have been guilty of the fault, not necessarily of negligence, but of the unreasonable user of the land."
  - (c) Lord Reid, The Wagon Mound (No.2) [1967] 1 AC 617: "nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential [but] ... although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability. ... it would not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others."  
  
In this case, public nuisance caused by discharge of oil into a harbour, foreseeability was a necessary element of liability.
  - (d) Lindley LJ, Rapier v. London Tramways [1893] 2 Ch 588, 599: "at common law, if I am sued for nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it."
  - (e) Marcic v. Thames Water [2002] 2 WLR 932 (CA). Once the claimant showed that a nuisance had emitted from land in the possession or control of the defendant the onus shifted to the defendant to show a defence. In this case, the defendant failed to show that its system of priorities was a fair and reasonable way of distributing limited resources to the widespread problem of nuisance from its sewers<sup>10</sup>.
- 3.2.4 There are various reasons for this uncertainty about the basis of liability in nuisance.

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<sup>10</sup> **Marcic**: Notice the concern here was with inactivity by a landowner and Leaky v National Trust principles were considered in defining the scope of liability.



- (a) The gist of the action in each category of nuisance appears to be different. This has implications for the nature of the fault ascribed to the defendant.
- (b) The court sometimes regards the nuisance as the activity being carried on the defendant's land rather than the escape of noxious things resulting from that activity. The nuisance is the dangerous state of affairs, Miller v. Jackson [1977] QB 966.
- (c) Does fault relate to the creating of a state of affairs, rather than harm resulting from it? If so, liability would not be avoided by using reasonable care to avoid harm.
- (d) In some cases, the court appears to regard the defendant of having the burden of proving absence of fault.

### 3.3 **Liability of occupiers**

The court must also deal with cases where the situation alleged to constitute the nuisance is not, in any common sense meaning, created by the occupier of the land concerned. Is the occupier liable along with the creator of the nuisance?

- 3.3.1 Situation caused by trespasser. The occupier is not liable unless he adopts or continues the nuisance. "An occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable steps to bring it to an end, although with ample time to do so. He 'adopts' it if he makes use of the erections, building, bank or artificial contrivance which constitutes the nuisance." Lord Maugham, Sedleigh-Denfield v. O'Callaghan [1940] AC 880, 910. The possibility of blockage causing flood ought to have been recognised. For a recent example see Lippiat v. South Gloucestershire CC [1999] 3 WLR 137 (CA<sup>11</sup>).
- 3.3.2 Situation created before occupier acquired the property: The occupier may be liable if he adopts the nuisance;
- 3.3.3 Situations due to natural characteristics of the land: Liability appears to depend on whether or not the nuisance is continued. The court will bear in mind that the nuisance was thrust upon the occupier, and his resources, in deciding what steps are reasonable to remove it, consider Leakey v. National Trust [1980] QB 485, Goldman v. Hargrave [1967] 1 AC 645 (PC);
- 3.3.4 Situation due to a latent defect in natural object: The occupier is not an insurer, for liability there must be some degree of personal responsibility. He is not generally liable unless the latent defect would have been discoverable by any reasonable careful inspection, Noble v. Harrison [1926] 2 KB 332. This may simply be an illustration of an Act of God, defence.
- 3.3.5 Situation due to unobservable defect in man made object: There is duty to repair premises (on a highway) and the occupier or owner, if he has undertaken the duty to repair, will be liable if they constitute a nuisance injure a passer-by or adjoining owner, irrespective of whether he ought to have known of the

<sup>11</sup> Lippiat v. South Gloucestershire CC [1999] 3 WLR 137. Travellers occupied land, allowed to do so. For three years used as a base for unlawful activities. Held. Occupier could be liable where P's enjoyment of his land interfered with due to continuing presence on D's land of persons whose activities, to the D's knowledge, included repeated harmful acts on P's land.

danger, Wringe v. Cohen [1940] 1 KB 229. Damage due to want of repair was distinguished from damage due to acts of trespassers, or "latent defects"; the secret and unobservable operations of nature, such as subsidence, consider Wilkins v. Leighton [1932] 2 Ch. 106;

- 3.3.6 Civil claims in public nuisance: Generally the requirement of fault relates to the creation of the public nuisance, not to the foresight of its danger or of particular harm to the plaintiff, Dymond v. Pearce.

### 3.4 Who can sue in private nuisance?

- 3.4.1 The traditional view: one must be able to show an entitlement to use and enjoy a right in or over land which nuisance protects. An action can be maintained by:

- (a) Those who occupy the effected land, eg. freeholder, tenants, or use the effected servitude, pursuant to legal or equitable proprietary rights, Malone v. Laskey [1907] 2 KB 141. De facto possession is sufficient to establish a right to possess;
- (b) Those who have proprietary rights to, but do not occupy, the affected land, eg. reversioner. But only where a permanent injury to that right or a related servitude is shown;
- (c) Not persons without proprietary rights, Hunter v. Canary Wharf Ltd [1997] 2 All ER 426.

### 3.5 Who can be sued in nuisance?

- 3.5.1 The creator of the nuisance, whether by himself or his servants or agents, irrespective of whether or not in occupation of the land on it occurred. For example, contractors who build structures that constitute a nuisance, Thompson v. Gibson (1841) 7 M. & B. 456. Thus the creator of a nuisance may be liable for damage caused by its continuance even though he cannot abate it, as not in possession of the land;

- 3.5.2 The occupier or user of property on which a nuisance exists, or which constitutes the nuisance unless the nuisance was created without his knowledge or consent, eg. by trespassers, previous occupiers, and he has not, thereafter, continued or adopted it, Sedleigh-Denfield v. O'Callaghan. But to adopt or continue a nuisance the defendant must have been aware or ought to have been aware of the danger that the state of affairs, that gave rise to the nuisance, posed to the neighbouring land, Holbeck Hall Hotel v. Scarborough BC [2000] 2 All ER 705 (CA). Consider Marcic v. Thames Water [2002] 2 WLR 932 (CA); Delaware Mansions v. Westminster CC [2001] 3 WLR 1007 (HL<sup>12</sup>).

- 3.5.3 A landowner may be liable for nuisances due to latent defects in his land but only where the kind and the extent of the harm was reasonably foreseeable, Holbeck Hall Hotel v. Scarborough BC [2000] 2 All ER 705 (CA).

- 3.5.4 A landlord where the nuisance occurs on let premises if:

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<sup>12</sup> **Marcic:** Flooding of the claimant's land caused by a section of the sewerage system that the defendant had inherited from its predecessor. It was adequate when built but had become inadequate thereafter. By using the sewers to carry out its statutory duty, knowing of the hazard created by the discharge to the claimant's land, the defendant passively permitted the continuance of and thereby adopted the nuisance. **Delaware:** The nuisance continued during the claimant's ownership, notwithstanding that, apparently, no further cracking occurred, because the trees were not removed and their roots affected the loadbearing quality of the claimant's land.

- (a) The nuisance arose prior to the letting and the landlord knew or ought to have known of the potential harmful condition of the property before letting it. Taking a covenant to repair does not exonerate him, Brew Bros. Ltd v. Snax (Ross) Ltd. [1970] 1 QB 612;
- (b) The landlord retained express or implied control, eg. a duty or power of repair. He may be liable even without actual or presumed knowledge of a nuisance arising after letting, Wringe v. Cohen, see also section 11 Landlord and Tenant Act 1985;
- (c) He let the property for a purpose likely to cause a nuisance, Harris v. James (1876) 45 LJQB 545, compare Smith v. Scott [1973] Ch 314.

3.5.5 A person is liable for a nuisance created by his independent contractor:

- (a) If he authorises or ratifies the commission of the tort;
- (b) If injurious consequences to neighbours must be expected to arise from the work instructed, unless means are adopted to prevent them, Bower v. Peate [1876] 1 QBD 321. There is a non-delegable duty to see that the injurious consequences are prevented where the work involves inherent dangers. For example: certain building operations, Matania v. National Provincial Bank, and work instructed on the highway, but not adjacent to it, unless inherently dangerous, Salisbury v. Woodland [1970] 1 QB 324;

3.5.6 Possibly, where the independent contractor's work infringes servitude over the land on which the contractor is working, Hughes v. Percival (1883) 8 App Cas 443.

3.5.7 There may not be liability for acts of collateral negligence by the servants of an independent contractor. For liability it must be shown that the work the contractor was employed to do was work the nature of which, and not merely the perforce of which case upon the superior employer the duty of taking precautions, Padbury v. Holliday and Greenwood Ltd. (1912) 28 TLR 494, compare Holliday v. National Telephone Co. [1899] 2 QB 72.

### 3.6 Defences

There are a range of defences that are, generally available to an action in nuisance. Some of these have been discussed when considering the nature of liability in nuisance.

3.6.1 Acts of trespassers: Occupier not prima facie liable for creation of a nuisance by trespassers without consent or actual or constructive knowledge, King v. Liverpool C.C. [1986] 1 WLR 890. Constructive knowledge is difficult to establish even if vandalism by trespassers is frequent, consider Smith v Littlewoods Organisation Ltd. [1987] AC 1004.

3.6.2 Act of God, or latent defect due to the secret and unobservable operation of nature, sometimes. Compare Noble v. Harrison [1926] 2 KB 332, Wringe v. Cohen [1940] 1 KB 229.

3.6.3 Volenti non fit injuria, and contributory negligence subject to apportionment under the Law Reform (Contributory Negligence) Act 1945 But, arguably, only claims in public nuisance for damage to person or property, Dymond v. Pearce.

- 3.6.4 *Novus actus intervenies*: a supervening act which breaks the chain of causation between the nuisance and the alleged harm.
- 3.6.5 Prescription: If the interference is sufficiently definite and quantifiable to be capable of amounting to an easement, a prescriptive right to continue it may be acquired over a specific tenement if the nuisance has continued for 20 years as a right, openly and without force or permission, Sturges v. Bridgman;
- 3.6.6 Limitation: Generally, claims will be barred 6 years after the accrual of the cause of action by operation of the Limitation Act 1980. But nuisance is, often, a continuing wrong with each continuance giving rise to fresh cause of action;
- 3.6.7 Statutory Authorisation. Lord Wilberforce, Allen v. Gulf Oil Refining Ltd. [1981] AC 1001, 1011.

"It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it authority to do what is authorised with immunity from any action based on nuisance. ... To this there is made the qualification, or condition, that the statutory powers are exercised without "negligence" - that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons ...".

The burden is on the person carrying out the authorised activity to bring himself within the immunity and to show that the relevant statute expressly or by implication authorises the relevant activity. If so, a remedy is only available to the extent that the actual nuisance exceeds that for which statutory immunity is conferred;

- 3.6.8 Where the complaint concerns a failure to exercise statutory powers or duties the court will be reluctant to give a remedy in nuisance for what is in effect a claim for non-feasance in the exercise of statutory powers, consider Glossop v. Heston & Isleworth Local Board (1879) 2 Ch. D. 102. But note Marcic v. Thames Water [2002] 2 WLR 932 (CA) where the successful claim concerned flooding of the claimant's land caused by inadequate sewers being used, pursuant to the defendant's statutory duty, to drain other land, this being regarded as outwith the Glossop principle.
- 3.6.9 These principles do not apply where there is an express statutory saving for actions in nuisance.
- 3.6.10 The following matters are not defences to actions in nuisance:
  - (a) That the plaintiff came to the nuisance, for instance, by building a house so close to the defendant's premises that he would be inevitably affected by the defendant's activities, Sturges v. Bridgman (1875) 11 ChD 852, Bliss v. Hall (1838) 7 LJCP 122;
  - (b) Public interest, or the convenience of the place where the activity is being carried out, although these may be factors in considering reasonableness of user, Kennaway v. Thompson [1981] QB 88.

### 3.7 **Remedies**

- 3.7.1 The principal remedies are injunctions and damages (contrast negligence, where injunctive relief is not available). These remedies are discussed in Section I of these Notes.
- 3.7.2 Nuisance is only actionable on proof by the claimant of both damage and the foreseeability of damage, The Wagon Mound [1961] AC 388. But an injunction may lie even if no damage, as yet, Midland Bank. v. Bargrove Property Services.
- 3.7.3 The measure of damages in nuisance is the same as that for tort generally. Except that it remains unclear whether an action will lie in private nuisance for personal injury.

### 3.8 **Consider the applicability of these principles to the following examples of nuisance**

- 3.8.1 Interference to riparian and other water rights;
- 3.8.2 Withdrawal of support from land in its natural state;
- 3.8.3 Interference with easements such as rights of support and ancient lights;
- 3.8.4 Obstruction of the highway.

## 4. **ESCAPES: THE RULE IN RYLANDS V. FLETCHER**

### 4.1 **Basis of liability**

The rule in Rylands v. Fletcher [1868] LR 3 HL 330 as stated by Blackburn J.

"We think that the true rule in law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape."

- 4.1.1 In the House of Lords, Lord Cairns concurred with this judgement but restricted the rule to situations where there was a "non-natural user of the land. A hidden" reasonableness test.
- 4.1.2 This principle has been applied to escapes of fire, gas, electricity, oil, spoil, poisonous vegetation, noxious persons.
- 4.1.3 Elements of liability:
  - (a) There must be an element of bringing on and keeping.
  - (b) There must be an escape for the defendant's land, Read v. Lyons & Co. [1947] AC 156.
  - (c) There must be non-natural user of land, some special use bringing with it increased danger to others not merely the ordinary use of land, or a use that is proper for the general benefit of the community, Rickards v. Lothian [1913] AC 263.

(d) Non natural user is a question of fact depending on the circumstances of the time and place, Read v. Lyons. Old cases must be treated with care but the principle has been applied to water in reservoirs, sewage, fire, gas, poison, explosives, and large spoil tips.

4.1.4 Liability is strict, it is imposed irrespective of whether or not reasonable care was taken to avoid the escape.

4.1.5 The duty is non-delegable. One cannot escape liability for the escape on the ground that he had employed a competent contractor to place and confine the matter in the position from which it escaped, see Hobbs v. Baxenden Chemical [1992] 1 Lloyd's Rep. 54.

4.1.6 Liability is fault based in that an action will only lie where the damage caused by the escape was of a kind that was reasonably foreseeable (at the time of accumulation, at the time of escape?), Cambridge Water Co. v. Eastern Counties Leather [1994] 2 WLR 53 (HL).

#### 4.2 **Who can sue in Rylands v. Fletcher?**

Anyone who suffers damage to property or, arguably, personal injury because of the escape, irrespective of whether or not they occupy land.

#### 4.3 **Who can be sued in Rylands v. Fletcher?**

4.3.1 The person who owns or controls the dangerous thing is liable if he brings or collects it on land, even if he is not the owner or occupier of the land, consider Rigby v. Chief Constable of Northamptonshire [1985] 2 All ER 985;

4.3.2 The occupier of the land from which it escapes if it is brought or collected on the land for his purposes or with his permission;

4.3.3 Liability for the escape cannot be avoided on the ground that competent contractors were used to place and confine the matter in the position from which it escaped, see Hobbs v. Baxenden Chemical [1992] 1 Lloyd's Rep. 54.

#### 4.4 **Defences**

4.4.1 Act of God: an operation of natural forces which no human foresight can provide against and of which human pretence is not bound to recognise the possibility. The test is not whether reasonable protection could have been provided.

4.4.2 Default by the plaintiff, such as indulging in particularly sensitive activities, or activities which he knew would cause an escape.

4.4.3 Consent to the accumulation of the dangerous thing or common benefit from the accumulation.

4.4.4 Independent acts of third person over whom the defendant has no control, unless the defendant ought reasonably to have guarded against the possibility of such acts, Rickards v. Lothian, Perry v. Kendrick's Transport Ltd. [1956] 1 WLR 85.

4.4.5 Statutory authority: If the use of the dangerous thing is expressly or by implication authorised by statute, negligence by the defendant or its independent contractor's must be proved, Geddis v. Proprietors of Ban Reservoir (1878) 23 App Cas 430, Hardaker v. Idle D.C. [1896] 1 QB 335. Consider in this respect the liabilities of statutory undertakers.

4.4.6 Limitation: The gist of the action is damage to person or property.

#### 4.5 **Remedies**

Damages are the principal remedy and, apparently, personal injury can be recovered. But the kind of damage sustained must be reasonably foreseeable (at the time of collection, at the time of escape?), consider Cambridge Water Co. v. Eastern Counties Leather.

#### 4.6 **Special rules relating to fire**

Under the Fire Prevention (Metropolis) Act 1774:

"No action, suit or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidentally begin."

4.6.1 The protection of the Act does not apply if:

- (a) The fire was not caused on the defendant's land or real property;
- (b) The plaintiff can prove that the fire was started intentionally or negligently, Filliter v. Phippard (1847) 11 QB 347;
- (c) The plaintiff can prove that an "accidental" fire was continued through the negligence of the householder, Musgrove v. Pendelis [1919] 2 KB 43;

4.6.2 The application of the act to fires started intentionally in domestic fireplaces is unclear. Must negligence or intention be shown in relation to the fire that caused damage or that which escaped from the grate, Sochacki v. Sas [1947] 1 All ER 344.

4.6.3 The creation of fires is, generally, regarded as a dangerous operation attracting strict liability for the negligence of sub-contractors, Emmanuel Ltd v. Greater London Council [1971] 2 All ER 835.

#### 4.7 **Remedies**

Remedies in Rylands v. Fletcher are similar to those available in actions in nuisance.

### 5. **SOME OTHER TORTS IN OUTLINE**

#### 5.1 **Breach of Statutory Duty**

Breach of statutory duty by a person or persons charged with a duty where the statute, on its proper construction, confers a civil right of action. The creation of civil liability can either be express, see The Defective Premises Act 1972 or implied, for instance, in certain provisions of The Factories Act 1961.

One aspect of this area concerns the liabilities of those undertaking statutory obligations, such as local authorities operating supervisory functions under The Building Act 1984. This area is notoriously complex as the courts are often reluctant to impose duties to individuals, in carrying out such functions, where Parliament has remained silent. Sometimes a distinction is made between operational and policy decisions. See discussion in Anns v. Merton [1979] AC 728, disapproved on another point in Murphy v. Brentwood D.C. [1990] 3 WLR 414. For negligence a suggested test is had the authority taken reasonable care in implementing its policy decisions, Lavis v. Kent CC [1990] LGR 416 (CA).

## 5.2 **Defamation**

The publication of a statement that reflects on a person's reputation and tends to lower him in the estimation of a right-thinking members of society generally or tends to make them shun or avoid him.

## 5.3 **Deceit**

There must be a false representation of fact, made with knowledge of its falsity or recklessly, and with the intention that it should be acted on by the plaintiff or by a class that included the plaintiff, in a manner that resulted in damage to him. It must also be proved that the plaintiff did in fact act upon the false statement and that he sustained damage by so doing, see Derry v. Peek (1889) 14 App. Cas. 337, Covent Hospitals v. Eberlin & Partners (1990) 23 Con LR 113.

The wrongdoer is liable for all the losses directly flowing from the deceit, not merely those that were reasonably foreseeable, see Doyle v. Olby [1969] 2 QB 158, and compare the actions and remedies available under the Misrepresentation Act 1967.

## 5.4 **Interference with Business Interests**

Procurement of a breach of contract: A person commits this tort if, without lawful justification, he intentionally interferes with a contract between B and C by persuading B to break his contract with C, or if, by some unlawful act, he directly or indirectly prevents B from performing his contract.

There are also torts of Intimidation, Conspiracy and Passing off.

## 5.5 **Interference with Goods**

There are a number of torts that concern the wrongful physical interference with goods, in the sense of possession or ownership. The law is now partly codified in The Torts (Interference with Goods) Act 1977.

The important tort is that of conversion. This is dealing with the goods of a person in a way which constitutes an unjustifiable denial of his rights in those goods or the assertion of rights inconsistent that persons rights such as wrongfully taking possession of, disposing of, damaging or destroying goods.

The principle remedy is damages, but if the wrongdoer still has possession of the goods the court may order them to be delivered up to the owner and also payment for any consequential damages. Usually, however, the wrongdoer will have the option of paying damages in lieu of delivery up.



## 5.6 **Trespass to the Person**

### 5.6.1 Battery -

The intentional and direct application of force to another person.

### 5.6.2 Assault -

The act of a person which causes another reasonable apprehension of the infliction of a battery on him by the former.

### 5.6.3 False imprisonment -

The infliction of bodily restraint which is not expressly or by implication authorised by law.

## 5.7 **Trespass to Land**

An unjustifiable interference with the possession of land. The act constituting the trespass must be deliberate. If so, it is irrelevant whether or not a trespass was intended. Trespass is actionable *per se*, without proof of damage.

Trespass is an interference with possession of land such as walking or throwing things onto land, staying in a building after permission to be there has expired, digging a tunnel into another's subsoil, obstructing air space within such height as is necessary for the ordinary use and enjoyment of land, Anchor Brewhouse Developments v. Berkley House Developments (1987) 38 BLR 82.

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