Tort in Common Law

Private Comparative law

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Tort law: early stages

In its early stages the law of tort normally comprises several concurrent types of liability, imposed in situations where a defined tangible interest has been invaded by specified physical conduct.

Thus in Roman law the most important types of such tort liability arose from:

- **Injuria;**
- **Furtum;**
- **Lex Aquilia**.

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Tort law: early stages

- **Injuria** was an offence to another's person or personality (i.e. murder, assault) but it came to include all outrages against a man's honour;
- **Furtum** at first covered only theft proper, but it became a comprhensive tort to propery;
- The **Lex Aquilia** established liability for individuals who harmed another's slave, farm animal or damaged their property. Originally limited to deliberate actions, it later encompassed **negligence**, incorporating "culpa" as a qualifying factor. Furthermore, while initially focused on **direct harm**, it was subsequently extended to cover harm arising from **indirect consequences** to both individuals and property.

Tort law: general principle and Common law model

Roman lawyers, however, never arrived at the **general principle** that everyone is responsible for the harm he is to blame for causing. This principle had to wait until the seveteenth and eighteend centuries for its promulgation by the great natural lawyers, especially Grotiuis and Domat. Thereafter it made its way into many of the codes of Europe.

The Common Law of torts started out by having **specific types of liability** just like Roman law, but whereas on the Continent legal scholars ironed out old distinctions between several delicts to the point where a general principle of delictual liability became not only a possibility but an actuality in most legal systems, Anglo-American Lawyers have largely adhered to the separate types of case and separate torts which developed under the writ system.

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Tort law: Common law model

Since the great **reform of 1875** English plaintiffs are no longer penalized for not mentioning the right tort in their statement of claim, but Anglo-American lawyers, judges and attorneys alike, still habitually and automatically tend to **classify** the case before them as falling within one of the **traditional types of tort** and to ask whether it satisfies the requirements of, say, conversion, nuisance, defamation, negligence, deceit.

Each of these **separate torts** is regarded as independent, each has its own constituent elements and its appropriate defences, and each protects particular interests of the citizen against a specified form of invasion.

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Tort law: Trespass

One of the oldest tort claims in the Common Law is **trespass**. The writ of trespass originally led to a penalty as well as to contemporary damages and was issued wherever a person forcibly and in **breach of the peace** – vi et armis contra pacem domini regis – **invaded another's quiet possession** of land or moveables (trespass to land or to chattels) or affected his physical integrity (trespass to the person).

Just like the actio Legis Aquilae, trespass required a direct attack on the person or thing against the will of the plaintiff. If the harm to the plaintiff occurred only as the indirect result of the defendant's conduct or, even directly from an omission to act, the trespass claim was unavailable.

No specific attention was given to the question whether the defendant's behaviour must have been deliberate or negligent.

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Tort law: Trespass on the Case

During the fourteenth century an action of trespass on the casse, later called simply «**action on the case**», was introduced to cover areas where trespass did not apply, where the plaintiff's injury was an indirect consequence of the defendant's conduct, positive or negative.

As a clear example see Blackstone J. in Scott v. Shepherd (1773):

«*If i throw a log of timber into the highway (which is an unlawful act) an another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass because it is an immediate wrong*».

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Tort Law: the evolution of Trespass

As said, the distincion between causing harm intentionally and negligently was not clearly made in the Common Law to begin with. In the example just given, provided that the log hit the plaintiff during its flight, the trespass claim lay whether the defendant intended to cause the harm or merely acted negligenlty in throwing the log into the highway.

As time went on, however, the **trespass** claim was gradually limited to cases of **intentional harm**, and today inentional conduct is required for those specific torts which developed out of the writ of trespass to the person, namely:

- **Assault** (the direct threat of immediate corporeal contact);
- **Battery** (personal injury);
- **False imprisonment**.

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Tort Law: Trespass to land

Liability in trespass is incurred by a person who enters the land of another without his consent, whehter on, above or below the surface, or causes anyone else or any thing (for example rocks, refuse, water) to do so. **Liability in damages** only arises if the act which consitutes or causes the invasion is **intentional**, though the defendant need not have known that the land in question belonged to another.

On the other hand, if a person conducts **activity on his own land** which unintentionally lead to damage on a neighbouring property, the modern view is that **trespass** only lies if he was **negligent** in causing the harm.

In the US, in case of damages to a neighbouring property, the owner is generally liable regardless of fault, on the principle of Rylands v. Fletcher.

If smoke, vapours, smells and so on unduly affect a person's land, the person causing them is liable, again **regardless of fault**, in the tort of **nuisance**, whose pedigree is as long as that of trespass.

Tort Law: Damages to person's moveable properties

Regarding person's **moveable properties** common law offers remedies that partially overlap: trespass to chattels, detinue and conversion.

Conversion, the most relevant, is applicable when the defendant has done something in relation to plaintiff's moveable property which is inconsistent with the plaintiff's ownership. The thief who takes the things away from the owner is liable in conversion but so also is a person who consumes the goods of others or destroys or alters them or who sells or pledges them with a third party.

The sole requiremente for liability in conversion is that the **defendant** should **conscioulsy and intentionally** have **dealt** with the goods.

The defendant need not have been at fault: he will be liable in damages even if he believed in good faith that the thing he consumed or used was his own or reasonably thought he was entitled to consume or use it.

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Tort Law: economic loss intentionally caused

So far we have been dealing mainly with torts which generally involve an intentional interference with integrity of property and person, but common law has a number of other torts which give protection against **economic loss intentionally caused**, for example:

- A person who knowingly **deceives** another by means of **false stament** of fact is liable for fraud or deceit and must pay for the consequent harm.
- A person who knowingly **induces another to break a contract** with the plaintiff is liable to the plaintiff for the tort of inducing break of contract.
- A person in bad faith who makes **false statements** about the plaintiff which cause him harm in his trade or profession is laible of **malicious falsehood**.

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Tort Law: Negligence

Negligence, maybe the most important tort in Common law, developed out of the action of trespass on the case and was not recognized as an independent ground of tortious liability until the nineteenth century.

The stimulus for this development was the great growth in the use of machinery in indusrty and transport that gave rise to a **long series of accidents not caused intentionally.** The typical feature of these accidents was the reprehensible **neglect of the requisite care** and that this fact was the real ground for holding the defendant liable.

Negligence in fact literally means absence of care.

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Tort Law: Conditions for Negligence

The firs condition is that the defendant should have been under a duty of care owed to the group of persons of which the victim was one (**Duty**).

In addition, the defendant must have been in breach of this duty of care (**Breach**).

Finally, in order to imputable to the defendant, the damage (or injury) for which compensation is claimed must be reasonably relevant consequence of his careless behaviour (**Damages**).

In order to support an action for damages for negligence the complainant has to show that he **has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury** (Donoghhue v. Stevenson, 1932).

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Tort Law: Negligence - Example

If a driver runs into a pedestrian is he under a duty?

Does he breach this duty? The pedestrian has to demonstrate that the driver **did not behave as a reasonable man of ordinary prudence** would have done in the situation to avoid the impeding harm.

Finally, the harm of which the victim complains must be a proper consequence of the breach of the duty of care.

The question for the common law here is whether the **careless behaviour** is still to be seen as a «**proximate cause» of the harm** or wheter the harm for which compensation is claimed is not too distant or too remote a consequence to be imputed to the defendant.

Tort Law: Negligence – Duty of Care – Manufacturer Liability

Due to the duty of care requisite, in common law it was difficult making the **manufacturer** of defective products liable to the consumer, since it was thought that whereas a person who manufactured or repaired goods of any kind was under a duty of care towards his purchaser or customer, **he owed no such duty to any third party with whom he had no contract**.

Such a third party, therefore, if injured by the faulty manufacturer of the good, could not claim damages for breach of contract, since he had no contract with the manufacturer, or for negligence since he was owed no duty of care.

This was in line with the principle: «**A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them**» (Le Lievre v Gould, 1893)

Tort Law: Negligence – Duty of Care – Manufacturer Liability

Otherwise, this principle was modified in the case Donoghue v. Stevenson (1932), which adfirmed that the **manufacturer owes the consumer a duty of care at least when, through the intermediacy of a dealer, he delivers to the consumer goods whose freedom from defect neither the dealer nor the consumer was in any position to ascertain**.

In the US today manufacturer is liable towards consumer also without any fault.

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Tort Law: Negligence for Economic Loss

There is no general principle the Common Law which excludes negligence liability in cases of pure economic harm, but here again the duty doctrine helps the courts to prevent negligence liability going overboard.

After great reluctance by the courts, in Hedley Byrne & Co. v. Heller & Partners (1964), this principle was stated: «**a person who, in a business situation, gives information, advice, or an opinion, apparently based on special skill or knowledge, incurs a duty of care towards those who, as he knows or should reasonably foresee, will take specific action in reliance of what he said**».