

## PART 1

# General principles of tort law

### 1 General principles



# 1

## General principles

### Introduction

This chapter will attempt to explain some of the basic principles which underlie the law of tort. Introductory chapters in textbooks are notoriously difficult for students to understand as they are written by people with a detailed knowledge of the subject for people who are new to it. The author will inevitably assume knowledge which the reader will probably not have. Readers are therefore asked to read the chapter and pick up what they can but not to agonise at this stage over material which appears impenetrable. As you progress through the book you will be able usefully to refer back to the introductory chapter.

### What is a tort?

A tort is a civil wrong in the sense that it is committed against an individual (which includes legal entities such as companies) rather than the state. The gist of tort law is that a person has certain interests which are protected by law. These interests can be protected by a court awarding a sum of money, known as damages, for infringement of a protected interest. Alternatively, by the issuing of an injunction, which is a court order, to the defendant to refrain from doing something. There are increasingly limited circumstances where the victim of a tort may avail himself of self-help.

Other branches of law also defend protected interests and the relationship between these and tort law will be discussed later. (See 'The boundaries of tort'.)

### Elements of a tort

Tort is a remarkably wide-ranging subject and probably the most difficult of all legal areas to lay down all-embracing principles for.

The approach that will be taken at this stage is to lay down a general pattern and then to show some of the main deviations from this pattern.

## The basic pattern

The paradigm tort consists of an *act* or *omission* by the defendant which *causes damage* to the claimant. The damage must be caused by the fault of the defendant and must be a *kind of harm* recognised as attracting legal liability.

This model can be represented:

**act (or omission) + causation + fault + protected interest + damage = liability.**

An illustration of this model can be provided by the occurrence most frequently leading to liability in tort, a motor accident.

### Example

A drives his car carelessly with the result that it mounts the pavement and hits B, a pedestrian, causing B personal injuries. The act is A driving the vehicle. This act has caused damage to B. The damage was as a result of A's carelessness, i.e. his fault. The injury suffered by B, personal injury, is recognised by law as attracting liability. A will be liable to B in the tort of negligence and B will be able to recover damages.

## Variations

We will be looking at these elements of a tort in more detail shortly. Now we will look at some of the common variations on the basic model. The elements of act (or omission) and causation are common to all torts. There are certain torts which do not require fault. These are known as torts of *strict liability*.

### Example

An Act of Parliament makes it compulsory for employers to ensure that their employees wear safety helmets. The employer may be liable in a tort called breach of statutory duty if the employee does not wear a helmet and is injured as a result. This is the case even if the employer has done all they could to ensure the helmet was worn. (See also 'The mental element in tort'.)

In some cases the act or omission of the defendant may have caused damage to the claimant but the claimant may have no action as the interest affected may not be one protected by law. Lawyers refer to this as *damnum sine injuria* or harm without legal wrong.

### Example

A opens a fish and chip shop in the same street as B's fish and chip shop. A reduces his prices with the intention of putting B out of business. A has committed no tort as losses caused by lawful business competition are not actionable in tort.

Just in case you thought this was straightforward, there are also cases where conduct is actionable even though no damage has been caused. This is known as *injuria sine damno* and where a tort is actionable without proof of damage it is said to be actionable *per se*.

### Example

If A walks across B's land without B's permission then A will commit the tort of trespass to land, even though he causes no damage to the land.

## The interests protected

### Personal security

People have an interest in their personal security. This is protected in a number of ways. If one person puts another in fear of being hit, then there may be an action in the tort of *assault*. If the blow is struck, then the person hit may have an action in the tort of *battery*. A person whose freedom of movement is restricted unlawfully may be able to sue for *false imprisonment*. If personal injury is caused negligently, then the claimant may have an action in the tort of *negligence*.

The scope given to the personal security interest expands as society becomes more advanced. Until the last century little attention was paid to the psychiatric damage that can be caused to a person. Someone who witnesses a traumatic event can incur serious mental suffering. The advance of psychiatric medicine and changing views on what is tolerable have led the courts to protect certain aspects of mental suffering, such as nervous shock caused by witnessing a negligently caused accident. This is an area of law which is still being worked out by the courts in the context of disasters, such as the Hillsborough football stadium disaster.

In the area of medical treatment, patients have become less willing to accept the word of doctors without question. Litigation in this area has led to the courts having to examine difficult issues such as consent to treatment and the right to life. Here law and morality are inextricably mixed. What, for example, is the legal position if a doctor needs to give a blood transfusion to a patient who will die if they do not receive it, but the patient refuses to have the blood transfusion because of his religious beliefs?

### Interest in property

Property in the broad sense of the word is protected by tort law. A person has an interest in their land which is protected by a number of torts such as *nuisance*, *Rylands v Fletcher* and *trespass to land*. Interests in personal property are protected by torts such as *trespass to goods* and *conversion*. Where clothing or a car is damaged in a negligently caused accident, then a person may have an action for damages in *negligence*.

## Economic interests

Tort law will give limited protection to economic interests where the defendant has acted unlawfully and has caused economic loss to the claimant. These are known as the economic torts. Such protection is limited because the common law has been cautious in drawing the line between lawful and unlawful business practice. This is a line which is largely left to statute to draw.

A controversial area, and one which will be dealt with in the chapter on negligence, is the extent of liability for *negligently* caused economic loss. This is an area where tort and contract intersect. (See 'The boundaries of tort'.)

A distinction is drawn between economic loss which is consequential on physical damage (to the person or to property) and 'pure' economic loss.

### Example

A is driving an excavator and negligently severs an electricity cable which leads to a factory. The factory is forced to close down for a day and production is lost as a result. Any production which had been started at the time of the interruption of the supply and is damaged will be classed as damage to property and can be claimed in a negligence action. Any production which has not been started but cannot be carried out and results in loss of profit will be classed as economic loss and will be irrecoverable. Do you think that this distinction makes sense?

## Reputation and privacy

Increasingly important are a person's interests in their reputation and privacy. Where a person's reputation is damaged by untrue speech or writing, then they may have an action in the tort of *defamation*. There is no specific tort in English law to defend privacy but there have been some interesting developments in this area which are dealt with in the chapter on privacy.

## The role of policy

Lawyers are used to dealing in concepts such as duty of care, remoteness of damage and fault, etc. When cases are analysed in these terms and there is held to be no liability as there was no duty or the damage was too remote, or the defendant was not at fault, this is referred to as formal conceptualism or black letter law. What is frequently concealed in this terminology is the policy reason behind the decision. Although the lawyer must know the relevant rules of law, and these will be the main area of study in this book, a clear picture will not emerge unless the student is aware of the policy issues which have shaped the decision.

Take another look at the example given in the previous section. The court has the choice of allowing the loss to lie on the factory owner by saying that A is not liable, or of shifting the loss to A by holding him liable. The court's decision will be explained by saying, for example, that A owes no duty to the factory owner in terms of certain kinds of loss or that certain kinds of loss are too remote. But the decision

can also be explained in terms of two policy factors. The courts are concerned with opening the floodgates of litigation: for example, if the electricity cable was connected to 50 factories. Closely connected to this is the role of insurance. Most damages in tort are in practice paid by insurance companies. The court's decision will act as a signal to firms as to who will have to insure against this risk. The decision may also be based on who they think is the best insurer.

Traditionally, English judges did not refer to policy when giving decisions but they are now increasingly prepared to state these reasons. The floodgates argument has been prevalent in the development of the law on both nervous shock and the recovery of economic loss in negligence. When you study these sections bear in mind that one of the factors governing the legal rules imposed is the fear of the courts being swamped by a large number of actions and too heavy a burden being placed on the defendant or his insurers.

## The role of insurance

Without insurance the tort system would simply cease to operate. Where a claimant is successful in an action, the damages will normally be paid by an insurance company.

In cases of property damage, insurance may take the form of 'loss', or first-party insurance, which covers loss or damage to the property insured from the risks described in the policy, whether or not the loss occurs through the fault of another party. There is also 'liability', or third-party insurance. This is a matter of contract between the insurer and the insured whereby the insurer promises to indemnify the insured against all sums the insured becomes liable to pay as damages to third parties. The third party must establish the insured's liability to them.

Both first- and third-party insurance are also relevant in cases of personal injuries or death. Three types of first-party insurance are relevant. These are life assurance, personal accident insurance and permanent health insurance. An accident victim who recovers tort damages in respect of the accident will not normally have any first-party insurance money received deducted from the damages. Third-party insurance operates in a similar way to cases of property damage.

The operation of the insurance system can be seen in relation to motor accidents.

### Example

A has taken out first- and third-party (comprehensive) insurance on his car with B insurance company. C has taken out similar insurance on his vehicle with D insurance company. Due to C's negligent driving, A's car is damaged and A suffers serious personal injuries. If A successfully sues C for negligence, then under the third-party insurance of C, D will become liable to pay A's damages. If C's car was damaged in the accident, then D may be liable to reimburse C for this damage under C's first-party insurance.

If A's negligence action was unsuccessful, then he could claim for the damage to his car from B under his first-party insurance, but unless he carried personal accident insurance (which is relatively rare) he would go uncompensated for the personal injuries.

In practice, most cases do not go to court but are settled by the parties. The largest element in *A*'s claim in the above example is likely to be for his personal injuries. If his lawyers have assessed his claim as £500,000, any action may well be settled if fault is not at issue.

The fact that a party is insured is, strictly speaking, disregarded by the court when liability and quantum of damages are assessed. However, it is suspected that the tort system would be unable to operate without the underpinning of insurance and that the presence of insurance may have shaped some liability rules. Not many people would be able to meet a damages award of £500,000 and, without insurance, it would be likely that many claimants would go uncompensated or receive only partial compensation. The fact that the defendant is insured in certain types of cases means that the court can set the standard of care at a higher level so as to compensate more people. This is particularly the case where insurance is compulsory, such as in motor accident cases. A driver must carry third-party insurance by law. Similarly, an employer must be insured against any damages an employee may recover against him in respect of injury at work.

This advantage has a price in the control which insurance has over the conduct of litigation. The insurer's right of subrogation combined with the terms of insurance policies will give the insurer complete control over the litigation process, although the case will be brought in the insured's name.

### Example

*A* runs into the back of *B*'s car while *B* is stationary at traffic lights. This causes £1,000 worth of damage to *B*'s car. *B* is comprehensively insured and the insurer pays for the repairs to the car. Normally, *A* would allow his insurers to deal with the claim and assuming liability is admitted, either a 'knock for knock' agreement between the insurance companies would operate, or *A*'s insurers would reimburse *B*'s insurers. If *A* decides not to use his insurance company as he thinks it would badly affect his no-claims discount, then *A* can be sued for the £1,000 by *B*'s insurers exercising their right of subrogation. The action would be brought in *B*'s name.

The insurance principle can also be seen at work in professional indemnity policies. A solicitor or accountant will carry indemnity insurance in case they are sued for professional negligence. The damages in such actions can be very high and insurance is essential to the operation of the system.

Insurers pay out 94 per cent of tort compensation and in some areas of tort law have a considerable influence on the tort system. This may happen in one of two ways. The first is the impact on legislation and judicial decisions. If legislative change is being contemplated, the impact on insurance will be taken into account by Parliament. Impact on judicial decisions is harder to assess, as few judges acknowledge the effect of insurance on their decisions. (But see *Barker v Corus UK Ltd* [2006] 3 All ER 785.) The second is in the actual operation of the tort system. As the insurance companies are effectively the paymasters, they have a large say in its operation. Insurers determine which cases go to court. Only 1 per cent of all claims made go to court and far fewer go on appeal and appear in the law reports. Which cases are appealed may be determined by the insurer and one factor in their decision not



to appeal may be that they want a point of law to remain uncertain. Other cases are settled by the insurers. For reasons of cost an insurer may wish to settle a case where in strict legal terms the claim might not succeed in court. Conversely, a party might be coerced by the insurer into accepting less on a settlement than they would have received if they had gone to court.

The rules of law as stated in this book may bear little resemblance to the practice of tort law, particularly in the area of personal injuries.

## Fault and strict liability

As we saw previously, it may not be sufficient for claimants to prove that the defendant's act or omission caused them damage in order to succeed in an action. It may also be necessary for the claimant to show that the defendant was at fault. Fault in tort means malice, intention or negligence. Where fault does not have to be proved it is said to be a strict liability tort.

The history of fault in tort law is connected to policy and stems from the nineteenth century. At this time the availability of insurance was extremely limited and damages would usually be paid personally by the defendant. In order to protect developing industries, the courts evolved a system of tort that usually required proof of fault in order for an action to succeed. The economic argument in favour of fault was supported by the moral and social arguments that fault-based liability would deter people from anti-social conduct and it was right that bad people should pay. One consequence of this development was that workers in industry who suffered industrial accidents were largely deprived of compensation.

English law has never succeeded in ridding itself of this nineteenth-century legacy and fault remains as the basis of most tort actions. Understanding of the principle is made more difficult as the spread of insurance has meant that the courts have been able to increase the standard of conduct required in certain situations, while retaining the language of moral wrongdoing. It has been shown that many errors by car drivers which are classed as being negligence (fault) are statistically unavoidable. Where this is the case, the moral and deterrent arguments for fault are certainly reduced if not extinguished. Further problems are caused by the fact that a tort judgment is rarely paid by the defendant themselves but by their insurer. What has happened is that fault has often moved away from being a state of mind to being a judicially set standard of conduct which is objectively set for policy reasons.

### Example

A was operated on by surgeon B. Something went wrong during the operation and A is now incapable of looking after himself. A sues B for negligence. If the action is successful, then A will be awarded £500,000 damages. The question in the case will be whether B was negligent (at fault). At what level should the court set the standard? In order to compensate as many victims of medical accidents as possible, the standard should obviously be set very high. But if this is done, the damages which are paid out by the health authority will remove money which could otherwise be used for patient treatment. The standard will therefore be set at a level which is dictated by policy.

There are three states of mind which a student needs to be aware of in tort law. These are *malice*, *intention* and *negligence*. Where a tort does not require any of these it is said to be a tort of strict liability.

## Malice

Malice in tort has two meanings. It may be: (a) the intentional doing of some wrongful act without proper excuse; (b) to act with some collateral or improper motive. It is (b) which is usually referred to.

In the sense of (b) above there is a basic principle that malice is irrelevant in tort law. If a person has a right to do something then his motive in doing it is irrelevant.

### *Bradford Corporation v Pickles* [1895] AC 587

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The defendant extracted percolating water in undefined channels with the result that the water supply to the plaintiffs' reservoir was reduced. The defendant's motive in doing this was to force the plaintiffs to buy his land at his price. The action failed, as the defendant had a right to extract the water. As he had such a right, his motive, even if malicious, was irrelevant.

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There are two groups of exceptions to this basic principle:

- 1 Where malice is an essential ingredient of the tort, for example, in *malicious prosecution*, the claimant must prove not only that the defendant had no grounds for believing that the claimant was probably guilty, but also that the defendant was activated by malice. The reason for this requirement is that policy in this area favours law enforcement over individual rights. The result of the requirement is that there are few successful cases of malicious prosecution.
- 2 There are also torts where malice may be relevant to liability. For example, in *nuisance* malice may convert what would have been a reasonable act into an unreasonable one.

### *Christie v Davey* [1893] 1 Ch 316

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Plaintiff and defendant lived in adjoining houses. The plaintiff gave music lessons and this annoyed the defendant. In retaliation the defendant banged on the wall and shouted while the lessons were in progress. The plaintiff was held to be entitled to an injunction because of the defendant's malicious behaviour. (See also Chapter 16.)

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The distinction between this case and *Bradford Corporation v Pickles* is difficult. *Pickles* was thought to have established a principle that a lawful act does not become unlawful when done with malice. However, this case was concerned with water rights to which special rules apply and was concerned with a prospective, rather than existing, amenity. This is not to suggest that malicious interference with an existing amenity is always actionable.

Also, in defamation cases, malice may destroy a defence of fair comment or qualified privilege and may affect the defence of justification where spent convictions are in issue. (See Chapter 20.)

## Intention

The meaning of intention varies according to the context in which it is used. Intention is relevant in three groups of torts:

- 1 Torts derived from the writ of trespass. Here intention means where a person desires to produce a result forbidden by law and where they foresee it and carry on regardless of the consequences. The defendant must intend to do the act, but need not intend harm: for example, if a person has a fit and strikes another person this would not amount to trespass to the person. But the test will catch the practical joker who intends to frighten a person but ends up causing them severe nervous shock.
- 2 In cases of fraud and injurious falsehood. In these torts the defendant must make a statement which they know is untrue.
- 3 In cases of conspiracy. If *X* and *Y* combine together and act to cause injury to *Z*, then *Z* will have an action provided that they can prove that their primary motive was to cause them damage. If the primary motive of *X* and *Y* was to further their own interests, then even if they realised that their act would inevitably damage *Z*, they will not be liable in conspiracy.

### Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435

Yarn for making Harris Tweed was spun by mills on Harris. Crofters who made Harris Tweed began importing cheaper yarn from the mainland. The millworkers' union ordered their members at the docks to refuse to handle the imported yarn after the millworkers' employers had refused a pay rise because of competition from the crofters. The crofters' action for conspiracy failed as the union's predominant motive was to advance the interests of its members and not to damage the crofters.

## Negligence

Negligence in tort has several meanings. It may refer to the *tort of negligence* or it may refer to *careless behaviour*. It is in the latter sense that the word is used here. In this sense it does not refer to a state of mind. When a court finds that a person has been negligent it is making an *ex post* assessment of their *conduct*. A person who totally disregards the safety of others but does not injure them is not guilty of negligence, although they may be morally reprehensible. On the other hand, the person who tries their best, but falls below the standard set by the court and causes damage, will be liable.

The standard set is an *objective* one. The court will apply the test of what a 'reasonable man' would have done in the defendant's position. One effect of this test is that no account is taken of individual disabilities.

### Nettleship v Weston [1971] 2 QB 691

The defendant was a learner driver who was given lessons by the plaintiff. The plaintiff was injured as a result of the defendant's negligent driving. The court held that all drivers, including learner drivers, would be judged by the standards of the average competent driver.

The setting of the standard depends on what the objective of the negligence formula is. If the objective is to compensate the claimant for their loss, then it is clearly in the claimant's interests to set the standard as high as possible. But if the objective is to deter the defendant, then it is counter-productive to set a standard which is too high to be attainable. Research has shown that the standard set for drivers is unattainable, even by safe drivers, with the result that the defendant may have been unable to avoid the accident but is still classed as having been negligent.

## Strict liability

Whereas fault is a positive idea, strict liability is a negative one. It means liability without fault. In the last century the emphasis was placed by the courts on fault-based liability, and strict liability was generally frowned on. Some areas of strict liability have survived and Parliament has created others.

No coherent theme links these areas. There are historical relics such as strict liability for trespassing livestock, which harks back to a predominantly agricultural society. The rule in *Rylands v Fletcher* represents a largely failed attempt by the judiciary to deal with the problems created by the Industrial Revolution. The rule that an employer is vicariously liable for the negligence of their employee in the course of their employment, in the absence of any fault on the part of the employer, is a pragmatic response to a particular problem.

In the area of industrial safety, Parliament has passed legislation which imposes strict as opposed to fault-based liability on an employer.

The standard of liability imposed, even within the context of strict liability, varies from tort to tort. There is one example of absolute liability, where no defence is available. This is the Nuclear Installations Act 1965. Most actions, however, permit some defences or exemptions from liability.

What is common to all tort actions is the idea of causation. The claimant must always prove that the defendant caused their injury. There are frequently calls for drug manufacturers to be made strictly liable for injury caused by their products. If this were to occur then the claimant would no longer have to prove negligence but would still be faced with the difficult task of proving that it was that drug which caused their injury. (See the Consumer Protection Act 1987, Chapter 11.)

## Objectives of tort

Tort law has two main objectives: compensation and deterrence. It is generally thought that tort law normally has no punitive function and that this job is performed by the criminal law. There are very limited circumstances, though, where *exemplary damages* may be awarded in tort and these do have a punitive function. (See Chapter 27.) The fact that the judiciary has kept the award of this type of damages within such narrow parameters means that they are wary of tort law performing this function.

## Deterrence

### Individual deterrence

The theory behind individual deterrence is that the possibility of a civil sanction, such as damages, will cause the defendant to alter their behaviour and avoid inflicting damage.

This theory depends on two factors. First, will the sanction actually affect the defendant? We have seen that most awards of damages are paid out by insurance companies. The only financial effect of an award of damages on an insured defendant may be to increase the premium which they have to pay for their insurance. But reputation is also important to some people. A finding of negligence against a doctor or lawyer may adversely affect their career. The second factor is whether the defendant could have avoided the accident. We have seen that it is impossible for a car driver to avoid committing driving errors which the law will label as negligence. If a person cannot avoid an error then they cannot be said to be deterred by a liability rule.

It is now generally accepted that individual deterrence has little part to play in many tort actions. The legal reason that most people drive as safely as they can is the fear of criminal, not civil, sanctions. Individual deterrence does have a role where a person's professional reputation is at stake, and the reason why most newspapers try to avoid libelling people is the fear of an action for defamation.

### General or market deterrence

Academic work on the economic effects of tort liability rules has renewed interest in the role of deterrence in tort law. This form of deterrence is not individual deterrence but what is known as market deterrence. The idea behind this is that tort law should aim to reduce the costs of accidents. This is achieved by imposing the costs of accidents on those who participate in accident-causing activities.

#### Example

If a car manufacturer were to be charged the accident costs of cars in which seat belts were not installed, then the price of cars without seat belts would reflect the accident costs. Rather than impose a law which states that cars must be fitted with seat belts, the market, through the cost of cars without seat belts, would enable people to make a choice between the cheaper cars with seat belts or the more expensive ones without.

## Compensation

One of the major aims of tort law is to compensate those who have suffered personal injury. The present system shifts losses from the claimant to the defendant when the defendant has been shown to have been at fault. In recent years this system has come under increasing criticism as being an inefficient method of compensating accident victims.

There are three systems which provide for accident victims. These are tort law, public insurance (social security) and private insurance. The largest part in

compensation is now played by public insurance. A person who is injured in an accident may become entitled to payments by the state, such as sickness benefit.

Tort damages are distinguished from payments by the state in that the former are payable only on proof that a person caused an injury and was at fault in doing so. The latter are payable on the occurrence of an event and according to need.

The third system is private insurance. This plays a small but growing part in accident compensation. Personal accident insurance or permanent health insurance may be taken out against the possibility of indisposition. This is still relatively expensive in the United Kingdom but is being taken up by employers for their key personnel.

A number of criticisms are levelled at the tort system. It is very expensive to administer in comparison with social security. It has been calculated that the cost of operating the tort system accounts for 85 per cent of the sums which are paid to accident victims. For claimants the system is unpredictable, as they do not know whether they will receive any compensation or not. This results in pressure on claimants to settle actions for less than they would receive if they went to trial. The system is also slow and a claimant may have to wait years before receiving compensation. The more serious the accident then generally the longer the claimant has to wait. Finally, damages are usually paid in a lump sum. This creates difficulties as inflation may erode the value of the award and no account can be taken of improvement or deterioration in the claimant's medical condition.

The civil justice system was subjected to a radical overhaul as a result of the Woolf Report on *Access to Justice* (1996). The reforms were introduced in 1999 with a view to saving costs and speeding up litigation. There are now three 'tracks' for cases. The small claims track is for claims of under £5,000 (or under £1,000 for non-pecuniary damages in personal injury cases). A 'fast track' applies to cases (other than small claims) where the value is under £15,000, the trial is likely to last no more than a day and oral evidence is restricted. The 'multi track' applies to cases not allocated to the other two tracks. Judges are given greater powers in case management in order to attempt to bring down costs and speed up cases.

## Alternative systems of compensation

We have already seen that tort damages are only part of the overall picture of compensation for accidents and are a junior partner to state benefits. The position in England and Wales is complex, with a number of possible avenues of compensation open to an injured person. They may be able to obtain tort damages, be covered by private insurance and be entitled to state benefits. Because of the haphazard and uncoordinated way in which the system has evolved, the victim may end up being over-compensated. On the other hand, a victim may have no insurance cover, not be able to prove fault against a person and may not have a sufficient contribution record to claim contributory state benefits. This victim will only have the safety net of income support benefit at subsistence level to support them.

One other source of compensation which should be mentioned at this point is the Criminal Injuries Compensation Scheme. Payments may be made for injuries

directly attributable to crimes of violence. If the victim goes on to obtain tort damages, then any award made under the scheme must be repaid.

In some countries the role of compensating for accidents has been removed from the tort system. In New Zealand, a comprehensive no-fault accident compensation scheme was set up in 1974 to replace tort damages in personal accident cases. Where a person suffers injury through accident they make a claim through the Accident Compensation Commission. The victim may claim up to 80 per cent of earnings before the accident. Payments are made on a weekly basis and can be adjusted to reflect inflation and the victim's medical condition. The victim does not have to prove fault and a wider range of accidents are therefore covered by the scheme than by tort law. The system of periodical payments avoids problems which are caused by lump sum awards of damages in tort cases. In tort cases it is not generally possible for the court to take into account future inflation or to allow for changes in the victim's medical condition. Under the scheme, a victim may also claim for non-pecuniary loss in the form of an independence allowance for persons who have a permanent disability above 10 per cent. Such awards are low compared with those which would be received under a tort system. The advantage of the scheme is that all accident victims receive some compensation and are not put to the trauma, cost and delay of having to sue someone. The drawbacks which have been discovered from experience of running the scheme are the cost, which is clearer and therefore more political than the tort system, and the possibilities of fraud. A further problem, which is common to most legal compensation systems, is that a distinction is drawn between the covered area of personal injury by accident (including occupational disease) and the uncovered areas of disease and ageing. A number of writers have pointed out that in a no-fault compensation scheme the concentration should not be on the cause of the accident but on the disability itself.

The New Zealand experience has been that a no-fault system that tries to replace tort damages across the board is extremely expensive and the government was forced to reduce the level of benefits available.

In England, the thalidomide tragedy in the 1960s and 1970s aroused interest in the question of compensation. The Pearson Commission (Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054 (1978)) was established and the report proposed a no-fault scheme limited to accidents caused by motor vehicles. Some 188 other proposals were made but it is doubtful whether any reform can be traced directly to these. A no-fault scheme does involve spending money and the implementation of such a scheme depends on the political will to do so. Opponents of such schemes argue that the removal of tort actions will remove an important deterrent to careless conduct.

Despite the political neglect of the Pearson Report, compensation schemes are now back on the political agenda. Disasters such as Zeebrugge, Piper Alpha and the Hillsborough football stadium disaster have given publicity to the plight of victims.

The question of taking medical 'accidents' out of the legal system has been discussed for a number of years. The option of a comprehensive no-fault scheme was dismissed in 2003 when the cost was estimated at £4 billion per annum.

The Department of Health has now come up with a proposal for an alternative to tort law in the form of the NHS Redress Bill 2005. The Bill establishes an NHS redress scheme which will enable the settlement of certain low value claims arising after

adverse incidents without the need for court proceedings. The scheme applies only to claims under £20,000 and will apply where the claim is by the estate or dependants of a deceased patient. The objectives are to take the 'heat' out of disputes and remove any financial disadvantage from the patient. (See Chapter 14.) This is not a 'no-fault scheme', as it applies only to claims in tort, but it is anticipated that it will remove the need for patients to go to court in low cost claims.

At least one influential writer in England now favours the abolition of the action for personal injuries and its replacement by private insurance. Professor Atiyah, who was once a strong supporter of state-funded no-fault schemes, has now declared his lack of faith in such schemes and his faith in the market. ((1997) *The Damages Lottery*, Hart.) This view is open to the criticism that the poor would be excluded from a market-based system.

## A compensation culture?

There is renewed interest in the personal injury litigation system, partly as a result of claims that England and Wales now have a 'compensation culture' similar to that in the United States. A compensation culture can be loosely defined as a propensity to respond to injury by legal redress. Such claims have been partly driven by changes in the way in which the legal system operates in this area.

Lawyers have become increasingly adept at identifying and developing claims for personal injuries. Increasing specialisation and the foundation of the Association of Personal Injury Lawyers in 1990 has enabled lawyers to coordinate claims and share expertise.

Social awareness of the right to claim has been raised, partially as a result of the ability of lawyers to advertise and the advent of claims management companies who act as intermediaries between the client and lawyers and aggressively advertise the availability of claims.

The availability of conditional fee arrangements (CFAs), which allow lawyers to work for clients on a 'no-win no-fee' basis may also be a factor. CFAs mean that if a claim fails the client does not have to pay his own lawyer's costs. An insurance policy can be taken out to cover the costs of the other side. If the claim is successful, the claimant lawyer's own costs and a 'success fee' can be recovered from the defendant. The financial risks of litigation have therefore been considerably reduced. CFAs became widely available after the implementation in 2000 of the Access to Justice Act 1999. However, such figures as are available do not suggest that claims in accident cases have risen appreciably since then.

One problem with assessing the current position is that there has been no comprehensive empirical study of the system since the Pearson Commission in 1978 and the Oxford Study in 1984. (D. Harris et al. (1984) *Compensation and Support for Illness and Injury*, OUP.) Recent research on the available data suggests that although there has been a threefold rise in claims since 1978, this is not a recent phenomenon and claims for accidents (as opposed to disease) have not risen in the last decade. The total number of claims has risen by 3 per cent in the past five years. However, there has been a 5 per cent fall in the number of accident claims in the same period. Motor claims have remained stable, whereas clinical negligence claims have fallen by 34 per cent



and employer's liability claims by 21 per cent. Motor accident claims account for 70 per cent of the total. What has increased is the total cost of claims, probably as a result of changes to the way damages are calculated and legal costs. (R. Lewis, A. Morris and K. Oliphant, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' (2006) 2 JPIL 87–103.)

The view of the UK government, following the conclusions of its Better Regulation Task Force in *Better Routes to Redress* (Cabinet Office Publications, 2004) is that the compensation culture is a myth but that the public's erroneous belief that it exists results in real and costly burdens. This underlies the rather strange provision of s 1 of the Compensation Act 2006 which, according to the government, simply reiterates the current test for breach of duty in negligence and then establishes a framework for the regulation of claims management companies.

Section 1 of the Act is intended to deal with the effect of negligence on social activities where people might be inhibited from involving themselves or allowing their land to be used:

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity.

It is difficult to see what this will achieve, as there is stated to be no change to the common law test for breach of duty and the courts are already alert to this problem as is shown in cases such as *Tomlinson v Congleton District Council* [2003] 3 All ER 1122. (See Chapter 7.)

## The boundaries of tort

For reasons of space, this section will concentrate on the boundary between tort and contract. This is an area which has caused the courts considerable problems in recent years.

A number of distinctions between contract and tort can be offered, but it remains the case that there are still substantial areas of overlap between these two strands of common law liability. At best, it can be said that there are differences between contractual and tortious obligations, but that the two interact and complement each other and in many instances they overlap.

### Legally imposed and voluntarily assumed obligations

One of the most commonly offered distinctions is that tortious duties are fixed by law, whereas the contractual obligations of the parties are fixed by the parties themselves. However, like most generalisations, this is apt to mislead. For example, many contractual obligations are legally imposed, not the least of which is the duty not to break a promise which forms the basis for a remedy for breach of contract. In addition, there are a number of contractual duties which can only be described as arising

by operation of law. For example, in the field of product liability, terms are implied in contracts for the supply of goods which owe little to voluntary choice. Sellers have terms of fitness for the purpose and satisfactory quality included in the contract by virtue of the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994).

Likewise, the courts are able to imply terms into contracts so as to make sense of the arrangement. Ostensibly the purpose of such implication is to give effect to the presumed intent of the parties, but one might be forgiven for taking the view that the court is actually legislating by imposing duties upon the parties to the contract. Sometimes, a court may 'create' a contract for the parties. In such cases, the court would appear to have imposed an obligation upon the 'promisor'. Frequently it will be found that the collateral contract device is used to fill a gap which has appeared in the law. For example, it was used to create liability in damages for negligent misrepresentations before the Misrepresentation Act 1967 was passed. It was also used to render liable the supplier of goods under a hire purchase contract for statements made by him during the course of negotiations. An explanation of these cases is that the court used the collateral contract as a means of disapproving of the defendant's conduct by ordering him to compensate the plaintiff for the loss he had suffered. In this way, the court effectively imposed an obligation upon the defendant.

Just as it is misleading to say that contractual obligations are voluntarily assumed, it is also a mistake to ignore the relevance of voluntary choice when considering the issue of tortious liability. Some tortious duties arise out of a relationship which has been voluntarily entered into. For example, the duties owed by an employer to his employees and that owed by an occupier of premises is partly dependent on the relationship between the parties. Moreover, liability for economic loss caused by negligently prepared advice will involve a consideration of the relationship between the adviser, the advisee and any relevant third party and it will be necessary to take account of any contractual undertaking which might have been given. In contract the statement is made voluntarily and must be supported by consideration from the recipient. In tort the maker of the statement must voluntarily assume responsibility for it. The only distinction is that no consideration is required in tort.

While tortious duties are imposed by law, it does not always follow that they are immovable, since it is possible for such duties to be modified by an agreement between the parties.

## Consent

Does the distinction between contract and tort make sense if one approaches this question from the point of view of consent (i.e. that a contractual duty can only be imposed where a party consents, but a tortious duty may be imposed in the absence of consent)? Whether a contractual duty exists or not is determined on the basis of objective criteria, not on the subjective intention of the parties. This means that although consent plays a part in contract, it is not all-important. Conversely, in tort consent may play a role. Where a person is injured during a sporting contest, such as football, there may be no action in tort, as the injured person may have consented to the risk of injury by taking part in the contest. Tort law also imposes duties on an occupier of land to a visitor to the land. Whether a person is a visitor or not, and

therefore whether such a duty may be imposed, depends on the consent of the occupier to the presence of that person.

### Strict and fault-based liability

A further generalisation is that contractual liability is strict, whereas tortious liability is fault-based. Although it is true that many contractual duties are strict, there are many that require the defendant to exercise reasonable care and are therefore fault-based. Many tortious duties are said to be fault-based, but the problem is to decide what is meant by fault. It is clear that the word fault has different meanings. For example, very rigorous standards are imposed in areas where liability insurance is compulsory. Furthermore, there are a number of strict liability torts in which it is not necessary to show that the tortfeasor is blameworthy in causing harm to the claimant.

### The interest protected when granting a remedy

The common law recognises a number of interests which it regards as deserving of protection. Traditionally, the fulfilment of expectations is perceived to be the function of the law of contract with the result that an award of contract damages is supposed to put the claimant in the position he would have occupied had the defendant's undertaking been fulfilled. The claimant's expectations may be protected in other ways, for example where a defaulting buyer is ordered to pay for goods he has agreed to purchase, or if the court grants a decree of specific performance. Compensating a claimant for wrongfully inflicted harm is seen to be the role of the law of tort and requires the claimant to be returned to the position they were in before the defendant's wrong was done. Accordingly, in general terms, tort damages are not supposed to take account of what would have happened to the claimant. Instead, damages are assessed on the 'out of pocket' principle.

#### Example

If *A* sold *B* a motor car for £5,000 which was worth £4,000 but *A* said it was worth £6,000, *B*'s contract damages would in theory be the difference between what the car was worth and what he had been led to believe it was worth, i.e. £2,000. But *B*'s damages in tort would be the amount required to put him in the position he was in before the tort was committed, i.e. £1,000.

But these distinctions are apt to mislead and it is important not to say that only the law of contract is concerned with expectations, and that only the law of tort is concerned with compensating wrongful harm. In some instances the so-called 'contract measure' is relevant in a tort action, for example where the claimant in a personal injuries case is awarded damages for loss of future earnings or where a solicitor has negligently drafted a will depriving the beneficiaries of their bequest.

The traditional role of tort law has been to protect people against damage to their person and property. This is done by making an award of damages for any loss

incurred by the victim. The problem comes, as in the above example, where tort is used to protect *economic* interests. Some people believe that this should be the role of contract and that tort should have no role to play. Contract law aims to make things better and tort to avoid making things worse. But consider the following case.

### *Ross v Caunters* [1979] 3 All ER 580

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The defendant solicitor acted negligently in the execution of a will, with the result that the plaintiff was unable to take a bequest under the will. The testator (person making the will) had a contract with the solicitor but the plaintiff did not, because of the contractual doctrines of consideration and privity. The court decided that the defendant was liable in the tort of negligence and the plaintiff was able to recover the value of his lost bequest from the solicitor. But was this a case of the solicitor making the plaintiff worse off or failing to make him better off? Would it not be easier in these circumstances to alter the law of contract so that there is a contract in favour of a third party (in this case the beneficiary)?

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Some writers have pointed out that the extent to which contract protects the expectation interest is in practice limited by the rules which restrict the amount of damages which may be claimed. The two most important are the rules that a claimant may not recover items of loss which are too remote and the claimant must take reasonable steps to mitigate their loss. The effect of these rules is that in many cases a claimant will only be able to recover their reliance or *status quo* loss.

## Concurrent liability

There are situations where a claimant may have a choice between contract and tort. If a person receives private medical treatment and is negligently injured, they may sue the doctor in negligence or for breach of contract. The substance of the action will not differ, as in negligence the doctor must take reasonable care and in contract there is an implied term that the doctor will take reasonable care. It is unlikely that the doctor will have guaranteed a cure, so there is no advantage to the claimant in suing in contract to protect their expectation interest. The damages in either case will be the same.

There are a number of technical distinctions between contract and tort. The limitation period (the time in which the claimant has to start proceedings) is different and there are different rules on when writs may be served outside the jurisdiction.

## Change

The dividing line between the two areas is never static and a student can observe the changes from a historical perspective. The rigidity of contract law through the doctrines of consideration and privity may give rise to an expansion in tort law. This can be clearly observed in the law relating to defective buildings. (See Chapter 10.) As a purchaser of a defective building may not have a contract with the builder or a sub-contractor if there is no privity of contract, there may be no breach of contract action against the builder. To compensate for this perceived injustice, tort law developed an action in the tort of negligence against the builder.

However, the senior judiciary turned against this action and it was rejected. This has now led to developments in contract law to create a contract action in the case of sub-contractors.

## The position of minors

As a general principle, anyone may sue in tort. A minor may bring an action through a next friend.

The position of minors as defendants has not been considered very much, probably because they would not normally be able to satisfy a judgment. In principle, there is no reason why a person of any age cannot be sued. In practice, it may be that the courts set the standard of care according to the age of the child (see Chapter 7), although in theory the standard of care in negligence is an objective one.

Damage caused before birth has always posed a problem in tort law. It was one of the principal hurdles that the parents of the thalidomide children had to face in their litigation. Legislation has since improved the position.

The Congenital Disabilities (Civil Liability) Act 1976 gives a child a cause of action where it was born disabled as the result of an occurrence which: affected the ability of either parent to have a normal healthy child; or affected the mother during the pregnancy; or affected the child in the course of its birth; or there was negligence in the selection or handling of an embryo or gametes for the purpose of assisted conception during treatment for infertility. In any of these cases the child must be born with disabilities which it would otherwise not have had.

The child's action is unusual as it is derived from a tortious duty to the parents. The defendant will be liable to the child if he would have been liable to the parent but for the fact there was no actionable injury to the parent.

The child's mother is not liable under the Act unless the injury can be attributed to her negligent driving of a motor vehicle.

### Example

Christine became pregnant and suffered badly from nausea. She consulted her doctor, who prescribed a drug to relieve the nausea. Christine gave birth to a daughter who suffered from physical and mental disabilities. Both the doctor and the manufacturer of the drug owed a duty of care to Christine. If the doctor was negligent in prescribing the drug or the drug company in making or marketing it, then all the elements of a negligence action by Christine are present except damage. It is the baby who has suffered the damage and has the action under the Act. The stumbling-block will be causation. It will be necessary to prove that the drug was the cause of the child's disabilities.

Where the disability is a result of a pre-conception event which affected the ability of the parents to have a normal healthy child, the defendant is not responsible if either or both of the parents knew of the risk. If the child's father is the defendant and he knew of the risk but the mother did not, then the father will be answerable to the child.

## The Human Rights Act 1998

A further layer of complexity has been introduced to tort law by the passing of the Human Rights Act 1998, which came into force in October 2000.

The United Kingdom was an original signatory to the European Convention on Human Rights, but until the Act the rights contained in the Convention did not form a part of national law. A person who alleged that their rights under the Convention had been infringed by the United Kingdom had to take a case to the Commission and then to the European Court of Human Rights in Strasbourg. If the decision of the Strasbourg court was against the United Kingdom, then national law would be changed to accommodate the judgment.

Under the 1998 Act the Convention applies either directly or indirectly. Most of the rights in the Convention are now directly enforceable against public bodies in English law. A new remedy is created against public authorities which act in a way which is incompatible with the Convention. A public authority is defined by s 6(3) as a court or tribunal or any person certain of whose functions are of a public nature. If proceedings are against a private person or body then the Act may have an indirect effect. A court is in itself a public authority and must therefore ensure compatibility with Convention rights by an appropriate interpretation of the law. As far as legislation is concerned, a court or tribunal must interpret legislation in accordance with the Convention (s 3). A court which is considering any question which has arisen in connection with a Convention right must take account of decisions of the European Commission and the European Court of Human Rights (s 2). It is important to note that a court may find that there has been a breach of a Convention right by a public authority and award compensation. This breach may or may not also amount to a tort. If it does amount to a tort then the claimant cannot be doubly compensated for the same injury.

### Example

A landowner suffers a reduction in the value of his property and interference with his peaceful enjoyment of it as a result of low flying aircraft from the Royal Air Force. This may amount to the tort of nuisance and it may also be a breach of Article 8. If the claimant has been compensated for loss of peaceful enjoyment (loss of amenity) in nuisance then he will not be compensated for breach of Article 8 for the same loss.

How this will affect the different parts of tort law is difficult to predict, but in some areas such as defamation and negligence the courts had been working towards compatibility with the Convention in their decisions before the Act came into effect.

### Example

Mark is a 10-year-old boy who has been taken into care following allegations that he has been sexually abused by his stepfather. Two years later it is discovered that social workers on Mark's case had been negligent and Mark should not have been taken into care.

As the social workers are employed by the local authority, which is a public authority under the Act, Mark will have a direct action under the Human Rights Act against the local authority for possible breaches of the Convention. He may also have an action in the law of tort for negligence and the court must take into account the jurisprudence of the Convention when determining the action.

### Example

A celebrity is photographed leaving a drugs clinic and the photograph is published in a newspaper. The celebrity cannot bring a direct action against the newspaper for breach of a Convention right, as the newspaper is not a public authority. However, in any other action the court must take account of relevant articles of the Convention and any relevant jurisprudence of the European Court of Human Rights. (See Chapter 21.)

More detailed treatment of the relevant parts of the Convention will be given in the appropriate chapters. At this stage of the book an indication will be given of the articles likely to affect tort law and where their impact will be felt.

Convention jurisprudence is different from English law but normally works on the basis of a right being given by an article (such as freedom of speech) and then the state being permitted to make derogations from that right for particular purposes (such as the protection of reputation). In making these derogations the state is allowed a 'margin of appreciation', in the sense that not all national laws need be identical. However, any derogations may be subjected to a test of whether the derogation was 'necessary' for the protection of one of the stated aims. This involves the court performing a balancing act between the harm done by a breach of the right and the harm which will be caused by upholding it. One of the difficulties posed for English law by the new law is that tort law is generally based on the commission of a *wrong* whereas Strasbourg jurisprudence is based on *rights*. The tension between these concepts creates problems for courts.

### Example

A newspaper wishes to publish a political corruption story about X. They are not able to prove that all their allegations are true. The relevant right is freedom of speech. The newspaper should be free to expose political wrongdoing. However, one of the permitted derogations is the protection of reputation. The question for English law will be whether the existing law of defamation draws the correct balance in the sense that any restriction on the newspaper's freedom to publish is necessary in a democratic society to protect X's reputation.

## Article 6

This gives the right to a fair trial. The most serious effect of Article 6 will be in negligence, where the granting of immunity from negligence actions to certain groups of public or quasi-public bodies such as the police and advocates had already come

under scrutiny. The previous system of the defendant having the action ‘struck out’ at an early stage because the defendant had immunity came under attack from the Strasbourg court. (*Osman v UK* [1999] FLR 193.) This was on the basis of a lack of proportionality, as on a striking out application there was no opportunity of balancing the claimant’s interests against the defendant’s immunity claim. This decision caused difficulties to the English courts (see *Barrett v Enfield London Borough Council* [2001] 2 AC 550), which had difficulties in determining how an article which appears to be concerned with procedural rights could affect a substantive right as to whether a claimant was entitled to bring a claim in negligence on these facts at all. The Strasbourg court then acknowledged in a later case (*Z v UK* [2001] 2 FLR 612) that their decision in *Osman* had been based on a misunderstanding of the English rules of negligence and the working of the striking out procedure.

### *Matthews v Ministry of Defence* [2003] 1 All ER 689

The claimant brought proceedings for negligence after serving in the Royal Navy and alleging that he had suffered personal injury as a result of exposure to asbestos fibres. At the time of his service the Crown Proceedings Act 1947 s 10(1) precluded certain claims for personal injury against the Crown. The claimant contended that s 10(1) was incompatible with Article 6 of the Convention, which gives the right to a fair trial. The House of Lords ruled that it was compatible as it was a substantive limitation on claims against the Crown, not a procedural bar.

The collision between two different legal systems, the pragmatic English common law and rights-based Strasbourg law will cause tensions and problems for many years. Subtly and gradually it appears likely that some areas of English tort law where there was no duty owed may be affected by the Convention. The courts, for example, now appear more prepared to weigh the various interests in cases involving public authorities and children more carefully. (See Chapter 6.)

## Article 2

Article 2 provides a right to life. This is most pertinent to medical law and to date English law has been found to comply with the right. The major right to life decision is that food and water may lawfully be withdrawn from a patient in a permanent vegetative state. (*Airedale NHS Trust v Bland* [1993] 1 All ER 821.) This decision has been held to be compatible with the Convention. (*NHS Trust A v M; NHS Trust B v H* [2001] 2 WLR 942.)

The most interesting area under Article 2 may be where an individual is unable to obtain treatment. Would the courts be prepared to sanction a right to treatment?

One way in which the right to life can be invoked and the principles to be applied by a court is illustrated by *Van Colle v Chief Constable of the Hertfordshire Police* [2006] 3 All ER 963. (See Chapter 3.) A prosecution witness in a criminal case was murdered by the person charged with the offence. An action under the Human Rights Act by his estate and dependants succeeded against the police for neglect of duty leading to loss of life contrary to Article 2. It is important to note that this was not a tort case but a direct action under the human rights legislation.



### Article 3

This is the right not to be subjected to degrading treatment. There are instances where a claimant can be prevented from claiming a remedy in tort law for policy reasons. Such a prohibition applied to actions against social workers for negligence in relation to care decisions on children. Even if no tort action exists, it may be possible to claim damages for a breach of Article 3. (See Chapter 6.)

### Article 5

Article 5 provides a right to liberty and security. This right is likely to operate in actions for trespass to the person and whether English law provides satisfactory remedies.

### Article 10

Article 10 provides a right to freedom of speech. This will be particularly relevant to actions in defamation and privacy.

### Article 8

Article 8 provides a right to a family life and privacy. There was previously no direct right to privacy in English law but the courts have had to confront this gap and balance the right to privacy against the right to freedom of speech.

The right to privacy also applies to cases of medical treatment (see Chapter 14) and to nuisance actions (see Chapter 16).

## Human rights and tort law

Conflicts inevitably arise between the rights-based human rights regime and the wrongs-based English tort law. These problems will continue to arise for a considerable period of time. One example of the stresses raised was considered by the House of Lords in the following case:

### *Watkins v Secretary of State for the Home Department* [2006] 2 All ER 353

The claimant was a prisoner serving a sentence of life imprisonment. The confidentiality of his legal correspondence was protected by the Prison Rules. The claimant complained that prison staff had breached those rules by opening and reading mail when they were not entitled to do so. He brought an action against the Secretary of State and certain prison officers for damages for misfeasance in public office. The judge found that three of the officers had acted in bad faith but he dismissed the claims against those officers on the ground that misfeasance in public office was not a tort actionable *per se*, and that the claimant had failed to prove actual loss. The Court of Appeal allowed the claimant's appeal, holding that if there was a right which could be identified as a constitutional right, then there could be a cause of action in misfeasance in public office for infringement of that right without proof of damage. They held that

the prison officers had infringed the claimant's constitutional right of unimpeded access to the courts and to legal advice. A nominal award of general damages was made.

The House of Lords held that the tort of misfeasance in public office was never actionable without proof of material damage, which included financial loss, or physical or mental injury and psychiatric illness but not distress, injured feelings, indignation or annoyance. The importance of the claimant's right to enjoyment of his right to confidential legal correspondence did not require or justify the modification of the rule that material damage had to be proved to establish the cause of action. Modification would open the door to argument as to whether other rights less obviously fundamental, basic or constitutional were sufficiently close or analogous to be treated, for damage purposes, in the same way and in the absence of a codified constitution the outcome of such argument in other than clear cases would necessarily be uncertain. The lack of a remedy in tort for someone in the position of the claimant, who had suffered a legal wrong but no material damage, did not leave him without a legal remedy. It could reasonably be inferred that Parliament had intended that infringements of the core human and constitutional rights protected by the Human Rights Act 1998 should be remedied under it and not by development of parallel remedies.

The Court of Appeal had made a bold attempt to create something akin to 'constitutional torts' which would have their own rules but the House of Lords were not convinced that the structure of English tort law could be changed in this manner and numerous problems would arise particularly with determining what a constitutional tort was.

## Summary

After reading this chapter you should be able to:

- Understand the elements of a tort.
- Explain what interests are protected by the law of tort.
- Understand the roles of policy and insurance in tort law.
- Understand the role played by malice, intention and negligence as states of mind in tort.
- Explain the objectives of tort law and how these objectives can be met by other means.
- Understand the relationship between tort and contract.
- Explain the position of minors in tort law.
- Understand the basic principles played by human rights in tort law.

## Further reading

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