

# An Introduction to Tort Law

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## INTRODUCTION

Tort law consists of a body of rules relating to private civil wrongs. The word *tort* is derived from Latin *tortum*, which means “crooked or wrong.” Tort law claims are prosecuted by the injured party. Hence, these claims are considered private. Tort law identifies what these wrongs are and provides remedies to an injured victim of such wrongs. The range of interests protected by tort law is wide and varied and includes protection of bodily integrity, psychiatric well-being, economic interests, property interests, reputation, privacy and commercial interests. [1-01]

Where a tort has proven to have occurred, the court may award remedies to the wronged party. Such remedies may consist of a financial award in damages, an injunction prohibiting the wrongful behaviour or some other specific remedy. Wrongful behaviour, otherwise known as liability, varies depending on the rules of the particular tort. For example, in negligence the appropriate standard is fault liability. Fault is measured objectively i.e. did the defendant fail to take the care expected of the hypothetical reasonable man acting in similar circumstances? Liability may also be strict i.e. imposed in the absence of fault. Thus, regardless of whether the defendant was to “blame” in the traditional sense, liability will attach. For example, the Liability for Defective Products Act 1991 provides that the manufacturer of a defective product is strictly liable to the consumer for injuries caused by the product. [1-02]

## THE HISTORICAL ORIGINS OF TORT LAW

The development of the modern law of private wrongs can be traced to the publication of Sir William Blackstone’s *Commentaries on the Laws of England* where the author distinguished between private and [1-03]

public law categorising each into separate books.<sup>1</sup> Blackstone's conception of private wrongs was dominated by intentional torts derived from the Aristotelian conception of justice which was based on the notion that the purpose of tort law was to correct injustice between private parties and the role of judges was merely to act "as disinterested referees"<sup>2</sup> in settling these disputes.

[1-04] Towards the end of the nineteenth century, the law of negligence gained ascendancy within tort law. Whether it was coincidental or the cause, the Industrial Revolution has been credited with giving rise to the modern negligence era.<sup>3</sup> With the onset of industrialisation and increased urbanisation, accidental injuries became more commonplace.<sup>4</sup> Tort law, based on the Blackstonian notion of private wrongs, was not best placed to handle the claims which were increasingly coming before the courts. Consequently, it developed from a system which essentially provided a lawful avenue for bloodless revenge – dealing with what in the main were intentional wrongs – to one which was now presented with issues of wider societal concern relating to how best to deal with what Calabresi famously referred to as "the costs of accidents."<sup>5</sup> The industrialisation era highlighted the deficiency of the current legal system in dealing with the explosion of claims arising from accidental losses.<sup>6</sup> Robinette argues that as a consequence of these developments the 'private wrongs' cause of action was reconceptualised from "what had been the adjudication of wrongdoing into a procedure focusing on deterrence, compensation or both."<sup>7</sup> As a result, the "obsession with accidents prompted mid-twentieth century jurists to emphasise the potential of tort law as a source for compensation while deemphasising its foundation in a notion of wrongs."<sup>8</sup> In essence, tort law became a vessel of regulation for the public good. It became public law.<sup>9</sup>

<sup>1</sup> Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Oxford 1765-69). For an excellent analysis of the historical development of tort law see: Paul Mitchell, *A History of tort Law 1900-1950* (Cambridge University Press, 2015); John C. P. Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 *Yale Law Journal* 524. See also, John C.P. Goldberg, 'Tort Law at the Founding' (2011) 39 *Florida State University Law Review* 85.

<sup>2</sup> Alan Calnan, 'The Distorted Reality of Civil Recourse Theory' (2012) 60 *Cleveland State Law Review* 159.

<sup>3</sup> Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law* (New York University Press, 2001); G. Edward White, *Tort Law in America, An Intellectual History* (Oxford University Press, 2003); Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1977). See also Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th ed.) (Cambridge University Press, 2006) 36; where the author attributes the rise of negligence to developments in the insurance industry such as compulsory third party insurance for road accidents.

<sup>4</sup> For example, see Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013) para [1.01] where the authors explain:

Since human beings are social animals they pursue their interests in a social context. Inevitably, this pursuit brings them into contact and into conflict with other persons pursuing their interests. This contact and conflict, of course, is not a new social phenomenon, but in the past century and a half, because of increased urbanisation, growth in population, greater and more sophisticated technology and deeper sensitivity, interpersonal conflicts have increased in numbers and have become more complex in nature.

<sup>5</sup> Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).

<sup>6</sup> John C.P. Goldberg, 'Ten Half Truths About Tort Law' (2008) 42 *Valparaiso University Law Review* 1221.

<sup>7</sup> Christopher J. Robinette, 'Why Civil Recourse Theory is Incomplete' (2011) 78 *Tennessee Law Review* 431, 443.

<sup>8</sup> John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (2010) 88 *Texas Law Review* 917.

<sup>9</sup> Michael L. Rustad, 'Torts as Public Wrongs' (2011) 38 *Pepperdine Law Review* 433.

White observes that while the industrialisation era created more accidents, this alone would not have been sufficient to lead to a change in attitude “had it not come at a time when legal scholars were prepared to question and discard old bases of legal classification.”<sup>10</sup> The legendary American jurist Oliver Wendell Holmes Jr, one of the leaders of the legal realism movement, is credited with the development of modern tort law.<sup>11</sup> Holmes was of the view that the law needed to adapt to tackle the accident society which had emerged. Consequently, the law needed to be reengineered in order to better respond to this threat and to achieve this he urged judges to “break free of the law’s formal restraints whenever social necessity and public policy so required.”<sup>12</sup> Thus, in his view, not only was it part of the function of modern tort law to correct private wrongs, but by assessing “the desirability of the consequences that flow from one scheme of liability rules rather than another”,<sup>13</sup> to also apply collective solutions to the social problem of personal injury. Supporters of this view, like the American author William Prosser, agreed, viewing tort law as having “grand aspirations than attending to the humdrum and faintly barbaric matter of settling accounts”<sup>14</sup> and interpreted it as an instrument by which society could be regulated for the public good.

[1-05]

This snapshot of tort law’s history suggests a reactionary, ad hoc response by the institutions of the state towards civil wrongdoing rather than a principled, considered one.<sup>15</sup> This apparent incoherence leaves the door open for those who call for tort law’s abolishment or radical reform. Such critics would argue that our current system is not fit for purpose because some of the stated aims of tort law such as compensation, deterrence, or loss distribution are not adequately met by the current regime. These critics

[1-06]

<sup>10</sup> G. Edward White, *Tort Law in America, An Intellectual History* (Oxford University Press, 2003) 3.

<sup>11</sup> Oliver Wendell Holmes, JR, *The Common Law* (Little Brown, 1909).

<sup>12</sup> Alan Calnan, ‘Whats Wrong with Torts as Wrongs (or Redirecting Civil Recourse Theory)’ (2010) available at <http://ssrn.com>., accessed 13 May 2014.

<sup>13</sup> Benjamin C. Zipursky, ‘Rights, Wrongs, and Recourse in Tort Law’ (1998) 51 *Vanderbilt Law Review* 1, 43.

<sup>14</sup> John C. P. Goldberg, ‘The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs’ (2005) 115 *Yale Law Journal* 524, 581.

<sup>15</sup> This debate manifests itself in the different labels used by academics in describing this field of law. For some, the topic is underpinned by general principle and is labelled as ‘Tort Law’ of the ‘Law of Tort’. For others, the topic is better labelled as the ‘Law of Torts’ implying that rather than bound by a single coherent principle, the field is nothing more than a collection of disparate torts with no discernible consistent theme linking them. Thus, there are leading academic titles in this field which refer to “Tort Law” in the singular such as Jenny Steele, *Tort Law, Text, Cases & Materials* (2nd ed.) (Oxford University Press, 2010); Simon Deakin, Angus Johnston, Basil Markesinis, *Markesinis & Deakin’s Tort Law* (6th ed.) (Oxford University Press, 2008); W.V.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.) (Sweet & Maxwell, 2002); Kirsty Horsley & Erika Rackley, *Tort Law* (2nd ed.) (Oxford University Press, 2011); S.T. Strong & Liz Williams, *Tort Law, Text, Cases & Materials* (Oxford University Press, 2008); John Tully, *Tort Law in Ireland* (Clarus Press, 2014) and John Cooke, *Law of Tort* (9th ed.) (Pearson Longman, 2009). On the other hand, there are titles which refer to the plural “Torts” such as Bryan McMahon & William Binchy, *Law of Torts* (4th ed, Bloomsbury Professional, 2013); Eoin Quill, *Torts in Ireland* (4th ed.) (2014); John Healy, *Principles of Irish Torts* (Clarus Press, 2006) and John G. Fleming, *The Law of Torts* (9th ed.) (LBC Information Services, 1998). Ultimately, this may simply be a personal preference rather than revealing any deep ideological viewpoint as Eoin Quill, *Torts in Ireland* (4th ed.) (2014) 1-2; writes:

At one time strong opinions were voiced on whether it was appropriate to describe the subject as ‘tort’ or ‘torts’, the former being preferred by those who saw the subject as a coherent body of law and the latter by those who saw it as a fragmented collection of discrete matters. Either term may be considered to be appropriate, since the subject has established a degree of common ground between the various causes of actions which distinguish it from other branches of law, while retaining many of the distinctions between the individual types of action. The choice of term is a matter of personal preference ...

argue that the stated aims of tort would be more effectively achieved through the implementation of administrative schemes like a system of fines or through the creation of a no-fault state-sponsored compensation fund generated from taxation.<sup>16</sup>

## THE FUNCTIONS OF TORT LAW

[1-07] As can be seen through that overview of tort law's history it is difficult to discern the precise role and function of tort law. Because the field developed in a haphazard fashion in reaction to societal challenges it is difficult to identify an underlying theme. Quill has eloquently summarised the various goals of tort law as follows:<sup>17</sup>

### 1. Compensation & Vindication

The primary purpose of tort law is to compensate the injured party and to vindicate his or her rights. Tort law provides that the defendant must pay financial compensation to the plaintiff where he or she has committed a tort and thereby caused a recognisable form of harm to the plaintiff. The award of such compensation is designed to put the plaintiff back into the position he or she was in before the injury caused by the defendant occurred. This may not always be possible. If the plaintiff is paralysed by the defendant's negligence, then no amount of money is going to give back to the plaintiff what he or she has lost. But it will provide some solace. The award of damages also sends out a signal to the rest of society that the plaintiff's rights have been vindicated. The award of damage tells the world that the plaintiff's right to be respected has been infringed. Such awards may be particularly important where the plaintiff has not suffered actual harm e.g. the tort of assault in trespass to the person.

### 2. Corrective Justice and Distributive Justice

From a morality based point of view, theorists argue that the true purpose of tort law is to do corrective justice. This theory is associated with the work of Aristotle and essentially provides that where the defendant wrongs the plaintiff he or she has disturbed the equilibrium in the relationship between the two parties. For example, if the negligent driver hits the pedestrian and thereby breaks his or her legs, the relationship between the two has been disturbed. The driver has "taken away" from the pedestrian by injuring him or her. Tort law allows the plaintiff to "take back" from the driver through a negligence claim and award of damages. In this way the relationship between the parties is restored. This interpretation of the function of tort law is very individualistic, it simply views the question from the point of view of the plaintiff and defendant only. It has no regard for the consequences of the particular case for the rest of society. For example, should a judge, when considering a case whereby a customer in the defendant's pub becomes so drunk having been negligently served alcohol and who leaves the pub and is later struck by a car because of his drunkenness, be entitled to bring a claim against the publican? If the publican negligently continued to serve alcohol to the customer has a wrong not occurred which is deserving of correction?

An alternative moral theory is that of distributive justice. Distributive justice is concerned with the wider implications of distribution in a given society, this form of justice has typically been

<sup>16</sup> For example, see The Accident Compensation Act 1972 in New Zealand which created one such statutory compensation scheme funded from general taxation.

<sup>17</sup> Eoin Quill, *Torts in Ireland* (4th ed.) (Gill & MacMillan, 2014) 2.

associated with relations between the State and the individual. Corrective justice, on the other hand, is primarily concerned with the relationship between individuals residing within that state.<sup>18</sup> Hence, distributive justice tends to be associated with public law and corrective justice with private law. However, tort law, although primarily private law, is influenced by factors outside of the direct relationship between the plaintiff and defendant. In the drunk customer example cited above, it could be argued on distributive justice grounds that imposing liability on the publican for what occurred would be unjust. It would create onerous obligations (and consequent knock-on effect on insurance) on publicans to place responsibility on them for the actions of their customers after they leave their premises. It would also undermine notions of self-responsibility and distributive justice principles would dictate that liability should not arise. Notions of distributive justice are replete throughout tort law e.g. the doctrine of vicarious liability.

### 3. Deterrence

Another claimed function of tort law is that it deters wrongful behaviour. Economic analysis of law supports the notion that tort law deters future wrongful behaviour through the award of damages. According to this theory, individuals are rational actors and will make what are essentially cost effective decisions. They will refrain from risky behaviour on the basis that should the risk materialise into harm they will be rendered liable in tort law. The deterrent effect of tort law is questionable. First, tort law normally only intervenes after a wrong has been committed, thus its deterrence value is of limited usefulness. Second, the wider public's general awareness of tort rules is questionable. If the public are not aware of what amounts to a tort how can they be deterred from committing such wrongs?

## TORT LAW AND OTHER LEGAL CATEGORIES

The role of tort law can perhaps be explained by comparing and contrasting it with other categories of law. [1-08]

### Tort Law and Contract

Tort law and Contract law are similar in the sense that both are administered in the civil jurisdiction. As a consequence, each category shares certain similarities. First, the primary remedy available in each case is damages. Tort and Contract do not involve the infliction of punishment. Second, the standard of proof in both categories is the same i.e. the plaintiff must establish his or her claim on the balance of probabilities i.e. it was more likely than not that the defendant caused the wrong (50%+). Third, claims in Tort and Contract are instigated by the parties themselves. Fourth, claims in Tort and Contract may be settled privately between the parties themselves. [1-09]

While there are a number of similarities between both categories, there are also differences. First, liability in Contract is determined in advance by the terms of the Contract. In Tort, liability is determined after the occurrence of the event in accordance with the rules of the tort. Second, Contract involves the voluntary assumption of legal obligations by agreement. Tort law deals with obligations which are imposed following involuntary transactions e.g. defendant injuring the plaintiff. Third, the purpose of compensation in Contract is to compensate the plaintiff for defeated expectations i.e. what the plaintiff would have earned had the contract not been breached. That is to say, the aim of damages in Contract is put the [1-10]

<sup>18</sup> Timothy D. Lytton, 'Smashing the Idols of Efficiency' (1993) 79 Virginia Law Review 275, 287.

plaintiff in the position he or she would have been had the contract been performed properly. Tort on the other hand is primarily concerned with putting the plaintiff back into the position he or she would have been in had the tort not been committed.

### Tort Law and Criminal Law

- [1-11] Tort law and the Criminal law serve very different functions. First, the Criminal Law is administered in the criminal jurisdiction and Tort in the civil jurisdiction. Second, the standard of proof in Criminal Law is beyond all reasonable doubt whereas in Tort Law it is based on the balance of probabilities. Third, the primary purpose of the Criminal Law is to deter future bad behaviour i.e. it has a public purpose. The purpose of Tort Law is to compensate and deterrence is a subsidiary function. Fourth, Tort Law claims are prosecuted by the parties themselves. It is the DPP who prosecutes criminal offences on behalf of the State. Fifth, breaches of the Criminal Law are normally punishable by payment of a fine and/or imprisonment whereas breaches of Tort Law are normally remedied by an award of damages or the granting of an injunction. Finally, an unsuccessful criminal prosecution does not eliminate the pursuance of a civil claim in tort arising from the same facts e.g. the OJ Simpson trial. Similarly, see *Breslin v McKenna* [2011] NICA 33; where the families of the victims of the Omagh Bombing successfully brought tort proceedings against those suspected of carrying out the bombing.

### TORT LAW AND CONSTITUTIONAL RIGHTS

- [1-12] Much confusion surrounds the interrelationship between tort law claims and the Constitution. Generally speaking, tort claims create horizontal liability i.e. private plaintiff against private defendant. But claims may also be brought by a private party against a State actor. The general approach appears to be that almost all torts involve some constitutional interest and therefore a private party whose interest has been wrongfully interfered with should bring a claim in tort to vindicate that interest. Only where the constitutional right is not adequately vindicated by tort law should the private party have recourse to a constitutional claim.
- [1-13] In the Irish Supreme Court judgment of *Meskeil v CIE* [1973] IR 121; Walsh J recognised that individuals are entitled to seek redress for infringement of their constitutional rights from others who have transgressed those rights. This was significant step as it confirmed the principle that the violation of constitutional rights gave rise to a cause of action not only vertically between the individual and the State but also horizontally between private individuals.
- [1-14] However, the application of this cause of action was subsequently limited by the Irish Supreme Court in *Hanrahan v Merck Sharp and Dohme* [1988] ILRM 629 (SC); to infringements where existing tort actions were “basically ineffective” in providing redress. Thus, tort law is looked upon as the primary mechanism by which infringements of a citizen’s constitutional rights should be vindicated and where tort law is deemed to be ineffective in addressing the issue then, and only then, should that individual have recourse directly to the Constitution for violation of these rights. Notwithstanding the limitations imposed on *Meskeil*, the principles outlined therein have been used to develop an emerging jurisprudence in areas – such as the right to privacy to name just one – founded on constitutional values of individual dignity.<sup>19</sup> However, as Binchy points out, this

<sup>19</sup> See *Herrity v Associated Newspapers [Ireland] Ltd* [2008] IEHC 249 and *Hickey & Anor -v- Sunday Newspapers Ltd* [2010] IEHC 349; where a private tort claim for invasion of privacy was recognised in actions between

approach “is an unsatisfactory strategy” and “the courts should reassess the tort repertoire in the light of constitutional values and rights.”<sup>20</sup>

### The Right to Privacy

One area which highlights the strange interrelationship between constitutional rights and tort law is the right to privacy. While the right to privacy has long been recognised as a constitutional right which is deserving of protection,<sup>21</sup> its status as a tort has been slow in coming. In the European Court of Human Rights decision in *von Hannover v Germany* (2005) 40 EHRR 1; it was that Princess Caroline of Monaco’s right to privacy was infringed when a photograph was taken of her while she was in a public place. [1-15]

The first Irish case to recognise that a citizen is entitled to legal protection against another private party for infringements to his or her right to privacy was the High Court decision in *Herrity v Associated Newspapers [Ireland] Ltd* [2008] IEHC 249. In that case, the plaintiff’s husband had illegally obtained telephone recordings of her having conversations with the local parish priest with whom she was having an affair. The plaintiff’s husband provided the transcripts to tabloid newspaper which not only published the fact of the affair but also included transcripts of the recordings. Held – the plaintiff was entitled to privacy. The defendant was entitled to free speech. In maintaining a balance between these competing rights the court acknowledged that there was a public interest in the defendant publishing the fact that the plaintiff had had an affair with a priest. However, publishing the transcripts of the illegally obtained telephone recordings amounted to a disproportionate publication which was not in the public interest and the plaintiff’s right to privacy trumped the defendant’s right to free speech. [1-16]

In *Hickey v Sunday Newspapers Ltd* [2011] 1 IR 228; the plaintiff had a highly publicised affair with the husband of Adele King (otherwise known as Twink) a minor celebrity in Irish terms. The plaintiff had been very forthcoming about her relationship with Twink’s husband, David Agnew, and had given interviews in the media. She also announced that she was pregnant with David Agnew’s child. The defendant took a photograph of the plaintiff on a public street while she was accompanied by Mr Agnew and her child as they left the Registry of Births, Deaths and Marriages Office in Dublin. The child was not identifiable from the photograph. The plaintiff brought an action for *inter alia* invasion of privacy following the publication of the photographs in a tabloid newspaper. Held – the plaintiff’s claim for invasion of privacy did not succeed. The court was of the view that the plaintiff did not have a legitimate expectation of privacy in the circumstances. The photograph was taken in a public place, the plaintiff had previously publicised her relationship with Mr Agnew and crucially, the child’s features were not identified in the photograph. [1-17]

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non-state actors was recognised on the basis of an unenumerated personal constitutional right upheld in cases such as *McGee v Attorney General* [1974] IR 284 (SC) and *Kennedy & Arnold v Ireland* [1988] ILRM 472 (HC).

<sup>20</sup> William Binchy, ‘Meskill, The Constitution and Tort Law’ (2011) Dublin University Law Journal 339.

<sup>21</sup> *McGhee v AG* [1974] IR 284; *Norris v AG* [1984] IR 36.





# Negligence: An Introduction

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## INTRODUCTION

The law of negligence essentially deals with the law of accidental harm. The tort of negligence regulates all human activity in society – whether it be between road users; doctors and their patients, solicitors and their clients etc – and imposes a duty on parties to take reasonable care in their activities so as not to cause harm to others within society. [2-01]

Until relatively recently, there was no discernible independent tort of negligence. Instead, there were a number of different types of tort action which required proof of negligent behaviour on the part of the defendant. However, there was no joined up thinking underlying these cases. It was not until the decision of the House of Lords in *Donoghue v Stevenson* [1932] AC 562; that the modern tort of negligence was born. With this decision a broad tort of negligence based on general principle was created. Some theorists credit the development of the modern tort of negligence with increased industrialisation and development of economic activity which made it imperative that the law develop in response.<sup>1</sup> [2-02]

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<sup>1</sup> Ken Oliphant, 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 McGill Law Journal 819. Other legal historians have argued that the coincidence of fault liability with industrialisation was the acts of judges who sought to "create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development". See Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977) 85-101. In Ken Oliphant, 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 McGill Law Journal 819; the author examines the historical development of tort law in light of the social change brought about by the Industrial Revolution and the risks it created. Oliphant notes that the "... law's overall response to accidental injury is excessively marked by ad hoc responses to historical circumstances, and ... sustained intellectual engagement is still required to provide a consistent and principled basis for further legislative reform." Thus, negligence, for example, may be seen as a response to the flood of accidents which coincided with increased industrialisation. This received wisdom regarding the development of fault liability has been criticised. See Robert W. Gordon, 'Book Review – *Tort Law in America: An Intellectual History*' (1980) 94 Harvard Law Review 903, 907; where the author argues:

... it is actually very difficult to account for the emergence of negligence as a general organizing principle of tort liability as if it were a technological response of the law to the "social needs of industrialization," for one would have to explain, for instance, why England and the United States seem to have undertaken the systematic generalization of the fault principle to include all tort liability at the same time (1870's and 1880's) despite England's much earlier industrialization as well as why Germany responded to industrialization by imposing

[2-03] The key feature of negligence claims is the behaviour of the defendant. Did he or she fail to take the reasonable care that was expected of him or her in light of all the circumstances? Therefore, the tort of negligence is premised on fault liability. Perfection is not required of the defendant. The question in such cases will be: did the defendant exercise the level of care which was expected of him in the circumstances? In this context, failure to take reasonable care "... means roughly acting without advert to the substantial and unjustifiable risks to others' interests created by so acting and to which a reasonable person would advert."<sup>2</sup> In *Blyth v Birmingham Waterworks* [1856] Exch 781; Alderson B described negligent behaviour – fault liability – as:

... 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.

## ELEMENTS TO THE CAUSE OF ACTION

[2-04] The tort of negligence has been succinctly summarised by Winfield & Jolowicz as follows:

Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant.<sup>3</sup>

[2-05] McMahon & Binchy outline the elements to the cause of action as follows:

1. A duty of care, that is, the existence of a legally recognised obligation requiring the defendant to conform to a certain standard of behaviour for the protection of others against unreasonable risks;
2. A failure to conform to the required standard;
3. Actual loss or damage to recognised interests of the plaintiff; and
4. A sufficiently close causal connection between the conduct and resulting injury.<sup>4</sup>

[2-06] Thus, in order to succeed in an action for negligence the plaintiff must prove that he or she was owed a duty of care by the defendant. This first element acts as a 'gatekeeper' or control mechanism by the courts to ensure that the courts are not flooded with claims in negligence. Second, the defendant's behaviour must have fallen below the requisite standard that was expected of him or her in the circumstances. Third, the careless behaviour by the defendant must have resulted in the plaintiff suffering foreseeable harm recognised by the law as deserving of compensation.

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strict liability on railroads and industrial concerns for accidents by way of exception to a pre-existing fault standard. There are simply too many variables in economic growth to support a hypothesis that any of them is socially "necessary."

<sup>2</sup> Larry Alexander, "Foreword: Coleman and Corrective Justice" (1992) 15 *Harvard Journal of Law & Public Policy* 621.

<sup>3</sup> W.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.) (Sweet & Maxwell, 2002).

<sup>4</sup> Bryan McMahon & William Binchy, *Law of Torts* (4th ed) (Bloomsbury Press, 213) 165.

# Negligence: The Duty of Care

## *General Principles*

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### INTRODUCTION

The duty of care is essentially a tool of social policy used by the courts to regulate claims in negligence. [3-01]  
 Owen described its function in the following manner:

Duty provides the front door to recovery for the principal cause of action in the law of torts. Every negligence claim must pass through the duty portal that bounds the scope of the tort recovery for accidental harm.<sup>1</sup>

While tort law claims generally involve private parties in dispute and do not, ostensibly at least, involve questions of public policy, the reality is that private disputes might raise issues affecting wider society. [3-02]  
 Thus, for example, private negligence claims may raise concerns about establishing precedent and opening the doors to floods of similar claims. Such a development might have consequences for society in that the activity giving rise to the claim might be curtailed or abandoned altogether because it is deemed too risky or expensive. It is primarily at the duty of care point that the courts take these questions into consideration. McMahon & Binchy explains how the duty of care operates as follows:

When, therefore, a court says that the defendant should not be liable because he or she was not under a duty of care towards the plaintiff, this really means nothing more than that, having regard to broad considerations of social policy, the court is of the opinion that it would not be wise to require the defendant, and others similarly acting, to compensate persons injured by that conduct. The court thus fashions the duty of care and specifies its scope with the simple aim of

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<sup>1</sup> David G. Owen, “Figuring Foreseeability” (2009) 44 Wake Forest Law Review 1301.

accomplishing social goals. The value system of which the duty of care is part is one of limited economic and utilitarian horizons rather than of nobler ethical pedigree.<sup>2</sup>

## THE 'NEIGHBOUR' PRINCIPLE

[3-03] The modern duty of care mechanism which is utilised by the courts today was established in the House of Lords decision in *Donoghue v Stevenson* [1932] AC 562. In that case, the plaintiff was enjoying some ice cream in a café with her friend. The plaintiff's friend had purchased the ice cream together with a bottle of ginger beer. The ginger beer was contained in a dark bottle. The plaintiff had poured some ginger beer on her ice cream and had consumed some of it. As she poured some more ginger beer on her ice cream the remains of a decomposed snail fell out of the bottle. The plaintiff became ill as a result and brought an action in negligence against the manufacturer of the ginger beer. Prior to this case, such a claim could only be brought on the basis of establishing privity of contract between the plaintiff and defendant. Outside of privity of contract, no duty was owed at that time by a manufacturer to the ultimate consumer. In a break from such precedent, Lord Atkin developed his now famous "neighbour principle" towards establishing a generalised conception of duty and negligence generally:

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 liable 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 omission which are called in question.

[3-04] Lord Atkin held that the plaintiff was owed a duty of care by the manufacturer. Specifically, it was held that given the fact that the product (the bottle of ginger beer) left the manufacturer in the form that it wished it to reach the consumer (sealed bottle) and because there was no possibility that an intermediate examination of the product (by the owner of the café, for example) would have discovered the defect (the dark colour of the bottle meant that it was impossible to see the remains of the snail contained within) meant that the manufacturer owed a duty of care to the consumer. That duty was breached by allowing the remains of the snail into the bottle. Finally, the breach caused the plaintiff harm in that she became ill.

[3-05] The significance of Lord Atkin's formula is that, prior to this decision, there was no singular conception of negligence. Instead, negligence claims were grouped by category i.e. road-users; doctor/patient; solicitor/client etc. However, there was no overarching theory or principle which linked these cases together. In *Donoghue*, for the first time, there was an attempt to bring cohesiveness to the tort by establishing a broad principle. The advantage of this approach was that it provided room for the tort to grow and develop on a principled basis. The previous categorical approach made it virtually impossible for the courts to recognise new categories of claim and as a result stymied the development of the law. The generalised approach towards the tort allows greater scope for its principled development. Of course, in so doing, the attempt was by its very nature vague and required judicial development.

<sup>2</sup> Bryan McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013) 170-171.