Chapter 1
What is tort law?

Key points In this chapter we will be looking at:
✦ What a tort is
✦ What kinds of activity tort law covers
✦ How torts compare to crimes and breaches of contract
✦ How tort law is made
✦ Some practical issues in tort law
✦ Tort and fault
✦ The relationship between tort law and human rights law
✦ The way the tort system operates in personal injury cases

Introduction

Imagine a young man, who we will call James, is walking along the street one day, when he is run over by a car. The car is driven by Ted, who is talking on his mobile phone and not really concentrating on his driving. James suffers a serious head injury that permanently affects his powers of thinking and concentration and, as a result, he cannot go back to his well-paid job as a computer programmer. You probably know that dangerous driving is a criminal offence, so Ted may be prosecuted and, if convicted, fined or even sent to prison. But where does that leave James? Ted’s carelessness has not only caused him serious pain and suffering but also financial loss, since at best he can only do a less well-paid job, and may even be unable to work at all. That is where tort law comes in. It offers a way for James to get compensation both for the pain and suffering, and for the financial loss, by suing Ted. Whereas the criminal law aims to punish wrongdoers on behalf of society, tort law aims to compensate the person who has suffered wrongdoing.

However, tort law does not only deal with car accidents, or even only with people who are physically injured. Just as there are lots of different crimes covering different types of activity and harm, there are lots of different torts too, covering a wide range of different situations where one person (or organisation) has caused harm to another or infringed their legal rights. Just to give a few examples, the tort of defamation can provide a remedy if a newspaper publishes something untrue about you that damages your reputation, the tort of nuisance can give you a claim if your neighbour keeps very smelly pigs and the smell means you cannot enjoy sitting out in your garden, and the tort of trespass to the person can help if a doctor operates on you without your permission.

This book looks at 13 of the most important torts, and each one provides a set of rules under which the person wronged can make a claim against the person who is alleged to have done wrong.

When a claim is made in tort, the person who has been wronged is known as the claimant, and the
Defining what a tort is

Academics have been trying for many years to pin down a precise definition of a tort, but it has proved quite difficult to come up with one description that covers every kind of tort. As already explained, a tort is a wrong committed by one party against another, but not every kind of wrong will be a tort. This is because the basis of tort law is that we all have interests which the law should protect. These include our own personal security, our physical health, our finances, our reputations and any property or land we own. Only a wrong that infringes one of the interests that the law protects will be a tort. For example, the tort of defamation protects against damage to reputation, the tort of nuisance protects interests in land, and the tort of trespass to the person protects personal security.

Where someone does wrong, but the harm caused does not relate to an interest protected by the law, there is no tort. For example, let’s say that someone you know tells your boyfriend or girlfriend a secret about you that you did not want them to know and, because of this, your relationship breaks up. You would probably consider that what your friend did was a wrong against you, but your interest in keeping your boyfriend or girlfriend is not one that is protected by the law, so there is no tort.

This will probably seem quite a slippery concept at this stage, but don’t worry, it will become clearer when we go on to look at the individual torts.

Out and about

Take a couple of newspapers – national or local – and go through them, looking for stories about people seeking compensation for a wrong that has been done to them. Many of these stories will concern torts (you will not usually see that word mentioned, but you may see the names of individual torts such as negligence, defamation, trespass or nuisance; if you’re not sure, your tutor can help you pinpoint which cases are tort ones). In each case, identify the wrong that is alleged to have been done to the claimant, and then try to work out what right the law might be trying to protect (you can ignore employment tribunal cases as these involve employment law and not tort).
Elements of a tort

As a general (but only very general) rule, most torts consist of the following:

✦ There must be an act or omission by the defendant, or in other words, something they have done or failed to do.
✦ The claimant must have been caused harm, and this harm must be a type of harm that the law protects against.
✦ It must be possible to prove that the defendant’s act or omission caused the harm.
✦ The defendant must be at fault in some way.

In the example of James and Ted that we looked at in the beginning of this chapter, the act was Ted hitting James with his car. This caused James physical injury and financial loss, which are both protected by the law of tort. The accident clearly caused the physical injury, and James will be able to get medical evidence to show that he cannot go back to his job and so prove that the accident also caused his financial loss. Finally, the accident was the fault of James, because he was driving without taking reasonable care.

There are, however, a few torts that do not fit this pattern, and these fall into two groups:

✦ torts committed without harm;
✦ torts committed without fault.

Torts committed without harm

While the vast majority of torts do require the defendant to have caused some kind of harm, there are a small number that can be committed merely by infringing the claimant’s legal rights, even though nothing we would recognise as harm has been caused. For example, the tort of trespass imposes liability when someone enters land without permission, even if they cause no damage to the land or loss to the owner of the land. Torts that can be committed without harm are known as ‘actionable per se’. The idea behind them is that there are some legal rights that are so important that the law should protect against any infringement of them, and the right to exclude others from your land, which would include your home, is one of these.

Torts committed without fault

When we talk about fault in tort, what we mean is either that the defendant deliberately acted wrongfully, or that there was something they could reasonably have been expected to do to prevent the harm they caused and they failed to do this. Most torts require the defendant to have been at fault, for the obvious reason that it seems fairer to expect someone to pay for harm they could reasonably have avoided, than for damage that was not their fault and which there was nothing they could do to prevent. However, you may be surprised to learn that there are torts which can be committed without the defendant being at fault in any way. These are known as strict liability torts. An example can be found in the Animals Act 1971, which states that someone who keeps an animal that is classified as a dangerous species under the Act is liable for any damage that animal does, even if there was nothing they should have done to prevent it. In some cases, a strict
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liability tort will include defences, which provide that despite the strict liability there are still some circumstances in which a defendant will not be liable. Under the Animals Act 1971, for example, the keeper of a dangerous animal will not be liable if the harm done was completely the fault of the claimant.

The reasoning behind strict liability varies, and we will look at this issue a little later in this chapter, under the heading ‘Tort and the requirement of fault’.

Torts compared to other legal wrongs

Another way to get an idea of exactly what a tort is is to compare it to other legal wrongs that you will have studied or be studying, namely crimes and breaches of contract. If we look first at crimes, we can see that often crimes and torts will have a lot in common in that they involve one person doing harm to another. In fact, in many cases, a single act can be both a crime and a tort. We saw this in the example of James and Ted, where the same accident could make Ted guilty of the crime of dangerous driving and liable to James in tort.

In legal terms, the key difference is that a crime is considered to be committed against the state, which is why prosecutions are brought by the state in the name of the Queen, and why people convicted of crime are punished by the state in the form of fines, imprisonment and other penalties. A tort, on the other hand, is treated in law as a matter between the defendant and the claimant, and the aim is to compensate the claimant for the harm done rather than punish the wrongdoer. However, in practice there is some overlap between the two legal functions, in that the criminal courts can order compensation for crime victims, and that someone who has to pay huge damages in a tort case may well feel as though they have been punished, even if that is not the law’s intention. Similarly, damages in a tort case are intended to act as a deterrent to wrongdoing, just as punishments in a criminal case are.

When we compare torts to breaches of contract, again there are both similarities and differences. The basic idea behind a contract is that it is a voluntary agreement between two parties, which creates duties from each to the other. If you make a contract to buy a car, for example, you voluntarily agree to accept a duty to pay the price agreed, and the seller voluntarily agrees to accept a duty to hand over the car. A breach of contract, therefore, is a failure to fulfil a duty that was voluntarily agreed to. Torts also involve failure to fulfil a duty, but in this case the duty is one that is applied by law, regardless of whether or not you agree to it. Going back to the example of James and Ted, tort law says that Ted, as a motorist, has a legal duty to take reasonable care for the safety of other road users, and breach of that duty will be a tort. Ted has that duty under the law whether he likes it or not; it is not something he has to agree to accept like a contractual duty.

Again, though, in practice some of these distinctions break down. In some cases, the fact that one party has agreed to something may change their duty in tort. For example, the tort of occupiers’ liability provides that the occupier of a house has a duty to protect the safety of anyone who comes into it. But the extent of that duty will be different, depending on whether they have agreed that the person can come in, or whether the person enters without permission.

Another way in which the distinction between torts and breaches of contract blurs is that not all duties under a contract are accepted voluntarily. If we take the example
of selling a car, the buyer voluntarily accepts the duty to pay the price, and the seller voluntarily accepts the duty to hand over the car. But in addition to these duties, the law states that their contract will contain other duties, including that the car must be of satisfactory quality, fit for its purpose and as described. Under the Sale of Goods Acts 1979 and 1994, these duties are implied into sales contracts regardless of whether the parties agree to them. That means that breach of these duties is not really breach of a duty voluntarily accepted by the parties but breach of a duty that is applied by law.

As with crime, the same act can make someone liable in both tort and contract. Let’s say that Bob, a builder, builds a wall for Jane. Because of his poor workmanship, the wall falls down and injures Jane. Bob’s contract contains a term requiring him to take reasonable care with regard to the standard of his work and he is in breach of that, but he is also likely to be liable to Jane in the tort of negligence because he failed to take reasonable care.

**Practical issues in tort law**

Before we go any further, there are some things about the way tort law operates in practice that will be useful for you to understand. These are:

✦ tort and lawyers;
✦ how cases work in practice;
✦ the role of insurance in tort law.

**Tort and lawyers**

As we have seen, there are lots of different torts, covering different types of activity and different types of harm. For the purposes of studying law, all these different types of claim fall under the general umbrella of tort. However, in practice, different torts and groups of torts tend to be treated as distinct and specialist branches of law, so there is no such thing as a ‘tort lawyer’ who would handle cases involving all the different types of tort. Instead, lawyers who are involved in tort cases tend to specialise. Some work mainly with one particular tort, such as defamation. Some might specialise in cases involving a particular type of harm, such as personal injury. Personal injury can happen as a result of a number of different torts, including negligence, occupiers’ liability, employers’ liability and product liability, so a personal injury specialist would deal with all these types of cases. Others will specialise in torts which are related by the kinds of situation they deal with; trespass to land and nuisance, for example, both deal with interests in land, and so a lawyer who deals with one will usually also deal with the other, and may also work on other areas of non-tort law that are related to land.

**How cases work in practice**

Something that you should bear in mind as you study the cases in this book is that they represent the tip of an iceberg, because the vast majority of tort claims never
actually make it to court. If the defendant believes that the claimant has a chance of winning, there will usually be a process of negotiation, in which the defendant tries to persuade the claimant to accept a lower amount of money than they are claiming rather than take the risk of going to court and not only losing but having to pay the defendant’s costs. Only if this process fails does a case go to court, but in most cases the parties agree and there is no need to go to court. This is called an out-of-court settlement. It may sound very harmonious and pleasant, but one thing to bear in mind is that in many tort cases the claimant is an individual and the defendant is a large company, and it is very easy for powerful defendants to put pressure on claimants to accept a settlement that may be much less than they could expect to win in court. We will look at this issue a bit more towards the end of this chapter, when we consider personal injury cases.

The role of insurance

Insurance is a very important issue in the tort system because, in the vast majority of cases, it is insurance companies who pay the damages if a case is lost. You have probably come across what is called first party insurance, which is designed to compensate the policyholder for any loss or injury that they personally suffer. An example would be home contents insurance, which pays out if your home contents are stolen, or damaged in a fire or other accident. There is also a second form of insurance, known as third party, which provides protection when the policyholder is liable for injury or loss caused to someone else. If you drive a car, for example, you are required by law to have third party insurance, which means that if you cause an accident anyone who is injured or has their car damaged can claim against your insurance.

Many, perhaps most, of the activities from which tort claims arise are covered by third party insurance. To give just a few examples, health trusts have insurance against claims by injured patients, employers have insurance against claims by injured employees, newspapers often have insurance against libel claims, and anyone running a building that is open to the public will have insurance protecting against someone suing for having an accident on the premises. Even normal household insurance usually includes a third party element, which protects the householder if anyone visiting the house should have an accident. Where a defendant has insurance, it is the insurance company who stands to pay damages if a claim is successful, and not the defendant themselves. In fact, if there was no insurance the vast majority of tort claims would never be brought at all, because there would be no money to pay them. For that reason, it is often argued that without insurance the tort system would no longer be able to function.

Because of this, insurance companies have a great deal of power within the tort system. Faced with a claim, an insurance company can choose simply to pay it, or to contest it. If they contest it, they will usually negotiate with the claimant, to try to persuade them to take a lesser amount, and then settle the case out of court. If the claimant says no, they can then choose to pay what the claimant is asking, or go to court in the hope that the
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claimant will lose, or will be awarded lower damages than they have claimed. This means that, to a great extent, it is the insurance industry which decides which cases come before the courts, and which cases go to appeal. As a great deal of tort law is common law, coming out of the cases which come before the courts, you can see that the way in which the law develops very much depends on what cases go to trial. For example, if a case going to the higher courts is likely to lead to a development in the law which would be unfavourable to insurance companies, it is in the insurance industry’s interests to settle that case, even at a high cost, and so prevent it going to court and creating a precedent that would end up costing insurers a lot of money. This happened quite recently, in the case of Fairchild v. Glenhaven (2002), discussed in the Law in Action box.

Law in action The asbestos cases

An example of the power that insurance companies can have in shaping tort law can be seen in the case of Fairchild v. Glenhaven (2002). We will be looking at this case in more detail in Chapter 3 but, for now, the brief details are that the case concerned people who had suffered illness which would kill them, due to working with asbestos, and the question at stake was exactly what they had to prove to make their employers liable. In the Court of Appeal, the defendants, who were funded by their insurers, had won their case. When the claimants decided to appeal to the House of Lords the insurers offered them a full settlement, meaning that the claimants would get the entire sum of money that their lawyers believed the claim was worth. If the claimants had accepted the settlement, that would have meant that the appeal would not have been heard, preventing any chance of the Court of Appeal decision being reversed at that point. As a result, the claimants in the case would have been compensated, but thousands of other victims would have been unable to succeed in a claim unless someone else came along and took a case all the way to the House of Lords, which was not very likely to happen given that it is a long and expensive process.

Quite unusually, the claimants refused to accept the settlement and the Court of Appeal decision was reversed but, had they decided to accept it, it is quite possible that the law would still not allow a remedy for people in their situation, saving the insurance industry a great deal of money.


Making tort law

A small number of torts take their rules from statutes, but the vast majority of tort law rules come from common law; that is, they were made by decisions of the higher courts in the cases that have come before them over the years. The most important tort of all, negligence, comes entirely from common law, and so do the key torts of nuisance, trespass to land and trespass against the person.

As well as the rules of individual torts, there are sets of general rules about how torts work, and many of these also come from common law. For example, as we have seen, most torts require that the defendant has done some sort of harm to the claimant, and therefore the claimant must prove that what the defendant did actually caused that harm. The rules about how this is done are known as the rules on causation, and they too have been created entirely by common law.
The role of policy in making tort law

Just like every other area of law, tort has a set of rules which judges use to decide whether a particular defendant is liable. However, in many cases these rules leave a certain amount of room for interpretation. For example, a very common concept within torts is that a defendant is required to take ‘reasonable care’, and this is clearly not a fixed and easily definable standard; what you might consider reasonable, I might consider unreasonable.

Because there is this room for interpretation in many areas, the way in which the courts apply the rules of tort, and make new ones when necessary, is often said to be shaped by policy. What do we mean by this? In general terms, when we say that judges make a decision on policy grounds, or are influenced by policy, we mean that they take into account what they see as the best interests of society as a whole. This can mean taking into account a wide range of issues, but there are three which commonly arise:

✦ insurance;
✦ the ‘floodgates’ issue;
✦ the risk of deterring desirable activities.

Insurance

As we saw earlier, many of the activities from which tort claims arise are covered by insurance and, in a majority of tort cases, it is insurance companies who stand to pay damages and not the defendant themselves.

The way that insurance companies work is that the higher the risk of them having to pay out, the more they will charge for the insurance. This means that the more chance there is that a certain type of claim will be successful, the more expensive insurance against that type of claim will become. This can then have wider effects on society as a whole: for example, if health trusts have to pay more for insurance, that means more cost to the taxpayer and/or less money for the trusts to spend on healthcare. Similarly, if companies have to pay more for insurance, they will usually pass the cost on to consumers in higher prices, which hurts us all. In some cases, higher insurance costs can even put companies out of business, which means lost jobs and losses to businesses who supply that business.

Where does the law come into this? As you will know from having studied precedent on your English Legal System course, decisions by the higher courts do not just affect the parties in the case before them but also set new law for the cases that come afterwards. In tort, higher court decisions are often about the boundaries of tort: deciding whether, when a new factual situation arises, that situation should create liability. If a court decides that a certain type of situation does create liability, that means that the number of successful claims will increase. That will lead to increased costs for insurance companies and they will therefore put up their prices for that type of insurance, with all the effects mentioned above. For this reason, when the courts are deciding whether to extend liability in a particular area one of the issues they sometimes take into account is the effect on insurance costs.

You can read about an example of the effect a court decision can have on insurance premiums in the Law in Action box.
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Law in action  The Mirvahedy case

An example of a court case which had an effect on insurance costs is Mirvahedy v. Henley (2003), a case which was brought under the Animals Act 1971, which details when owners will be liable in tort for injury or damage caused by their animals. We will look at the case in more detail in Chapter 20, but the key point was that the House of Lords decided that the owners of some horses who caused an accident could be liable, even though the way the horses had behaved was quite normal in the circumstances. Up until the case was decided it had been thought that owners could only be liable for behaviour that was abnormal in their particular type of animal. The decision in the case meant that there would be more successful claims against animal owners, particularly owners of horses which, because of their size and the fact that they are often ridden on the road, are involved in a fairly high number of accidents. This in turn meant that companies providing insurance to riding schools and stables knew that they might have to make more payouts. Insurance costs went up by as much as 200 per cent, and many riding schools and stables said they might well be forced out of business by the increase.

The ‘floodgates’ issue

A policy issue which the courts often refer to openly is what is known as the ‘floodgates’ issue. This refers to the fact that if the courts decide to extend liability in a particular case a huge number of similar claims may be brought. That has three possible implications. First, that the court system may be overwhelmed with claims. Secondly, as we have seen, that insurance costs may go up, and thirdly, that the change may place too much of a burden on those who would be sued and make it harder for them to predict whether they were likely to be sued. For example, if a decision made it very much easier for an employee injured at work to succeed in a claim against their employer, that would place greater costs on businesses, which would be passed on to consumers in higher prices and/or might make it difficult for smaller businesses to survive. In such a case, therefore, the courts have to decide between restricting protection for employees and leaving some claimants without a remedy, or putting that extra burden on businesses with all the wider effects that would bring.

This decision is even more difficult where the defendant is some kind of public body funded by the taxpayer. For example, take the situation where someone is seriously injured during an operation, and when they sue, the court has to decide whether the surgeon took reasonable care. Clearly, it is desirable that people injured by poor medical care should get compensation, and if the court sets the standard of reasonable care too high, fewer such victims will be able to claim. However, the more victims who can claim successfully, the more money hospitals will have to pay in insurance cover and/or damages, and that money comes from the taxpayer who expects it to be used for patient
care. In all these cases, judges cannot realistically avoid taking policy into account, whether they refer to it in their decisions or not.

The risk of deterring desirable activities

The third common policy issue is one which has been very much in the news recently. This is the idea that if it becomes too easy to make a successful claim regarding a particular type of activity, potential defendants might avoid getting involved in that activity at all. For example, there have frequently been news reports that schools are reluctant to take pupils on trips because of the danger of being sued if something goes wrong, and that public events such as fêtes have been cancelled because the organisers are concerned about the danger of being sued. As we will see later, these fears are often based on a misunderstanding of the law, but in an attempt to address the issue the government introduced legislation which specifically permits the courts to take this aspect of policy into consideration when deciding cases. Section 1 of the Compensation Act 2006 states that when deciding whether a defendant should have taken particular steps to avoid harm, a court

may . . . have regard to whether a requirement to take such 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.

In other words, if the activity which has caused the harm is one which is considered to be good for society in some way, the courts can take this into account when deciding how wide liability for harm caused by that activity should be.

Law in action

A compensation culture?

The provisions of section 1 of the Compensation Act were put in place because of fears that Britain has developed a ‘compensation culture’, in which people are overly ready to sue, sometimes over quite trivial incidents, and it is said to have become common to try to blame someone for events which would once have been seen as nothing more than accidents. The media in particular give the impression that the number of cases is constantly rising and the courts are flooded with trivial claims; it is, for example, widely believed that the British courts allowed a claim against McDonald’s by a woman who was scalded because her coffee was too hot.

Source: Pearson Education Ltd/Photos.com/Jupiterimages
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In fact, when the government set up a taskforce to investigate the issue, its report, *Better Routes to Redress*, found that the overall number of people suing for personal injury has gone down in recent years, and there was no statistical evidence that the compensation culture actually exists (Better Regulation Taskforce 2004). As you will discover when you read the next chapter, it is not legally possible in England to claim for trivial accidents that are nobody’s fault, and while it is true that McDonald’s were sued in the USA for selling coffee that was too hot, an attempt to bring a similar claim in the English courts failed in *Bogle v. McDonald’s* (2002) (see page 272).

On the other hand, the *Better Routes to Redress* report found that what does seem to be happening is that the belief that it is easy to be sued can make people and organisations reluctant to get involved in activities which involve any kind of risk. This could mean that the very idea of a compensation culture is causing problems all by itself, regardless of whether we actually have one.

[Reference: 'Judge rules against McDonalds scalding victims’, *Daily Telegraph*, 27 March 2002]

Tort and the requirement of fault

As we saw earlier, most torts require the claimant to prove that the defendant was at fault in some way, meaning that they deliberately caused harm or failed to take reasonable precautions to prevent it. You might well think that this is just common sense, because it is obviously fairest to impose liability where the defendant is at fault. However, it can be argued that there are good reasons why fault should not be a requirement for tort liability, and there are some legal experts who argue that more areas of tort law, particularly those involving injury, should be subject to strict liability or should be taken out of the tort system altogether and compensated on a no-fault basis, where claimants would only have to prove that they had a particular injury rather than having to pin the blame on someone for it. Such a system exists in New Zealand and we will look at it a bit later. This issue often comes up on exam papers, so it is useful to look at some of the arguments for and against the requirement of fault.

Arguments in favour of a requirement to prove fault

There are three main arguments in favour of a fault requirement:

✦ The ‘floodgates’ issue: As we saw earlier, the courts are always concerned to avoid swamping the legal system with cases, or placing too heavy a burden on defendants. Requiring a claimant to prove fault clearly limits the number of cases quite considerably, because it rules out all those situations where a defendant has caused harm through no fault of their own, or where the claimant cannot prove fault.

✦ Deterrence: The requirement of fault is said to make people and companies more likely to take care to avoid harming others, because by taking care they can avoid being sued. If they were liable regardless of fault, it is argued, there would be no point in taking care.

✦ Fairness: The argument here is that it is only just to make someone pay for their wrongdoing if there was some way they could have avoided doing that wrong. If not, they are simply unlucky and should not have to pay for that.
Arguments against the requirement of fault

The fault requirement has a number of drawbacks. These are some of the arguments used against a requirement for fault, and in favour of strict liability in some areas of tort law:

✦ Expense: The need to prove fault increases the length and so the cost of tort cases. This increases the amount of money that is spent on lawyers and the court system, and if that money was saved it could be spent on compensating tort victims.

✦ The effect of insurance: The idea that the fault requirement helps deter wrongdoing is very much weakened when you consider that in the vast majority of cases damages are not paid by the wrongdoer but by their insurance company.

✦ Unpredictability: The fault principle makes it much more difficult to predict which party will win a case. This means that powerful and wealthy defendants can put pressure on claimants to accept an out-of-court settlement that might be much less than they could have won, because the claimant is afraid to take the risk of losing and getting nothing.

✦ Economic realities: Where a tort causes financial loss, that loss must either be borne by the defendant or by the claimant. In very many cases, the claimant in a case will be a private individual and the defendant will be a company. This would be the case where a patient sues a health trust, for example, where an employee sues their employer, and even where a pedestrian sues a motorist, since it will be the motorist’s insurance company that stands to pay damages. In these cases, it can be argued that increasing the number of successful claims by removing the requirement of fault moves the financial loss to the party who can most easily bear it.

✦ Unjust distinctions: Requiring fault means that two people who have suffered exactly the same kind of harm may receive very different treatment. For example, let’s say that Susan and Sophie are both seriously injured in separate car accidents. They both suffer the same amount of pain and suffering, and neither of them are ever able to work again. In Susan’s case, she can prove the driver is at fault and is able to claim hundreds of thousands of pounds in damages that compensate for her pain and suffering, and for the financial loss caused by being unable to go back to work. In Sophie’s case, however, the driver was not at fault, and so all she can expect to receive are the very low level of benefits provided by the social security system. To that we could add another imaginary case, Shirley, who has the same kind of medical problems as Sophie and Susan but was born with hers as a result of a hereditary disease. She too suffers in exactly the same way as they do, and will have done so for longer, but there is no compensation for her either. It could be argued that as tort damages are almost entirely paid for by insurance, and that cost is ultimately passed on to all of society, it might be simpler and fairer for society simply to compensate all victims of injury and illness through a no-fault system, with payouts that are smaller but more fairly distributed.

No-fault liability in practice

What would a system of no-fault liability look like? Such a system has actually existed in New Zealand since the 1970s, when the government abolished the tort system for all personal injuries caused by accidents. It was replaced with a state compensation scheme, paid for by taxpayers and extra charges on employers and motorists. Accident victims
can simply apply for compensation, without having to prove that anyone was to blame for their injuries. The system has very low administrative costs compared with the tort system, and initially the payments made were just slightly less than people could have expected to receive in a tort case, though they have since been reduced. It was initially intended that the scheme should be extended to cover injuries resulting from other causes but this has never happened, so the system does not address the criticism that people who suffer illness or injury through, for example, hereditary disease are treated differently from accident victims.

In this country, the nearest we have to a no-fault system for injury victims is under the Consumer Protection Act 1987, which imposes strict liability for people injured by dangerous products. However, as we will see when we look at product liability in Chapter 10, there are a number of provisions in the Act which mean that liability is not quite as strict as it looks at first glance, and it can still be very difficult to win a case in this area.

Out and about

Have a look at www.acc.co.nz, which is the website of New Zealand's no-fault accident compensation scheme and gives a useful insight into exactly how such a scheme can work. Do you think the scheme sounds like a good idea? What advantages might it have over a system like ours, where people have to go to court for compensation? Can you see any drawbacks to it?

Tort and the Human Rights Act 1998

As you will probably know from studying the English legal system, the Human Rights Act 1998 brings into English law the provisions of the European Convention on Human Rights and allows people to bring cases regarding these provisions in the English courts. This has had a number of effects on tort law.

First, it means that the courts must interpret and apply statutes and case law in a way which is compatible with the rights protected under the Act, as far as it is possible to do so. In some cases, these rights may conflict with rights protected under tort law. The tort of defamation, for example, protects the right to reputation. Claims are most often brought against the media in an attempt to prevent them saying, or get compensation for the fact that they have already said, things which damage someone's reputation. However under the Human Rights Act, the media have a right to freedom of expression, and so the courts must balance this against a claimant's right to protect their reputation. We'll look at this issue in more detail in Chapter 16.

The second way in which the Human Rights Act is making an impact on tort law concerns the fact that the Act allows individuals to sue public bodies who may have breached their rights under the Act. In several areas, the rights protected under the Human Rights Act overlap with rights protected by tort. For example, Article 8 of the European Convention on Human Rights gives a right to respect for a person's private and family life, their home and correspondence, and there are some situations where this could overlap with the right, protected by the tort of nuisance, to peaceful enjoyment of your own land. If, for example, you live in a house which is near an airbase and low-flying aircraft cause noise and disturbance to you, that could potentially be a breach of Article 8, but could also be nuisance.
Because of these overlaps, there are an increasing number of cases where claimants sue both in tort and under the Human Rights Act 1998. Although it is possible for the same act or omission to be a breach of the Act and a tort, the claimant will not be compensated twice for the same injury. The advantage of bringing both claims is simply to increase the chances of winning; if one fails, the other might succeed. As we will see when we go on to look at specific torts, there are an increasing number of situations where tort law does not give someone a remedy, but the Human Rights Act does.

The tort system and personal injuries

As we have seen, torts protect against a wide range of different types of harm, from having your reputation damaged by a newspaper, to being unable to enjoy sitting in your garden because your neighbour’s pigs are smelly. However, as you can see from the Key Stats box, the majority of tort claims involve personal injury, which essentially means anything which damages a person physically or mentally, whether permanently or not. That can also include fatal injuries; if a person dies as a result of a tort, the person who inherits their estate, meaning the money and property they leave behind, also inherits the same right to sue that the person would have had if they were still alive. In most cases, of course, it is the close relatives of the dead person who sue.

Key stats  Tort cases begun in the High Court during 2010

This list gives you an idea of how tort cases divide up in terms of numbers. As you can see, the majority of cases involve personal injury, and these will mostly be cases involving the torts of negligence, occupiers’ liability, employers’ liability and product liability. Clinical negligence cases are those alleging poor treatment by medical staff, and so most of these are also likely to involve personal injury.

- Personal injury actions 1041
- Clinical negligence 752
- Other negligence 247
- Defamation 158
- Other torts 19

In case you were wondering about the other categories on the list, ‘Other negligence’ would cover other cases of negligence involving purely financial loss or damage to property, and defamation cases, as already explained, are those where the claimant is seeking to protect their reputation. ‘Other torts’ would include, for example, nuisance, the tort which protects against interference with your land, and trespass, which protects against people coming on to your land without permission.

[Source: Judicial and Court Statistics 2010]
Chapter 1  What is tort law?

Given that personal injury cases are such a big part of the tort system, it is worth looking at the way that system handles them, before we go on to look at the individual torts in detail over the following chapters. This background will help you understand some of the cases that we will look at later.

The personal injury ‘obstacle race’

During the 1970s academics from Oxford University did an extensive survey of the experiences of injury victims in the tort system, which is usually referred to as ‘the Oxford Survey’. One of the researchers, Donald Harris, likened the tort system to ‘a compulsory long-distance obstacle race’ (Harris 1984) because of all the hurdles that the system itself, and the law behind it, throws in the victims’ way. Although the survey was completed over 30 years ago, none of those hurdles have disappeared (though we could say that some have been modified), and so the report’s conclusions are still a useful guide to the way the tort system operates in personal injury cases. The hurdles it identified fall into three main groups:

✦ access to legal services;
✦ problems with settlements;
✦ difficulties of proof.

Access to legal services

The first hurdle, to continue Donald Harris’s comparison, appears before the injured person even gets on to the race track. This is the hurdle of access to legal services. As you will know if you have studied an English Legal System course, there are a number of reasons why people who might have a legal claim never take any action to follow it up, including worries about how much legal action will cost, not knowing how to make a claim, being put off by the intimidating image of the legal profession, and not even realising that they have a claim. Since the Oxford Survey was done, two major changes to the legal system have happened, which you might expect to have had an impact on this problem. The first is that solicitors have been allowed to advertise, and many have chosen to incorporate in their advertising messages about the kind of injuries people can sue for— you will probably have seen adverts that begin ‘Had an accident at work?’ or ‘Been injured in an accident that wasn’t your fault?’ On top of this has come the growth of claims management companies, who advertise for accident victims and then refer them on to law firms who pay them for the referral. You would imagine that this makes it much less likely that someone who might have a legal claim would not realise it. However, when the website personalinjurylawyers.co.uk did a survey in 2011, shown in the Key Stats box, they found that half of all accident victims still do not make a claim, and their reasons for not doing so were strikingly similar to the ones quoted in the Oxford Survey: not knowing how to claim, not realising they had a valid case, and unfamiliarity with the legal profession.
The second big change regarding access to legal services has been the arrival of conditional fee agreements (CFAs), often called ‘no win, no fee’, which were introduced during the 1990s. Under a CFA, a solicitor agrees not to charge a fee if they lose the case but, if they win, to take their usual fee plus an ‘uplift’, which can be anything up to twice the usual fee but no more. A claimant who wins will usually be able to claim these costs from the losing defendant, and will usually take out an insurance policy which will pay their opponent’s costs if the claimant loses and has costs awarded against them. The existence of these arrangements has meant that ordinary individuals who would not be able to afford to pay for a court case themselves can still take legal action.

However, CFAs have their limits. Clearly lawyers will only take on cases on this basis if they are fairly certain of success, and most firms insist that there is at least a 60–70 per cent chance of success before they will consider a CFA. Given that some types of personal injury case can be very hard to prove, it is possible that there are many potential claimants who are not helped at all by the existence of CFAs. In addition, when the Oxford Survey was done legal aid was available for personal injury cases. During the period since CFAs were introduced, the availability of legal aid for personal injury cases has been drastically reduced and is now only available for medical negligence cases and cases of deliberate injury. This suggests that overall the financial barriers to legal action for personal injury victims are still a big problem.

Problems with settlements

As mentioned earlier, most tort cases never come to court but are settled, with the parties agreeing compensation between them. Although this cuts costs, as the trial is the most expensive part of the process, it can have disadvantages for claimants. Hazel Genn’s very important 1987 study, Hard Bargaining, looked at the experiences of

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**Key stats** Attitudes to accident claims 2011

The research carried out by personalinjurylawyers.co.uk found that:

- 39% had suffered an accident for which they could have claimed compensation
- 36% had had an accident at work
- 25% had been hurt in a car accident
- 22% had been hurt by slipping or tripping over
- 64% had injuries severe enough for them to need time off work
- 48% did not claim compensation
- 52% said they did not know how to go about claiming
- 23% were worried about being able to find a reputable law firm to take their case
- 18% did not claim because they thought they would lose

[Source: http://www.lawgazette.co.uk/news/half-accident-victims-do-not-claim]
personal injury claimants, and found that the two sides in a case were usually in very different positions. The defendants would be backed by insurance companies, and in the tort system insurance companies are what Genn called ‘repeat players’. They are involved in a lot of cases, know the system very well and have no real emotional involvement with individual cases. By contrast, for most claimants that Genn studied their case would be the first time they had been involved with the tort system, it would have enormous personal importance to them and they were likely to find the whole process quite stressful. In many cases, they might also need to get their compensation quickly, in order to pay for care, or perhaps adaptations to their home to accommodate disabilities caused by the accident.

Given this imbalance of power between the two parties, Genn found, claimants often accepted much less in a settlement than they might have got if they had gone to court, and some even dropped their cases completely rather than continue with the process. Accepting a low settlement was most likely to happen in very serious cases, where the claimant’s need for compensation was greatest and where damages ordered by a court were likely to be high, so that by achieving a settlement insurance companies stood to save themselves a lot of money.

This pressure on claimants to settle is increased by a provision in part 36 of the Civil Procedure Rules, which are the set of rules that govern the way tort and other civil cases are run. Under part 36, if one side makes a realistic offer and the other side turns it down and the case goes to trial, the existence of the offer can make a difference to the costs awarded. From a claimant’s point of view, part 36 means that if they turn down an offer and then win their case but are awarded damages equal to or less than the offer, the court can decide that the claimant should pay their own costs and those of the defendant from the date at which the offer expired (instead of the defendant paying both sets of costs as they usually would). This can be a frightening prospect for claimants, and it is well known in the personal injury world that insurers use part 36 offers as a bullying tactic to put pressure on claimants to settle.

**Difficulties with proof**

Some types of personal injury case can be very difficult for a claimant to win, because of the need to prove fault and causation. One of the most difficult areas is clinical negligence, where what is alleged is that medical treatment has fallen below a reasonable standard, and by falling below that standard the medical professional has caused harm to the claimant. Given the complexity of modern medical care, it can often be very difficult to work out exactly what, or who, has caused the claimant’s problems. For example, there are situations where the claimant might not have recovered fully from the condition or injury that took them to hospital in the first place, even if the treatment had been correct, but they claim that the medical treatment they got made their injury or illness worse, or their recovery less complete, than it would have been if the treatment had been correct. In such cases the claimant has to prove that it was the treatment that caused their problems, or at least some of them, and not the underlying condition. There may also be a variety of different problems and treatments which interact with each other, so that it is difficult to pinpoint exactly what has caused the harm, and a variety of different medical professionals involved in the treatment making it difficult to see who, if anyone, caused the damage. On top of that, the court has to decide what a reasonable standard of care for that particular condition would be, and that may be something that even medical professionals do not agree on.
All these complications mean that it may not be possible to know whether the case is worth pursuing without doing a substantial amount of research and consulting medical experts, and that preparatory work can easily cost £2,000–£5,000. It is perhaps not surprising then that the average chance of winning a clinical negligence case is only around 17 per cent, compared to 85 per cent for other personal injury cases. For this reason lawyers will often refuse to take these cases on a no win, no fee basis.

The People in the Law box gives you an insight into how the experience of making a claim can be for claimants, and the lawyers who work for them.

**People in the law**

Marek Bednarczyk is a Partner at Hart Brown solicitors in Guildford, Surrey, and specialises in personal injury claims. He came into the legal profession after working as a teacher for 10 years.

**What kind of cases do you typically deal with?** It’s a huge variety – I do nearly all types of personal injury and clinical negligence, so I get road traffic accidents, occupiers’ liability and accidents at work, as well as a lot of clinical negligence. I’ve been qualified for nearly 20 years, so I tend to get the more complex, high-value cases, from around £50,000 up to multi-million pound claims.

**What attracts you to this area of law?** I like the variety, and the fact that you’re dealing with human beings. And it’s not a dry and dusty area of law – you could call personal injury law many things, but it’s definitely not dry.

**Research shows that a proportion of accident victims never make a claim, because they don’t realise they have a case, or don’t know what to do about it. What do you think should be done to address that problem?** Obviously it’s not possible to teach everyone all about the law, but I’d like to see some basic legal education taught in all schools, I think that would go some way towards raising awareness. We often find, for example, that even if people do decide to make a claim, they don’t realise that there are limitation periods, and they simply leave it too late.

**How do your cases typically progress?** Quite often they’ll start with a phone conversation, when I’ll find out what’s happened and what the injuries are. Then we ask the person to fill in a questionnaire, which we use to assess whether we can take on the claim. If not, we’ll explain our thinking and the client won’t be charged anything, so we’re essentially giving free advice at that stage. If we are taking on the claim, we’ll explore the funding options – they may have legal expenses insurance, for example as part of a home insurance policy, or we may want to look at a CFA.

Then we’ll do a Letter of Claim, and the process of negotiation begins. In most cases, there’ll be a
What is tort law?

A series of offers, from both sides, and part of my job is to know when to settle and when to wait for a better offer. It’s very rare for a first offer to be a reasonable one—insurance companies want to settle for as little as they can get away with, so the first offer will almost always be deliberately low. For example, in a case that eventually settles for half a million pounds, the first offer might only be £250,000. It’s up to me to fight my client’s case and get the best offer I can. You do need to be quite robust for that part of the job, but it’s a part that I really enjoy. In the meantime, the other side will be doing all they can to minimise the claim, so they might use tactics like secret filming, or having people followed, to see if they’re exaggerating their injuries.

Most cases take 1–2 years, but some settle within six months, some take much longer. Only a few will go to trial—most personal injury cases don’t get anywhere near the door of a court, and I know personal injury lawyers who haven’t had a court case in five years. That often surprises law students—reading court reports can give a misleading idea of how things really are, because the cases that end up in court are the minority.

How do claimants find the experience? It can be quite stressful for them, especially in the higher value, more complex cases, where people might need 24-hour care for the rest of their lives, or might be unable to go back to their jobs, because for them the outcome is crucial. If an insurance company loses a million, it’s not good news, but it doesn’t change anyone’s life—but if a client loses a million pound claim, that’s devastating. It’s part of my job to minimise the stress for them, but I can’t completely eradicate it because the outcome is so important to them.

One client said to me recently that he felt as though he’d been accused of something and was having to prove his innocence, and that was spot on—the system is skewed in favour of the defendant, because it’s the claimant who has to prove their case. People do find that difficult, because the way they see it, they’re the victim, they haven’t done anything wrong and yet they’re the ones being secretly filmed or followed. Some—not all—insurance companies have the mindset that all claimants are malingerers and that incenses people. But having worked for defendants in the past, I’ve ordered that kind of surveillance myself, and although mostly you don’t find anything, we did have one or two that were caught red-handed in fraudulent claims, so I do understand the need for it.

On the other hand, some people find that the process of litigation can be quite beneficial in itself, aside from the money. In clinical negligence cases, for example, people often have serious injuries, and they feel they’ve been very badly let down by a medical professional, and what they want, as much as anything, is to get vindication and acknowledgement that what happened to them was wrong.

What’s your view on the idea that Britain has a compensation culture? Lord Young’s report [Better Routes to Redress] made a distinction between the reality of the situation and the perception, and I think that’s accurate. There is a perception that we have a compensation culture, and I think lawyers have played a part in creating that perception, with all those ‘If there’s blame, there’s a claim’ adverts that you see. But the reality, looking at the statistics, is that over the past 10 years, there’s actually been a drop in litigation. The underlying position is that most people are ignorant of their rights in pursuing claims—for example, if you look at the numbers of adverse incidents in the NHS every year, it’s hundreds of thousands, and the number of people who actually pursue a claim against the NHS is a tiny fraction of that. And in my experience, even those that do claim are often quite reluctant about it—they’ll say ‘I don’t really want to sue my doctor’ or ‘I don’t really want to sue my employer’. So I don’t think we’re living in a society that’s rife with litigation.

I also think the compensation culture debate has a slightly odd attitude to legal rights. No one would say ‘Please take away some of my legal rights’, yet criticising people for making a claim is effectively criticising them for pursuing their legal rights. And you have to remember that when people do sue, there can be very good reasons for that. If someone else’s negligence means you’ve been so seriously injured that you need 24-hour care for the rest of your life, or you can’t work anymore, you have a good reason to claim, and it’s your legal right to do that. It’s about holding people accountable for their mistakes, which as a principle I think is the right thing.
Alternative methods of compensating personal injury victims

We saw earlier that for victims of personal injury getting compensation through the tort system is not a straightforward activity at all. Fortunately, perhaps, there are a variety of other ways in which people may get financial support after being injured in an accident, and we can only really understand the role of the tort system if we look at how these run alongside it. Although these systems rarely provide as much money as a tort claim can, they have the benefit that the claimant does not have to prove anyone was at fault for their injury.

Employment benefits

All employees who earn £102 a week or more are entitled to Statutory Sick Pay (SSP), which pays a standard weekly rate for up to 28 weeks. At the time of publication the rate was £81.60. Some employers have their own sickness benefit schemes which pay more, for longer, and these may take over after the first 28 weeks, or be paid as well as SSP during that time. They rarely go on longer than six months, however.

The social security system

The vast majority of accident victims who need financial support get it not from a legal claim but through welfare benefits. As we saw in the survey by personalinjurylawyers.co.uk, around half of people who could have a legal claim do not take legal action, and to this we can add all the people who cannot claim because their injury was not (or could not be proved to be) anyone’s fault. A proportion of these people will be unable to work, either for a temporary period or permanently, and once sick pay from their employer runs out their main source of support will be welfare benefits, unless they have insurance. The amount of money they can claim will vary, depending on the type of benefit they are eligible for, but in general benefits only pay enough to provide for the necessities of life. Tort compensation, by contrast, aims to put the claimant back in the position they would have been in if the accident had not happened, so someone who would have been earning a good salary can expect their tort damages to replace that money.

The advantages of welfare benefits over tort damages is that they can be obtained relatively quickly, and they offer certainty, in that if the claimant is entitled under the rules of a particular benefit they will get the money, unlike a tort case where a claimant may spend months and even years making their claim and then end up with nothing. The main disadvantage of welfare benefits is the very low amounts of money they offer. There is also a certain stigma attached to claiming benefits, with welfare payments referred to in the press as ‘handouts’ even though in most cases the people claiming them will have been supporting the social security system for years, through the tax and National Insurance that they have paid while they were in work. Welfare benefits also have an advantage over tort damages for society as a whole, in that they cost less to provide. During the 1990s, the judge Lord Woolf prepared a report into the civil legal system, called Access to Justice, which found that it costs 8–12p to provide every £1 of benefits, compared to as much as £1.35 to provide every £1 of tort damages (Woolf 1996).
Insurance

Some types of insurance policy offer cover for victims of accidents. The two most important are life insurance, which is designed to pay out when someone dies in order to take care of that person’s family once their income is no longer available, and income protection insurance, which replaces part of a person’s income if they are unable to work for a long time through illness and disability. It continues to pay out until the person can go back to work, or reaches retirement.

Life insurance is a very well-accepted product that most people buy if they have dependants, and, as the market is large, can usually be obtained at a reasonable price. Its main drawback is simply that it pays out only on death, so does not help accident victims who are only injured. Income protection insurance has more drawbacks, in that it is quite expensive and policies can be quite complex, which can mean that people do not always realise what they are buying. For example, many people assume their policy will pay out for as long as they are unable to do their old job, but then find that the policy will only pay out while they are unable to do any job at all.

Compensation schemes

There are also a number of schemes designed to offer compensation to victims of particular types of accident. One of the biggest is the Industrial Injuries Scheme, which provides benefits for people who have been injured at work, or who have developed certain illnesses, such as asthma or deafness, because of their work. Other schemes have been set up by the government to compensate children who suffer injury as a result of having vaccinations, and to compensate people who contracted HIV and/or hepatitis C through infected blood transfusions. These schemes offer levels of benefit that can compare with those in the tort system, and claimants who want to use them have to give up their right to sue in tort. The idea behind them is that, although the government does not accept legal liability for the injuries, they have been caused by activities run by the state and so the government accepts a responsibility to help those harmed.

There have for many years been plans for a compensation scheme for victims of poor medical treatment in the NHS. Since the mid-1990s, claims against the NHS for medical negligence have been increasing, and at the time of publication were costing the NHS around £500 million a year in compensation and legal fees. As a result, in 2001 the National Audit Commission looked into the issue of negligence claims against the NHS and concluded that money could be saved, and complaints dealt with more efficiently, if a new system specifically for NHS complaints was created.

The Commission pointed out that research showed that in many cases financial compensation was not the patient’s main aim. Often, they were more interested in getting a genuine explanation of what had gone wrong, an apology, and some kind of reassurance that action would be taken to prevent other people being injured by the same sort of mistake. It was when the NHS failed to meet these needs that attitudes tended to harden, leading people to sue for compensation. The Commission concluded that if measures were put in place to address these issues, fewer legal cases might be brought.

A further report was produced in 2003 by the Chief Medical Officer, Liam Donaldson. In Making Amends, he too recommended the creation of a new scheme for NHS complaints, which would make it easier to get not just compensation but also acknowledgement of mistakes, and care and rehabilitation to deal with the results of the medical
The tort system and personal injuries

The emphasis in the report was on creating a system in which, instead of the patient having to prove fault and the NHS attempting to fight claims, NHS staff would be encouraged to admit mistakes and the organisation would take responsibility for improving practice by learning from such mistakes.

The government’s response to Making Amends was the NHS Redress Act 2006. It allows the creation of an NHS Redress Scheme which, the explanatory notes to the Act state, will ‘provide investigations when things go wrong, remedial treatment, rehabilitation and care where needed, explanations and apologies, and financial compensation in certain circumstances’ without the need to make a legal claim. Only cases worth less than £20,000 will be handled by the scheme, and patients who accept redress offered under the scheme will have to waive their right to take legal action.

The Act is what is known as an Enabling Act, which sets out a broad framework for the scheme and then permits the detailed rules to be put in place by means of secondary legislation. It was passed in November 2006, and the government then began consulting with interested parties before deciding on the details of how the scheme will work. It was eventually decided that the scheme would be piloted in Wales.

The details of the scheme had not yet been approved when this book was published, but the proposals included provisions for claimants to receive compensation in the form of any care that they might need as a result of poor medical treatment; a duty for medical organisations to appoint a person responsible for ensuring lessons learned from complaints are put into practice; a more proactive approach to investigating negligence, with organisations required to review incidents where things have gone wrong, and investigate them, and the onus no longer on the patient to make a complaint. It was thought that the scheme would be restricted to complaints which, if brought as a tort case, would be worth less than £20,000, while more serious claims would still use the tort system.

All these systems run alongside the tort system, and in some cases an individual claimant may use more than one. Someone whose accident means they are out of work for a long time, for example, may make a claim in tort and claim state benefits during the period while their case is in progress. However, remember that the aim of the tort system is to put the claimant back in the position they would have been in if the tort had not been committed. This means that the tort victim not only should not be worse off, but also should not be better off as a result of the accident. For this reason, when a tort claim includes a sum of money for loss of earnings any welfare benefits received will be ‘set off’ against that claim, so that the claimant is not compensated twice for the same loss. Insurance benefits, however, are not set off, as it is believed doing this would dissuade people from taking out insurance.

One other element that we should take into account when looking at the whole picture of support for accident victims is the NHS. Although not strictly speaking a source of compensation, the NHS does provide a major benefit for accident victims in the form of free care for their injuries. In any other system, they would have to pay for this care and then hope they could claim back the cost in a tort action. This may be one reason why tort damages here have never reached the incredible levels that they do in the USA, where many claimants may have to factor in tens of thousands of pounds worth of medical care.
Chapter 1 What is tort law?

Studying tort law: some advice

As we saw earlier, although a handful of torts have been created by statute, most of them have come from common law, meaning that their rules have been created by the decisions of judges in cases over the years. Sometimes students find that this makes the rules of tort harder to pin down than those of, for example, crime, where statute is much more heavily involved. Whereas a statute will usually state what the law is quite clearly and concisely, the rules on common law torts need to be picked out from the many thousands of words in a Court of Appeal or House of Lords/Supreme Court judgment, and this can lead to uncertainty about how a particular rule might apply in different cases, or for your current purposes, in problem questions. Try not to worry too much about this, though. When you are tackling problem questions, the main thing is not that you should know exactly what a court would decide, but that you can spot the issues the problem raises and what tests a court would use to decide those issues.

If we take, for example, a nuisance case where one neighbour’s smelly pigs mean that the other cannot enjoy sitting out in his garden, an important issue the courts would look at is whether the pig owner’s interference with her neighbour’s enjoyment was reasonable. You do not need to know for certain whether they would find it was reasonable or not – remember that lawyers do not always know this either, because if they did there would never be any need to bring cases on the point to the courts. What you do need to be able to do is to spot that this is the issue the question raises, and then explain what factors the court would take into account in deciding this question. If you can refer to the decided cases that you will find in the relevant chapter, apply them to the situation described in the problem, and give a reasoned opinion on the question based on the law you have applied, you will be giving a good answer.

Summary

✦ Tort law aims to compensate the person who has suffered wrongdoing, and covers a wide range of different situations where one person (or organisation) has caused harm to another or infringed their legal rights.

✦ Not every kind of wrong will be a tort. The basis of tort law is that we all have interests which the law should protect, and only a wrong that infringes one of the interests that the law protects will be a tort.

✦ There are many different torts, covering different ways of doing wrong against someone else, and each one comprises a set of things that the claimant must prove in order to win their case.

✦ Most torts have four elements:
  • an act or omission by the defendant;
  • harm to the claimant, of a type that the law protects against;
• the harm must be caused by the act or omission;
• the defendant must be at fault.

A few torts do not require harm; these are called torts actionable per se.

Some torts do not require fault; these are called strict liability torts.

Torts differ from crimes in that crimes are committed against and prosecuted by the state, but torts are a matter between the wrongdoer and the person wronged. The aim is to compensate the claimant, not punish the wrongdoer. But there is some overlap between them, because criminal courts can order compensation for crime victims, and damages in a tort case are intended to be a deterrent to wrongdoing, just as punishments in a criminal case are.

Torts differ from breaches of contract in that torts are usually breaches of a duty owed by law, and breaches of contract are usually breaches of a duty voluntarily agreed to. But they overlap in that voluntary agreement can change the nature of a duty in tort, and some contractual duties are imposed by law, not agreement.

Most tort cases are funded by insurance and this means the insurance industry has a big say in which cases come before the courts. This is important because most tort law is case law.

Decisions in tort cases are often influenced by policy, which means the judges’ view of what is best for society. Courts may consider the effects on the insurance market, the number of cases coming before the courts, the impact on business or publicly funded organisations, or whether widening liability might prevent desirable or useful activities.

An important question in tort is whether it is a good thing for the claimant to have to prove the defendant was at fault. Arguments in favour of this include:
• It limits the number of cases, preventing the system being swamped.
• It deters wrongdoing if people know they can avoid liability by taking care.
• It is fairer if people only have to pay for wrongdoing they could have avoided.

Arguments against the requirement of fault include:
• It makes cases longer and so more expensive.
• It cannot deter wrongdoing when damages are paid by insurers, not the wrongdoer.
• It makes cases unpredictable, which allows the more powerful party to put pressure on the weaker one.
• It makes sense for losses to be paid for by those who can best bear them, and the fault principle puts a barrier in the way of this.
• It means that similar injuries are treated in quite different ways, depending on whether fault can be proved.

The Human Rights Act 1998 is making an impact on tort law, in two ways:
• courts must interpret tort law in line with the provisions of the Act as far as possible;
• the Act gives rights which may overlap with rights protected by tort, or give remedies where tort does not.

Most tort cases deal with personal injuries and research shows that claimants in this area of law face a number of difficulties, including getting access to legal services, the imbalance of power between them and defendant insurance companies which can make settlements unfair, and problems proving their case.

Alternate methods of compensation for personal injury victims run alongside the tort system, including employment benefits, social security, insurance and special compensation schemes for particular types of injury.
Further reading and references

This report looks at whether we really have a compensation culture, and gives suggestions for better ways to improve access to justice for those who have genuine claims. It has lots of useful background information on how the tort system works.

This book has been through many editions but still remains one of the best and most detailed explanations of the way the law treats personal injury claims. Easy to read and very interesting, it has lots of useful background information, and looks at current topical issues including funding and the ‘compensation culture’.

This report looks at the way claims against the NHS are handled and recommends the creation of a new scheme. Its recommendations led to the NHS Redress Act 2006.

A critical look at one of the world’s best-known no-fault compensation schemes, which argues that recent reforms have brought back some of the disadvantages of the tort system. Useful material if you are writing about the advantages and disadvantages of the fault requirement.

A fascinating study of the way the tort system works, particularly from a claimant’s point of view.

Although it is now over 30 years old, this research still sheds useful light on the difficulties the tort system places in the way of claimants.

An interesting article on the impact of insurance on decisions in tort cases. The author argues that decisions influenced by insurance issues have led to incoherent rules.

This is another report into the way clinical negligence claims against the NHS are handled, which reveals a number of weaknesses with the tort system as a way of dealing with this type of claim.

This very interesting article looks at a new system of compensating victims of medical accidents which has been set up in France, and considers what advantages it might have over our system of using the courts for these kinds of cases.

Lord Woolf’s report led to a number of changes being made to civil justice procedure, and gives useful background to some of the problems with the system. Some have been remedied by his reforms, but some remain.
Visit www.mylawchamber.co.uk/quinntort to access tools to help you develop and test your knowledge of tort law, including practice exam questions with guidance, annotated weblinks, glossary and key case flashcards, legal newsfeed and legal updates and interactive ‘You be the judge’ questions.

Use Case Navigator to read in full some of the key cases referenced in this chapter with commentary and questions:

*Fairchild v. Glenhaven Funeral Services Ltd and others*

[2002] 3 All ER 305