The tort of negligence

2 General principles of negligence
3 Duty of care
4 Nervous shock
5 Economic loss
6 Omissions, third parties and public authorities
7 Breach of duty and proof of negligence
8 Causation and remoteness of damage
9 Defences to negligence
Aims and objectives

After reading this chapter you will:

- have a knowledge of the elements of the tort of negligence
- understand the interests protected by the tort of negligence
- appreciate the problem areas that the tort of negligence has to deal with
- have a critical knowledge of the problems created by concurrent liability in contract and tort.

Elements of the tort

To succeed in a negligence action the claimant must prove three things:

1. that the defendant owed him a duty of care;
2. that the defendant was in breach of that duty; and
3. that the claimant suffered damage caused by the breach of duty, which was not too remote.

The defendant may raise certain defences to the action. The most important defences are that the claimant consented to run the risk of the injury (volenti) or that the defendant was contributorily negligent.

Example

A drove his car over the speed limit and failed to keep a proper lookout, as he was talking to the passenger next to him. A’s car struck B, a pedestrian, causing personal injuries to B. Analysing this event in terms of the legal categories, A owed a duty of care to B as one road user to another. A was in breach of the duty in speeding and failing to keep a proper lookout (i.e. A was ‘negligent’). B has suffered damage as a result of A’s negligence.

If B had failed to look before stepping into the road, it would be open to a court to find that B had been contributorily negligent and reduce his damages by the proportion in which he was held to be responsible for the accident.
Negligence is the most important modern tort. Other torts are normally identified by the particular interest of the claimant which is protected: for example, defamation protects interests in reputation, and nuisance protects a person’s use and enjoyment of land. Negligence, on the other hand, protects a number of interests and the only unifying factor is the defendant’s conduct, which must be labelled as negligent if liability is to arise.

Three interests can be identified as being protected by the tort of negligence. These are: protection against personal injury, damage to property and economic interests. Economic losses consequential on damage to the person and damage to property may also be recovered.

Example

A drives his car negligently and collides with B’s car. This causes personal injuries to B and damage to his car (property damage). B may recover damages from A for both these losses. B may lose wages as a result of his injuries and may have to hire a car while his own is being repaired. Both these losses are recoverable as consequential economic loss.

A asks his solicitor, B, to draw up a will leaving A’s property to C. B negligently drafts the will with the result that C is unable to take his bequest under the will. C may sue B in negligence, for the value of his lost bequest. The interest protected here is C’s economic interest and C is said to recover damages for pure economic loss.

Note the difference between consequential and pure economic loss. In the example of the will, C has suffered no personal injuries or property damage and his loss is said to be damage to the pocket or pure economic loss.

Readers are reminded that most defendants in tort actions will be insured and any damages awarded will be paid by an insurance company and not by the defendant themselves. When a judge says that they will not impose liability as it would impose too heavy a burden on the defendant, they usually mean that it would impose too heavy a burden on the defendant’s insurers. In the car example above, B’s damages would be paid by A’s motor insurers, and C’s damages would be paid by B’s liability insurers. In both cases it is compulsory for the defendant to carry insurance against these risks.

A defendant cannot be liable in this tort unless the court judges him to have been negligent (i.e. at fault). This means that the defendant’s conduct must have dropped below a standard set by law. Where there is liability insurance the court can set the standard at a fairly high level, as the award of damages will not directly penalise the defendant. But as one of the purposes of the negligence formula is said to be deterrence, the presence of insurance distorts the actual deterrence to the defendant.

Problem areas

Negligence expanded so quickly in the twentieth century that, at one time, it appeared possible that it would make other torts redundant. Its popularity was based on a fairly simple formula of fault, backed by insurance. The structure is now creaking due to problems in the insurance market and negligence no longer seems to be the simple panacea for all legal problems that it once did.
Personal injuries

In statistical terms, most negligence actions are brought for personal injuries suffered by the claimant. The majority of personal injury actions are brought in the areas of motor accidents and accidents at work.

An injured person requires compensation for their injuries and the more serious the injury, the greater the need for compensation. It has already been observed that the insurance factor dilutes the personal deterrence objective of negligence. As the other objective of tort law is compensation for the victim, the negligence system can only be supported if it is an efficient and fair method of delivering compensation to the victims. The Pearson Commission established that this was not the case. (See Chapter 1.)

The inefficiency and apparent unfairness of the tort system at delivering compensation has led to calls for it to be replaced in whole or in part by a no-fault scheme of compensation or by private insurance. No such scheme is perfect and the introduction of such a scheme is a question of political will.

Medical negligence

There have been claims that England is suffering a medical malpractice crisis similar to that in the United States. Doctors claim that the threat of litigation leads to ‘defensive medicine’: i.e. carrying out procedures in order to avoid being sued, rather than for the benefit of the patient. The rise in the Caesarean section rate is often pointed to as an example of defensive medicine. However, recent research shows that the number of claims for clinical negligence is dropping but the overall cost of claims is rising due to changes in the way in which damages are calculated. The number of claims has dropped from 10,980 in 2000–01 to 7,196 in 2004–05. The cost of claims has risen from £415 million in 2000–01 to £503 million in 2004–05. (R. Lewis, A. Morris and K. Oliphant, ‘Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?’ (2006) 2 JPIL 87–103.)

Victims of medical accidents are not happy with the negligence system. Numerous problems stand in the way of a person who wishes to sue for medical negligence. The action is expensive and legal aid is not easily available; lawyers with the necessary skills in this specialised area are not always easy to find; the system leads to a closing of ranks on the part of the medical profession, which makes it difficult for the patient to find out what went wrong; even if the victim does obtain compensation, this may be many years after the event.

Disenchantment with the system on the part of both doctors and patients led to calls for medical negligence to be replaced by a no-fault scheme of compensation. This was supported by the medical insurers, doctors, professional bodies and victim support agencies. The Department of Health’s proposal for an alternative to tort law, in the form of the NHS Redress Act 2006, is discussed in Chapters 1 and 14.

Economic loss

Complaints about negligence in the area of personal injuries are concentrated on inefficiency and unfairness, but at least the law in that area is relatively clear and mature, except in cases of psychiatric damage. The tort of negligence has only recently ventured into the area of economic loss and the law on this subject is unclear and at an early stage of development.
Historically, contract was the proper action where a person suffered economic loss and if a person had no contract they had no action. The reason that negligence (tort) law moved into this area was the perceived injustice created by the doctrine of **privity** in contract law. This doctrine states that only a party to a contract may sue or be sued on the contract. A party to a contract is a person who provides consideration.

**Example**

A instructs B, his solicitor, to draft a will leaving A’s property to C. When A dies, it is discovered that B has drafted the will negligently with the result that C is unable to take his bequest. C’s loss is economic loss and in theory C should sue for breach of contract. But C has no contract. The contract is between A and B. The doctrine of privity means that C cannot sue B in contract, which leaves tort law to decide whether C should have a negligence action against B.

It is often useful to consider economic loss cases in diagrammatic form:

```
A —— Contract —— B
    \   /
     C
```

Many of the economic loss cases fall into this triangular pattern. The question for the court is usually whether tort law is prepared to complete the triangle by granting C a negligence action against B.

**Omissions**

Negligence actions are usually concerned with the situation where A commits a negligent act and causes damage to B. But could A be liable in negligence to B where they omit to do something and B suffers damage?

*NB*: In legal terminology, a positive act is known as **misfeasance** and a failure to act as **nonfeasance**.

Liability for failing to take positive steps to safeguard another is traditionally the role of contract. If you want a person to assist you then you have to pay them (provide consideration).

If A sees B drowning then they are under no duty in tort to attempt a rescue. But what if A has some relationship with B? For example, A is B’s parent or B is a visitor to A’s premises. Would A then be under a duty to attempt a rescue?

**Liability in contract and tort**

Where the parties have a contractual relationship, can there also be tortious liability? This is known as **concurrent liability**. The answer to this question has practical importance as, if the answer is yes, the claimant will be able to take advantage of tortious rules which may be more advantageous.

The most important of these will be the rules on limitation. These rules govern the time period within which a claimant must bring an action. In contract, time...
periods generally run from the time a contract is made and in tort from the time damage is suffered.

Other rules are those on *causation* and *remoteness*. Remoteness principles in tort are generally thought to be more favourable to the claimant than those in contract.

Not all concurrent liability principles will run in the claimant’s favour. If the claimant chooses to sue in negligence, then the defendant has the opportunity of raising the defence of contributory negligence by the claimant. If the action is brought in contract, then the opportunity to raise contributory negligence is limited by the current law and is not available where the contractual duty is stricter than negligence.

Two competing principles have been at work in English law since the courts started to grapple with this problem. The first is the solution adopted by French law, that a party to a contract should pursue the remedy in contract alone. This has the advantage of simplicity. The second is the principle followed in German law that concurrent remedies are permissible. At first, English courts refused to allow professional people, such as solicitors and architects, to be sued in tort by their contractual clients. This created a problem as certain professional people, such as doctors, could be sued in contract or tort.

The decision in *Hedley Byrne v Heller* [1964] AC 465, changed the basis on which English law operated. It was now possible for a person who did not have a contract to sue in respect of negligent advice leading to economic loss. This raised the question of why a person who had a contractual relationship should not be able to take advantage of tortious principles and might be worse off than a person who had received gratuitous advice.

The case sparked off a series of decisions sympathetic to the existence of concurrent duties. These included: *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (petrol company and tenant); *Batty v Metropolitan Realisations Ltd* [1978] QB 554 (property developer and purchaser); *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 (solicitor and client).

Doubt was cast on these developments by a statement by Lord Scarman in *Tai Hing Cotton Mill v Liu Chong Bank Ltd* [1986] AC 80 at 107.

Their Lordships do not believe that there is anything to the advantage of the law’s development in searching for liability in tort where the parties are in a contractual relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships – either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties – their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises in contract or tort, e.g., in the limitation of action.

In *Tai Hing*, the plaintiff was seeking to establish liability in tort which went further than the liability established by the contract between the parties. The court had refused to implicate a term into a contract between banker and customer whereby the customer would be obliged to take reasonable care of the bank’s interests. They also refused to recognise a similar obligation based in tort. The case does not deal with the position between professional and client and is probably best interpreted as meaning that liability in tort cannot be imposed which contradicts the express terms of the contract. (See
PART 2 THE TORT OF NEGLIGENCE

*Johnstone v Bloomsbury Health Authority*, below.) The case does not prevent a claimant from taking advantage of a tortious duty which is the same as a contractual duty in order to use advantageous rules such as limitation periods.

The case posed difficulty in the area of employer’s liability to his employees. This area is a complex mixture of contract and tort. There is a contract of employment between the employer and employee which will contain express terms. There are also implied terms in the contract and the employer owes tortious duties. The case is concerned with the interaction of the express and implied terms and the tortious duties.

*Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293

The plaintiff was employed by the defendant health authority as a junior doctor. The essence of his claim was that, by his contract, he was obliged to work 88 hours per week and that this was in breach of the employer’s duty to take reasonable care for his safety and well-being. The Court of Appeal heard cross appeals on the question of striking out the claim.

It was held (Leggatt LJ dissenting) that although the defendants were entitled to require the plaintiff to work up to 88 hours per week under his contract of employment, they had to exercise that discretion in such a way as not to injure the plaintiff. The health authority therefore had to exercise its power in such a way as not to injure the plaintiff’s health. The authority could not require the plaintiff to work so much overtime in a week that his health might reasonably foreseeably be damaged.

Two of the judges also stated that an implied contractual term in a contract of employment, such as the implied duty to take reasonable care for the health of employees, is subject to any express terms in the contract. It was only because the defendants had a discretion to get the plaintiff to work 88 hours, rather than an absolute obligation, that the Vice-Chancellor was able to consider the interaction of the express and implied terms. Stuart-Smith LJ dissented on this point. To him it was a question of the interaction of the two terms, the express and implied one. The contract gave the authority the power to require the plaintiff to work up to 88 hours per week, but only if this could be done in such a way as not to breach the implied term of reasonable care for the employee’s health.

If the approach of the majority were adopted on the point of express terms overriding implied terms, this would reduce the whole of the law of negligence on employer’s liability to a question of contract. It is unlikely that the judiciary would take such an approach. One problem may be that the judges were trying too hard to follow Lord Scarman in *Tai Hing*. However, in that case his Lordship stressed that his quote was particularly apt for commercial relationships where the allocation of commercial risks should not be disturbed by an escape out of contract into tort. What is appropriate for a commercial case may not be so for an employer’s liability one.

Where there is no contradiction between the contractual and the tortious duties, it is now clear that concurrent liability does exist and that a claimant can take advantage of favourable tortious rules.

*Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506

Lloyd’s names sued their managing agents. Some of the names had a contract with their agents but this was held not to preclude a duty of care in tort.

Lord Goff in a detailed judgment reviewed the authorities and upheld the analysis in favour of concurrent liability.
[L]iability can, and in my opinion should, be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the claimant, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him the most advantageous.

This case established that concurrent liability in contract and tort is generally available. There will not be concurrent liability in all cases where there is a contract between the parties. The contractual duty must require the exercise of reasonable care and not be a strict liability duty. The tortious duty must be co-extensive with the contractual one and be freestanding in the sense that the claimant cannot build on the contract to establish a duty where no tortious duty is recognised. This would be the case where a person had a contract with a builder and suffered economic loss. There is no duty of care on a builder to avoid economic loss. However, the tortious duty may be more extensive than the contractual one, for example, where a professional gives advice which is outside his retainer. (*Holt v Payne Skillington* [1996] PNLR 179.)

It is possible that this decision may lead to a review of other cases. What is the position now, for instance, of the following case?

**Reid v Rush & Tompkins Group plc** [1989] 3 All ER 228

The plaintiff was employed by the defendants and was sent abroad to work. He was injured in a motor accident by a hit-and-run driver. The plaintiff sued his employers, claiming (among other things) that they were in breach of duty in tort to take all reasonable steps to protect his economic welfare, arising out of personal injury, while he was acting in the course of his employment. The breach of duty was alleged to be in failing to take out appropriate insurance cover for him or advising him to take it out for himself. Relying on Lord Scarman’s dicta in *Tai Hing*, the Court of Appeal held that as there was no term in the contract providing for this, the plaintiff was precluded from suing for economic loss in tort.

This was an attempt by the plaintiff to expand the employer’s duties beyond the express and implied terms of the contract and the existing boundaries of the law of torts. The decision must now be read in the light of *Henderson* and *Spring v Guardian Assurance* [1994] 3 All ER 129 and *Scally v Southern Health and Social Services Board* [1992] 1 AC 294. *Spring* imposes liability for economic loss on an employer for giving a negligent reference and *Scally* imposes liability on an employer through the implied term contractual route for failure to give information regarding valuable pension rights.

**Summary**

This chapter deals with the general principles of the tort of negligence.

- The claimant must prove duty, breach and damage to establish the tort of negligence.
- The usual defences to a negligence action are *volenti* and contributory negligence.
- Unlike other torts, negligence protects various interests.
Three interests are protected: personal injuries; property damage; and economic loss.

Insurance is crucial in underpinning the tort of negligence.

The presence of insurance may explain the standard of care set by a court.

The alternative to compensating for personal injuries through the tort system would be a no-fault scheme or private insurance.

Some areas of negligence pose particular problems. These include medical negligence, liability for economic loss and liability for omissions (nonfeasance).

It is possible for there to be concurrent liability in contract and tort based on the same facts. \((\text{Henderson v Merrett Syndicates} (1994))\).

In order for there to be concurrent liability, there must be a contractual duty based on reasonable care; the tortious duty must be a freestanding one; and the tortious duty must not have been excluded by the contract.

The advantages of a tort action for a claimant are principally in the more generous limitation rules and the rules on remoteness of damage.

Further reading


Visit \(\text{www.mylawchamber.co.uk/cooke}\) to access study support resources including sample exam questions with answer guidance, multiple choice quizzes, flashcards, an online glossary, live weblinks and regular updates to the law, plus the Pearson e-Text version of \(\text{Law of Tort}\) which you can search, highlight and personalise with your own notes and bookmarks.

Use Case Navigator to read in full some of the key cases referenced in this chapter with commentary and questions for comprehension: \(\text{Henderson v Merrett Syndicates Ltd} [1994] 3 \text{All ER 506}\).