

Introduction to Tort Law

study points

After reading this chapter, you will be able to understand:

- what is meant by the term ‘tort’
- how tort can be defined by what it is and what it is not
- the scope and breadth of the torts that we’ll be looking at throughout this book
- some of the key terms and phrases.

1.1 Introduction

If you’ve ever bought a newspaper and read it, chances are you will have some concept of contract law (you bought the newspaper, there’s your contract) and criminal law (perhaps you read the front page about a burglary or a murder). But tort law as a concept might not feel so familiar. It’s that word ‘tort’. A cake? Something pulled tight? The thing the teacher did last week? This chapter should clarify things: it will explore what tort law is, what it isn’t, the different types of torts covered in this book, and some of the key terms you’ll need. In short, tort law is a fascinating subject and it’s everywhere you look. In fact, they say you’re never more than 6 feet away from a tort ...*

(*Do you smell a rat?)

1.2 What is tort?

The word tort derives from the Old French for *wrong*, via Latin and Medieval Latin (*tortum*: something twisted; *torquere*: to twist). For legal purposes, a tort is simply a **civil wrong, for which the law provides a remedy**. The last part of this definition (‘for which the law provides a remedy’) is an important clarification, in that not every civil wrong you might be able to think of would be classified as a tort for which the law might provide a remedy.

So which civil wrongs are torts? We can examine a list of these, and we will in a moment, but you may be wondering what it is that connects these apparently disparate torts. The simplest answer is to think of tort law as a residual or bucket category, holding those civil wrongs not caught by other areas of civil law, such as land law or contract law. This is how Negligence, a tort, can sit with other torts, such as nuisance and defamation, though the three are very different in character

and in terms of the interests they protect. Therefore, one way to get at what tort is, is to think a little more about what it is not.

What's the point of it all?

You might be wondering what the purpose of tort law is. Beyond the most important aim of providing a remedy for a claimant who has been wronged in a civil law setting, can you think of other purposes? All of the following have judicial and/or academic support – you may feel some are more important than others:

- (1) *To compensate* those who have been wronged – though note that not every type of harm that the claimant has sustained can be remedied in tort. For example, Negligence only recognises certain types of harm (or damage or loss – we use these terms interchangeably) and not others. You can't claim for upset, grief or irritation.
- (2) *To deter* – this can be measured in terms of exemplary damages (albeit only rarely available). It can also be said to be reflected in other ways. For example, making an employer potentially liable in Negligence to its employees ensures that the employer works hard to maintain high standards (to avoid being sued).
- (3) *Striking a balance between competing interests and rights* – we see this perhaps most obviously in the tort of private nuisance where the court seeks to allow, so far as is reasonable, the defendant freely to carry out activities on their land, whilst also seeking to provide the claimant with the right to enjoy their own land without interference.
- (4) *As an alternative to statutory compensation.*

1.3 What is tort not?

Tort can be distinguished from other areas of law. Let's take a look at the most important of these.

1.3.1 Criminal law

Criminal law is a type of public law (whereas tort is private, ie usually an action between two private individuals or bodies). Criminal cases are brought on behalf of the Crown; hence criminal cases are cited as *R v Name of Defendant* (meaning Regina against the individual). Tort law, being a branch of civil law, has different aims. The principal aim in tort law is for the claimant to be compensated, ie to receive monetary damages for the loss or damage caused to them by the defendant (whereas, in criminal law, the emphasis is on punishment of the offender). As such, tort law citations will look like this: *Name of Claimant v Name of Defendant*. (We'll look at tort terminology in more detail below at 1.7.)

The remedies available are different in respect of the two types of law. In criminal law, we are not dealing with remedies so much as sanctions, and these might include a fine, imprisonment, etc. In tort law, the claimant will usually be seeking some kind of remedy, and if not damages, as mentioned above, the other

key remedy sought will normally be an equitable remedy known as an injunction, which might be full or partial. An injunction is an order that stops or limits an activity. As we'll discover, injunctions are only available for certain torts, for example defamation and nuisance.

The final key difference between criminal law and tort law is as to the standard of proof. Criminal law is based on the criminal standard of proof, so that the judge or jury in a criminal case must be sure beyond reasonable doubt before finding a defendant guilty. In tort law, because it is a branch of civil law, the standard of proof is the lower, civil standard. The judge (there being no jury) will need to be persuaded on the balance of probabilities, ie they must feel that it is 'more likely than not' that the claimant's version of events is to be believed in order for the claimant to succeed. We don't talk about a defendant in a tort action being guilty. Instead, we are concerned with their liability.

1.3.2 Contract law

Whilst there are some overlaps between contract law and tort law, in that both are types of civil law, at heart they are very different. Contract law disputes arise where there have been breaches of contract, ie duties and obligations voluntarily undertaken between parties. Tort law, by contrast, regulates our conduct whether we voluntarily agree or not. Such duties are not (normally) imposed by contract so much as by society.

example

Tom, a car driver, carelessly pulls out at a junction without looking. He knocks over Sadiq, a pedestrian, causing him injury.

In this simple example, it is likely that Sadiq will be able to sue Tom in the tort of Negligence, because Tom owed Sadiq a legal duty to take care. It's not that Tom and Sadiq signed a contract to this effect – in fact they are strangers – but rather, the court would say that Tom owes a tortious legal duty to take care of anyone who might feasibly make up the class of person using the road that he's driving on, including other drivers, cyclists and pedestrians. This duty attaches to the task – driving – and is separate from any contract between the parties.

1.3.3 Land law

Land law, another branch of civil law, is primarily concerned with the ownership and control of land, and with its transfer or acquisition. In contrast, whilst we do have so-called land torts, such as nuisance and trespass to land, generally speaking a claimant will be more concerned with any infringement of their use and enjoyment of that land arising out of, for example, the noise emanating from the defendant's house (a classic nuisance action) than with ownership of land *per se*. Again, there are some overlaps between land law and tort law; for example, tort lawyers utilise a defence called prescription – a form of acquiescence – as a defence to a nuisance action.

1.4 Torts we will examine

Now we're a little clearer on the nature of tort, partly by reference to what it's not, let's turn to the torts we'll be studying. This is best expressed as a table, with the name of the tort and the interest(s) that that tort protects, in other words, the heads of loss for which you would sue as a claimant affected by the defendant's tortious conduct towards you. If this appears at first glance as a disparate list of civil wrongs, that's because it is! (Remember that concept of the residual or bucket category.) You may be able to spot some connections between some of the torts, however.

Table 1.1 Protected interests

Tort	Interests protected
General Negligence	Bodily integrity, property, finances
Clinical Negligence	Bodily integrity, property, finances
Employers' Liability	Bodily integrity, property, finances
Occupiers' Liability	Bodily integrity, sometimes property
Product Liability	Bodily integrity and property
Trespass to the Person	Body (and mind), liberty
Defamation	Reputation
Nuisance	Use and enjoyment of land, property, sometimes other losses

Torts that haven't made the list

There are many more torts than we have space to study here; in fact there are more than 30 recognised in English law. Here are some of the more common torts that we don't cover in this book:

- abuse of judicial process
- breach of statutory duty (we touch on this in passing)
- deceit (which is related to but not the same as defamation)
- harassment (a statutory tort created by the Protection from Harassment Act 1997)
- malicious falsehood (again sometimes an alternative to defamation)
- misuse of private information (this is mentioned in a case discussed in **Chapter 8** on vicarious liability – can you spot it?)
- trespass to land and trespass to goods
- passing off.

1.5 The torts in outline

The list set out at **Table 1.1** above represents the torts that we'll look at in this book, and the order in which we'll do that.

The first five torts on the list, from General Negligence to Product Liability, are all types or variations of Negligence (negligence being legal-speak for carelessness). This means that once you are clear on the elements of a Negligence claim, the basic principles remain broadly the same within those five torts. Acts of Trespass to the Person (which is the generic term for three specific torts, namely assault, battery and false imprisonment) are crimes as well as torts, so you'll notice that some of the authorities we rely on are actually imported from criminal law. Defamation (the generic term for two torts, namely libel and slander) is very different from the other torts, in terms of the interest it protects and the legal structure we use when discussing or advising on it. Most lawyers who practise defamation do little else as it is a highly specialised and sometimes technical area.

Finally, Nuisance (the generic term for three torts, namely private nuisance, public nuisance and the rule in *Rylands v Fletcher*) is the oldest tort, and this is reflected in some of the archaic language that underpins it. For example, you can claim in private nuisance for 'sensible personal discomfort', which means something the defendant does on their land that adversely affects a claimant's sense of smell, hearing or taste. On the other hand, private nuisance is also current, and evolving, with a case concerning the spread of Japanese knotweed having been heard fairly recently in the Court of Appeal (see *Network Rail Infrastructure Ltd v Williams and Another* [2018] EWCA Civ 1514, discussed as part of private nuisance in **Chapter 12**).

1.6 The significance of policy

Before we move on to tort terminology, it's important to be aware of what we mean by the term 'policy' in a tortious context and why it's relevant to many torts, especially Negligence. Tort law is decided on the basis of precedent and the application of statute, yet policy has clearly played its part in many landmark judgments. So what is policy? It can best be defined as the non-legal considerations, whether social, political or economic (or a combination), that the court takes into account when having regard to the effect its decisions will have. Policy considerations can work for or against either party, and they can narrow or broaden the scope of claims depending on the legal climate at any time.

Rather than list every possible policy consideration here, it makes sense to highlight the most important consideration, a policy term called 'floodgates' (see below at **1.6.1**), and to explore the rest as and when they arise in the case law.

Do look out for the mention of policy in judgments. Some judges will refer overtly to the term, citing policy as the reason why a claim might fail or succeed. (For an illuminating and entertaining example, read Lord Denning's judgment in *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27, which we will look at when we consider pure economic loss in **Chapter 2**.) Often, however, the judgments do not make their policy considerations explicit, and, as lawyers, we have to learn to read between the lines, reconciling ostensibly strange decisions on the basis of policy.

1.6.1 Floodgates

This is probably the most frequently cited policy consideration. It refers to the courts' concern that to allow one claim would be to open the floodgates to a deluge of claims which would overwhelm the courts, and therefore effectively thwart their attempts to deal fairly with the most important cases. It tends to arise where the potential class of claimant is very wide.

A clear example of floodgates being used as a judicial obstacle to limit claims arises in the context of Negligence claims where the loss suffered is psychiatric harm (defined as a recognised form of psychiatric illness, such as post-traumatic stress disorder, clinical depression and so on) in the absence of any physical harm (see **Chapter 2**).

example

Bryony and two friends, Charlie and Dylan, are walking down the street past a house being rebuilt by a team of builders. Charlie and Dylan, themselves builders, go close to the scaffolding to take a closer look at the quality of the build. At that moment, due to the negligence of one of the builders, some bricks fall from the scaffolding, narrowly missing Charlie but glancing Dylan's head, causing him concussion. Both Charlie and Dylan sustain psychiatric harm. Bryony also sustains psychiatric harm as a result of what she saw.

This scenario does raise the issue of floodgates but not for all of the potential claimants. Can you work out which claim the court might seek to prevent?

The answer – and we will look more closely at the mechanics of this in Chapter 2 – is that Dylan is the most likely to succeed in his Negligence action against the builder because he suffered both personal injury and psychiatric harm. Charlie is likely also to be able to claim, because although he wasn't himself physically injured, objectively it would appear that physical harm was reasonably foreseeable in this situation. For both, there is no danger of floodgates because they belong to a small and finite class of people caught up in the incident itself.

Bryony, on the other hand, will struggle to succeed in her claim because she was neither physically hurt, nor was it reasonably foreseeable that she might be. She was not intimately caught up in the incident though she witnessed it. The court would say that the floodgates concern arises with her claim. Why? Because if she is allowed to succeed, where would the courts draw the line? What about everyone else walking down the street at that moment who might have seen or heard something? What about the people Bryony told later that day, and the people who later read the local newspaper article about the incident? Should they be able to claim? Can you see the potential for floodgates here, with the class of claimants getting very wide, and further removed from the negligent incident itself?

For this reason, as we will see, the courts have put mechanisms or obstacles in place whereby claimants like Bryony, classified as 'secondary victims', can only claim for their loss if they can satisfy a number of stringent criteria. You might feel this is unfair, but the courts would say that they exist to deal with the most pressing Negligence claims, and in particular those claimants who suffer physical injury and/or were in the 'zone of danger' at the time. So the concept of floodgates is a judicial control mechanism that controls and limits the numbers of Negligence claims allowed to succeed.

1.6.2 Other policy considerations

The other policy considerations you are likely to come across frequently as you read into the case law are as follows:

- *Crushing liability* (see especially on pure economic loss (**Chapter 2**) and remoteness (**Chapter 5**)). This would be where the defendant is held financially responsible disproportionately to the wrong they have caused.
- *Insurance*. The courts are more likely to find a defendant liable where they are insured because they will have the financial means to pay out for exactly the eventuality that is envisaged by virtue of the insurance. We see this often in tort, especially connected with those activities for which insurance is compulsory (driving, being an employer, and so on). Sometimes, the claimant will be insured; a reason why the court may decide not to make the defendant liable.
- *Defensive practices*. We see this most often where the court arguably tries to protect public bodies or professionals so as to ensure that they don't feel fettered through fear of litigation and can do their work/carry out investigations freely. See if you can find reference to this in the case law, particularly as regards the police (see **Chapter 2**) and the medical profession (see **Chapter 7**).

There are many other policy considerations, including *deterrence* and *justice*, but the above are the most important for our purposes.

1.7 Tort terminology, key terms and phrases

Think of this section as a basic phrasebook that you might have reference to when you're in a foreign country trying to make sense of what you're hearing or reading. Some of these key terms and phrases may feel abstract until we start to apply them to real situations or read about them in cases, some of which you may already be familiar with, but either way hopefully they will provide a useful foundation as you move through this book.

1.7.1 Claimant and defendant

The person bringing the claim is the claimant (formerly known as the plaintiff, as seen in older cases pre-dating the Woolf reforms in 2000). The person or legal body (such as an NHS Trust, etc) against whom the claim is brought is the defendant, or the tortfeasor. When you read cases – also known as authorities, though an authority is *any* legal source you are relying upon, whether that be a case, an excerpt from a statute or possibly an academic authority – the name of the claimant appears first followed by the defendant's name. The 'v' separating them is pronounced 'and' rather than 'versus' or 'against'. The only time the order of the names might be different is on appeal, where the appellant's name goes first, meaning whichever party is appealing (claimant or defendant).

1.7.2 Loss, damage, damages

You may read about a claimant claiming damages for their damage. What does that mean? Simply that the claimant is seeking monetary compensation, known as damages, from the defendant for their loss (also known as damage or harm). This would typically arise in a Negligence claim where, as a result of the defendant's careless act or omission, the claimant is injured/suffers loss. Let's say the careless act in question is driving. A claimant knocked down by a negligent defendant driver may suffer personal injury, such as a broken leg, and also possibly psychiatric harm such as post-traumatic stress disorder, property damage, which could be a damaged watch or mobile phone, and consequential economic loss, which is financial loss flowing from the damage to their person or property, typically time off work for which they are not paid.

1.7.3 Tortious not tortuous

Tort may sometimes feel tortuous, but if we're talking liability, the correct term is tortious. And while we're on the subject of liability, use liability and not guilt when you're advising on whether the defendant committed the tort. Similarly, the words liable and libel are not interchangeable. A defendant may be liable in libel but not libel in liable!

1.7.4 Fault liability and strict liability

Most torts require a claimant to prove that the defendant was in some way at fault in committing the tort. This means proving, on the balance of probabilities, that the tortfeasor intentionally carried out the act that constitutes the tort (required for certain torts such as trespass to the person) or that they negligently acted or omitted to act (required for certain torts such as Negligence).

However, a few torts are known as strict liability torts. These are torts that do not require proof of fault on the part of the defendant and are deemed to be made out as soon as the relevant act or omission has occurred, regardless of what the defendant intended or how careful they were. Examples of such torts for our purposes would be some types of nuisance and product liability under statute. This is not to say that the defendant in such circumstances is automatically liable (a concept closer to a term called absolute liability); they may have a defence.

Vicarious liability is not a tort but a mechanism, and this imposes strict liability on employers for the torts of their employees (see **Chapter 8**).

1.7.5 Actionable *per se*

Most torts require proof of loss, for example Negligence, which is not actionable unless the claimant has sustained some form of recognisable loss. Some torts, however, are actionable without proof of loss and we say that these are actionable *per se* (of themselves). An example of such a tort would be trespass to the person. Having said that, whilst you can, in theory, bring an action for, say, battery, a form of trespass to the person, without having suffered any quantifiable loss, ultimately

you might choose not to, as the costs and time and inconvenience of bringing the matter to court might well outweigh the nominal damages you might receive if successful.

1.8 Further reading

R Bagshaw, 'Responsibility and Fault' (2000) 116 LQR 321–23.

V Corbett, 'The promotion of human dignity: a theory of tort law' (2017) 58 Irish Jurist 121–52.

J McEldowney, 'Tort Law and Human Rights' (2003) 22 CJQ 213–16

summary

- A tort is a civil wrong for which the law provides a remedy.
- There is nothing much to connect the torts apart from some overlaps as to the interests they protect and the fact they fit into a residual category of civil wrongs not dealt with by other types of civil law.
- The claimant is the party bringing the action and the defendant or tortfeasor is the party defending it.
- Most (but not all) torts require some kind of fault to be proven and for the claimant to have suffered recognisable loss.
- Policy underpins much of tort law.

test your knowledge

Have a go at these multiple choice questions (MCQs):

Question 1

A man is injured as a result of being run over by a careless motorcyclist. The man suffers personal injury and has to take 6 weeks off work to recover from his injuries. His work only pays him 4 weeks of sick pay. The man succeeds in his Negligence action against the motorcyclist.

Which one of the following options best describes what the man will be able to claim for in terms of his financial loss?

- A He will be able to claim for 6 weeks of lost salary, as this is consequential economic loss.
- B He will be able to claim for 4 weeks of lost salary, as this is consequential economic loss.
- C He will be able to claim for 2 weeks of lost salary, as this is consequential economic loss.
- D He will be able to claim for 6 weeks of lost salary, as this flowed from the injury to his person.
- E He will not be able to claim for any lost salary, as he was back at work after 6 weeks.

Answer

The correct answer is option C. Consequential economic loss refers to financial loss flowing from injury to your person or your property, but you can only claim for what you have actually lost.

Question 2

A junior solicitor has been asked to give a presentation outlining some of the key terminology used in tort law.

Which one of the following is completely accurate as to tort terminology?

- A A tort is a civil wrong; the standard of proof used is the balance of probabilities; the tortfeasor is the also known as the defendant.
- B A tort is a civil wrong; all civil wrongs are torts; the standard of proof used is the balance of probabilities.
- C The tortfeasor is the party bringing the action; a tort is a civil wrong; the standard of proof used is beyond reasonable doubt.
- D A tort is a civil wrong; the standard of proof used is beyond reasonable doubt; the usual remedies are damages or an injunction.
- E The usual remedies are damages or an injunction; all civil wrongs are torts; the standard of proof used is the balance of probabilities.

Answer

The correct answer is option A: the others all contain at least one inaccuracy.

Question 3

You are reading a judgment in which the judge discusses policy as being one of the factors influencing her decision.

Which one of the following provides the most accurate definition of policy?

- A Policy is where the courts limit the number of claims allowed through the courts.
- B Policy refers to the courts using their own political persuasions to determine the outcome.
- C Policy is where the courts consider the floodgates argument.
- D Policy refers to the non-legal considerations underpinning a decision, such as the social, political and economic factors that might have a bearing on future cases.
- E Policy refers to the legal considerations underpinning a decision, such as the social, political and economic factors that might have a bearing on future cases.

Answer

The correct answer is option D. Policy is not a legal consideration as such. Option C gives an example of policy but the question doesn't ask for this. Option A is incorrect in that policy can favour either a claimant or a defendant.