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Chapter 1
Introduction

1.1 What is a tort?

'Tort' is the French word for wrong. (Other terms derived from this root are the adjective 'tortious', the adverb 'tortiously' and 'tortfeasor', the name for a person who commits a tort.) Yet, just as all dogs are animals but not all animals are dogs, so all torts are wrongs but not all wrongs are torts. To make sense of this conundrum, we must distinguish (a) civil wrongs from criminal wrongs; (b) equitable civil wrongs from common law civil wrongs; and (c) the different varieties of common law civil wrongs, some of them known as 'torts', others going under different names.

1.1.1 Criminal and civil wrongs

If I punch you in the face, that is both a crime and a civil wrong (both the crime and the tort of battery). The one event gives rise to two legal responses. First, I may be prosecuted by the state for committing a criminal offence and, if found guilty by the court, made to pay a fine to the state, sent to prison or punished in some other way. Second, I may be sued by you in the civil courts (the County Courts or the High Court) and, if found liable, ordered to pay you a sum of money (damages) or to change my behaviour in the future (by an injunction). Unlike criminal proceedings, civil actions are brought by individuals, not (generally) the state. Furthermore, it is those individuals, not the state, who stand to benefit directly from a court judgment against the defendant. Because of this, and because the defendant who is held liable is not exposed to the stigma of a criminal conviction, civil actions are possible in many circumstances in which no criminal liability arises. It should be noted, however, that not all crimes give rise to concurrent tortious liability: this is true especially of so-called victimless crimes (eg possession of drugs) which have no effect upon other people.

Some would press the distinction between criminal and civil law further and say that the criminal law is designed to punish the defendant while the civil law aims only to vindicate the claimant's rights, but we should not pursue doctrinal purity at the expense of practical convenience. Medieval English law certainly knew no such purity. Criminal proceedings were originally instituted by individuals, for the law enforcement arm of the state did not develop until much later. Furthermore, many proceedings we would now recognise as civil were at least semi-criminal in character: the unsuccessful defendant would be punished as well as being obliged to pay damages, while the defendant who failed to appear in court would not only lose her case but would also be liable to arrest and imprisonment (see Maitland, 1936, 39–40). In view of these beginnings, and of the pragmatic nature of English lawyers throughout history, it is no surprise that the modern criminal and civil law borrow elements from each other. Thus a criminal court may order the guilty party to pay compensation to the victim under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 as well as passing a criminal sentence. Conversely, the damages awarded by a civil court may include a punitive element designed not to

vindicate the claimant's rights but to punish the defendant for her wrongdoing (see Section 23.2).

1.1.2 Equitable and common law wrongs

Within the category of civil wrongs, history obliges us to make a fundamental distinction between wrongs at common law and wrongs in equity (see Baker, 2002, ch 6). Before 1875, two distinct court systems existed side by side. The first to evolve had been the common law courts of the King's Bench and Common Pleas. The law applied in these courts was embodied in the 'forms of action', the verbal formulas written on the 'writs' purchased from the Chancellor's office (the Chancery) which authorised citizens to commence an action. In order to mount successful proceedings, litigants of the period had to ensure that the form of words inscribed on the writ matched the substance of their complaint. In the case of the writ of trespass to the person, for example, this required them to establish that, in the florid language of the writ, they had been beaten, wounded and maltreated by force and arms, against the King's peace. With the passage of time, the forms of action became more or less set in stone. Such rigidity in the law led to injustice because litigants were denied the remedy they deserved simply because none of the existing forms of action covered their case.

It was to remedy this injustice that the equitable jurisdiction was developed. (The common law's response to the same problem was to recognise the flexible 'action on the case', yet even this did not go far enough and the writ system was finally abolished by the Judicature Act 1873.) Some of the victims of such injustice took to petitioning the King for help, and in time these petitions came to be passed on to the Chancellor who proved willing to grant relief in some cases where the common law provided no remedy. The grant of this relief was at first purely discretionary, but after a while a body of established rules and principles evolved. A primary concern of these rules was to lay down the circumstances under which property, whose official 'legal' title was held by one person, should be held on trust for another. They thus laid the foundations for our modern law of trusts. For present purposes, the rules are significant for their recognition of a class of equitable wrongs. Examples of equitable wrongs might include an employee 'stealing' a trade secret from her employer in the hope of selling it to a rival, or a company director accepting a bribe to ensure that the company enters into contracts with a particular supplier. The remedies that equity gave in respect of these wrongs differed from the normal common law remedy of damages: the employee might be subjected to an injunction forbidding her to pass on the trade secret to anyone else, while the company director might be required to 'account for' (hand over) the value of the bribe she received.

This equitable jurisdiction, and these equitable remedies, grew up outside the common law courts; however, the Judicature Act 1875 'fused' the two separate systems so that, from that time on, both common law and equitable principles were applied by the same courts. Nevertheless, and despite the views of many judges who – like Lord Diplock in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, 925 – believe that 'the waters of the confluent streams of law and equity have surely mingled now', most commentators continue to regard breach of equitable duty as entirely distinct from the civil wrongs at common law. The result is not only that the subjects are treated in different textbooks (breach of equitable duty being consigned

to books on equity and trusts), but also that certain equitable remedies, particularly the account of profits made by a wrongdoer, are generally held not to be available in respect of common law wrongs (cf Birks, 1991). Yet there is one cause of action which seems to straddle both categories. The origins of the liability for unlawful disclosure of private information are in equity, but the modern tendency is to treat it as a liability in tort (see eg *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 at [14], per Lord Nicholls). By developing the law of confidence, the courts have been able to increase the level of protection afforded by English law to the right of privacy under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Section 20.1), with which they must now ensure that their decisions are compatible (Human Rights Act 1998, s 6; see Section 1.4). The full implications of the judicial recognition of this hybrid 'equitable tort' are yet to be worked out, but any development that reduces the hold of anachronistic legal distinctions is to be applauded.

1.1.3 Torts and other common law wrongs

Common law wrongs themselves come in different varieties, breach of contract, tort and unjust enrichment being the most familiar. This subdivision of the common law wrongs was unknown to the early common law and only took shape closer in time to the modern era when lawyers looked to impose some order on the many disparate forms of action that history had bequeathed them (see Baker, 2002, 401–02). Their first move was to seize upon a body of law dealing with undertakings or promises and, sharply differentiating breach of promise from other forms of wrong, to develop a set of rules that we recognise today as our law of contract. A comparable, and ongoing, endeavour has been the attempt to formulate a law of unjust enrichment by drawing together a variety of causes of action, many of which had previously been considered to be rather anomalous appendages to the law of contract, torts or equity (see Birks, 2005). The common element of such cases is that the defendant has acquired a benefit which the law requires her to surrender to the claimant. The law of tort is what is left behind after cases of breach of contract and unjust enrichment have been withdrawn from the list of common law wrongs and may be accurately described as 'our residual category of civil liability' (Gilmore, 1974, 87).

1.2 The classification of torts

The status of the law of tort as our residual category of civil liability means that it consists of a 'rag-bag' of disparate cases which very often have little connection with one another. For this reason, it is very difficult to elaborate general principles of the law of tort to match those of the law of contract, which are to be found in any textbook on the subject. The considerations raised by a road traffic accident are very different from those raised by a smear campaign of a public figure conducted in the popular press, which in turn are very different from those raised by industrial action taken by disgruntled employees. All these incidents might lead to liability in the law of tort, but it would be impossible to apply the same principles in relation to each. So when we turn to modern works on the law of tort, we find chapters dealing with principles said to be common to all torts intermixed with discussions of the divergent rules applicable to different kinds of cases. These rules are generally listed under the name of a particular tort, but they may come under a heading which groups together a number of different

torts. These groupings may be justified on the grounds that the torts are all relevant in a particular context (eg 'Liability for Land and Structures'), that they all serve to protect a particular interest (eg 'Interests in Reputation'), that they can all be traced back to one of the early common law's forms of action (eg 'Trespass'), or that they share a common mental element (eg 'Intentional Wrongs').

The different torts that we can identify today often overlap one another in their application. They are a mixture of 'hand-me-downs' from the age of the forms of action, abolished by the Judicature Act 1873, whose names recall the names of the original writs (eg trespass), and later creations, both legislative and judicial. These later judicial creations were attempts to draw together different instances of liability recognised under the old forms of action. The most notable of these is the tort of negligence, which united a variety of instances of liability for damage caused by negligence and was recognised as a fully fledged tort in its own right only in 1932 (see Section 2.1). Since that time it has done the work of a number of the older torts and has become the favoured head of claim for many claimants, being the purest expression recognised by the law of the moral notion that wrongdoers should pay for their wrongs.

1.3 The organisation of this book

This book conforms to type in giving separate treatment to the general principles of tortious liability (Part V) and to the various discrete torts (Parts I–IV). In dealing with the latter, we start with the tort of negligence (Part I) which merits this prime position by virtue of its present practical importance and its tendency with the passage of time to subsume the other torts under its mantle. When we come to dealing with the remaining torts, we make no pretence of completeness: this is a student book and the torts covered in depth are those that typically feature in tort courses in university. We have omitted detailed coverage of areas of the law that are generally found in the syllabuses of other subjects (thus conversion has been left to the commercial lawyers and intimidation, conspiracy, and so on, to courses on labour law). Despite these exclusions, we have been left with a wide-ranging though ramshackle body of law, as befits tort law's status as the great dustbin of civil liability.

To impose some order on this expanse of materials, we have looked at the various torts in terms of the interests they may be said primarily to protect, dealing in turn with interests in the person and personal property (Part II), interests in land (Part III) and interests in reputation and privacy (Part IV). We preface our discussion of the torts selected under each heading with a few words on the extent to which negligence provides protection in each area, and on the continuing importance of the other torts in furnishing additional relief. One major interest has been largely omitted: that in financial well-being. As financial well-being is largely dependent on one's ability to exploit one's labour, goods and land, it is protected by those torts that provide relief in respect of physical interference with the person and personal property (Part II) and with land (Part III). Other torts provide relief even where there has been no physical interference with these interests, as where *I pass off* my goods as yours so that I can sell at a better price or where *I conspire* with militant workers to picket your factory and cause you to cease trading by *intimidating* you with threats of personal violence. The torts of passing off, conspiracy, intimidation and the like are omitted for the reason given above, namely that they are best left to be considered in depth in other, more specialised works. Liability in respect of pure economic loss sustained as

a result of another's negligence is, however, dealt with in the chapters on negligence (see Chapter 5).

1.4 Torts and human rights

A new stage of the development of the law of tort began on 2 October 2000. This was the date on which the Human Rights Act 1998 came into effect. Bringing about change in the law of tort was perhaps not the foremost concern in the mind of the legislator, though there was a lot of discussion – both in and out of Parliament – as to whether the Act would enable the courts to fashion a remedy in tort for invasions of privacy. Nevertheless, there has been considerable discussion as to the Act's effect on tort law.

For our purposes, the central provision of the Act is to be found in section 6(1), which states: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' The Act defines 'Convention rights' by reference to specific provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and certain protocols added to it (s 1). Amongst the most important of these are the right to life (Art 2), the right not to be subjected to inhuman or degrading punishment (Art 3), the right to liberty and security (Art 5), the right to respect for private and family life (Art 8), the right to freedom of expression (Art 10), and the right to the protection of property (Art 1 of the First Protocol). Certain parts of the Convention do not feature in the Act's definition of 'Convention rights' because the Act already contains equivalent provisions.

The effect of the Act on the law of tort is two-fold. First, in what may be termed the Act's 'vertical' effect, it allows any person who is the victim of a public authority's breach of its section 6 duty to bring proceedings against the authority under the Act (s 7) and, at the court's discretion, to recover damages if this is necessary by way of 'just satisfaction' (s 8). It is also possible for victims of a public authority's unlawful act under section 6 to rely upon their Convention rights in other legal proceedings, for example, those brought against them by the authority (ss 7(1)(b) and (6)). The nature and scope of the new cause of action against public authorities is considered further in Sections 7.3–7.4.

Second, in what may be termed the Act's 'horizontal' effect, it appears that one may rely upon one's Convention rights even in litigation against another private person. This is because the courts are included within the Act's definition of 'public authority' (s 6(3)) and so must comply with the duty imposed on all public authorities by section 6(1). The result is that the courts must ensure that *all* their decisions are human-rights compatible, whoever the litigants are, and not just when public authorities are involved. Consequently, it seems that the courts will be required to develop the common law where it does not currently give full weight to Convention rights. This obligation may be regarded as the counterpart of the courts' *express* obligation under the Act to read and give effect to *legislation* in a way which is compatible with Convention rights (s 3(1)). But the obligation to develop *the common law* is not express: everything depends upon how the courts' section 6 obligation is interpreted. Already, a range of different opinions has been advanced, with some arguing for 'full horizontality', whereby the violation of Convention rights would automatically be actionable even if perpetrated by a private person (see eg Wade, 2000), and others that the court's duty is only to see that its *procedures* are Convention compliant, and not to develop the substantive law at all (see eg Buxton, 2000). Most likely, the courts will adopt an intermediary position – 'limited

horizontality' – which will require them to develop the substantive common law except insofar as this would undermine 'the measure of certainty which is necessary to all law' (*Douglas v Hello! Ltd* [2001] QB 967, 1002 per Sedley LJ). The correctness of this approach seems subsequently to have been accepted by Baroness Hale in *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 at [132–133], where she observed:

> The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights... But the courts will not invent a new cause of action to cover types of activity which were not previously covered.

The extent to which the court's duty incorporates a positive obligation to make incremental extensions to existing causes of action so as to protect Convention rights, as well as a negative obligation to prevent their infringement through recognition of new or expanded defences, remains somewhat uncertain notwithstanding the passage of some 10 years since the Act's implementation.

Summary

1.1 A tort is a civil, as opposed to criminal, wrong. The category of civil wrongs contains breaches of contract and equitable wrongs as well as torts.

1.2 Different torts deal with different types of wrongful conduct and developed, often haphazardly, over the course of time. This makes it difficult, if not impossible, to identify general principles about the law of tort.

1.3 In this book, we look at (a) the tort of negligence, the most important tort in both theory and practice; (b) a selection of other torts arranged according to the interest they primarily protect; and (c) such general principles as do exist.

1.4 The passage of the Human Rights Act 1998 has had a significant (but, in some respects, still indeterminate) impact on the law of tort. Its 'vertical effect' is to enable victims of a public authority's violation of their 'Convention rights' to bring a new statutory action against the authority. Its 'horizontal effect' is to require the courts to act compatibly with Convention rights in developing the law, whether in cases involving public authorities or not.

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