

TORT LAW SUMMARY



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TABLE OF CONTENTS

INTRODUCTION	5
DEFENCES	6
<i>Consent (Or Volenti Non Fit Injuria)</i>	6
<i>Illegality (or Ex Trupi Causa)</i>	7
<i>Contributory Negligence</i>	8
NEGLIGENCE	11
<i>Duty of Care</i>	11
<i>Breach of Duty</i>	14
<i>Causation</i>	18
LIABILITY FOR PSYCHIATRIC ILLNESS	24
LIABILITY FOR ECONOMIC LOSS	30
VICARIOUS LIABILITY	36
<i>Employees</i>	36
<i>In the Course of Employment</i>	37
NUISANCE	40
<i>What Is a Nuisance?</i>	40
<i>Who Can Sue in Nuisance?</i>	42
<i>Who Can Be Sued in Nuisance?</i>	43
 <i>Defences to Nuisance Actions</i>	44
THE RULE IN RYLANDS v. FLETCHER	45
<i>The Scope of the Rule</i>	45
<i>Defences to Ryland's Actions</i>	48

OCCUPIERS' LIABILITY	50
<i>The 1957 Act</i>	50
<i>The 1984 Act</i>	51
<i>Children</i>	53
<i>Who are Occupiers?</i>	56
DEFAMATION	58
<i>What Constitutes Defamation?</i>	59
<i>The Mean of the Words</i>	61
<i>The Words Must Apply to the Claimant</i>	64
<i>Publication</i>	66
DEFENCES TO DEFAMATION	69
<i>Innocent Publication</i>	69
<i>Consent</i>	69
<i>Absolute Privilege</i>	69
<i>Qualified Privilege</i>	70
<i>Justification</i>	76
<i>Fair Comment</i>	80
SOURCES CONSULTED	81

INTRODUCTION

A tort is a civil wrong. Actions are brought in the law of tort where the law of contract does not apply or where issues are raised which are separate from the terms of a contract. Tort can involve personal injury, psychiatric harm, economic loss (negligence), ruining reputations (defamation) or the interference with the enjoyment of land (nuisance).

The law seeks to put the claimant in the position he would have been in had the tort not occurred. Therefore claimants are usually entitled to full compensation where they can prove a tort has taken place. Defendants (often employers and company owners) are usually insured and better able to bear the burden of having to pay compensation. Thus, in some areas, the law is relaxed and more in favour of the claimant where the defendant would usually be able to bear the burden of a potentially expensive claim.

DEFENCES

There are a number of defences which are available to defendants in tort claims. Some will exonerate them completely if successfully argued, whereas contributory negligence will relieve them of a share of the blame. This is not, therefore, a total defence.

Consent (Or *Volenti Non Fit Injuria*)

The defence of *volenti* is available to a defendant if he wishes to show that the claimant was to blame. Even though the defendant was negligent, if the claimant caused the damage himself through negligence, the claimant could lose. In *O'Reilly v. National Rail and Tramway Appliances*¹ the claimant was found to have consented to injury sustained when he hit an ammunition shell with a sledgehammer. In *Morris v. Murray*² consent was found where the claimant and defendant became drunk together and the defendant accepted the claimant's offer to take a ride in his plane. He had impliedly consented to

¹ [1966] 1 All E.R. 499.

² [1991] 2 Q.B. 6.

the risk of injury where he knew the defendant was intoxicated and the Court of Appeal found that he was capable of appreciating and understanding the risks.

In *Nettleship v. Weston*³ a driving instructor was injured by the negligence of his pupil. The pupil was found to have been negligent, but damages were reduced by fifty per cent because they had both been as negligent as each other. On the issue of consent, Lord Denning M.R. said:

“Knowledge of the risk of injury is not enough Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or, more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.”

Salmon L.J. dissented, saying that the duty of care arose from the relationship. Where the passenger knows there is a danger in getting into a car with a particular driver, he could not expect the driver to drive other than dangerously.

In *McGinlay v. British Railways Board*⁴ A person was injured and another killed by a train. They had crossed the track after getting through a broken fence. The defendants knew the fence was broken and that people often crossed the track. The House of Lords held that the defendants had discharged their duty because the fence itself was a sufficient warning to passers by. Alternatively, there could be no breach of duty because the appellant would have crossed the track even if the fence had been in good repair. Alternatively, they found that they had consented to the injury. Lord Fraser said that the existence and extent of a duty to fence depends on the circumstances, including the age intelligence of the entrant. The duty will be higher for younger people. The appellant admitted that she was fully aware that the line existed, that there was danger in walking across it and that she ordinarily looked out for trains.

³ [1971] 2 Q.B. 691, 701.

⁴ [1983] 1 W.L.R. 1427.

Illegality (Or *Ex Turpi Causa*)

The law will not allow claimants to profit from their own crime. Where it can be shown that the claimant was engaged in a criminal act or some other misfeasance and it would be unfair to compensate them, they will gain nothing.

In *Thackwell v. Barclays Bank plc.*⁵ Hutchison J. found that where the claimant was involved in a fraud, he could not succeed. It was a matter of public policy. He saw the situation as similar to a burglar who leaves a house after stealing goods. The burglar cannot claim against a thief who then steals the goods from him. A 'conscience test' has been suggested as the basis of a claim. This involves the courts deciding whether, in all the circumstances, the courts should take notice of the illegality (a distinction between crimes that are so serious that the claimant should not be able to claim, and crimes that can be overlooked), and whether to allow the claim would be an affront to the public conscience. The House of Lords rejected that test in *Tinsley v. Milligan.*⁶

In *Pitts v. Hunt*⁷ the claimant was found to have aided and abetted the defendant driver who was unfit to drive through drink, because he encouraged the defendant's behaviour. The Court of Appeal found that the claimant could not recover as his claim was dependant on a joint unlawful act. Dillon J. said the public conscience test would be difficult to apply. He said, "appeal to the public conscience would be likely to lead to a graph of illegalities according to a moral turpitude". It would be too difficult to separate serious crimes from non-serious crimes. He preferred the distinction espoused by Bingham L.J. in *Saunders v. Edwards*⁸ between cases where the claimant's action in truth arises directly *ex turpi causa* and cases where the plaintiff has suffered a genuine wrong to which allegedly unlawful conduct is incidental. In *Reville v. Newbery*⁹ a man attempted to break into the defendant's shed and he was shot. The defence did not apply here.

⁵ [1986] 1 All E.R. 676.

⁶ [1993] 3 All E.R. 65.

⁷ [1991] 1 Q.B. 24.

⁸ [1987] 1 W.L.R. 1116.

⁹ [1996] 1 All E.R. 291.

Contributory Negligence

Contributory is not a defence because the defendant will still be liable and he will have to pay court costs (which can exceed the cost of damages). It gives courts the opportunity to calculate damages in a way which acknowledges the claimant's fault in addition to the fault of the defendant. If the defendant was found to have acted negligently and the claimant suffered as a result, the claimant will usually be entitled to full compensation. However, if he has contributed to the harm himself (possibly through carelessness or negligence in not taking precautions) he will suffer a reduction in damages to reflect his contribution. Section 1 of the Law Reform (Contributory Negligence) Act 1945 says the damages recoverable in respect of contributory negligence, "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Section 4 states that "damage" includes loss of life and personal injury and "fault" "means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would apart from this Act, give rise to the defence of contributory negligence."



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