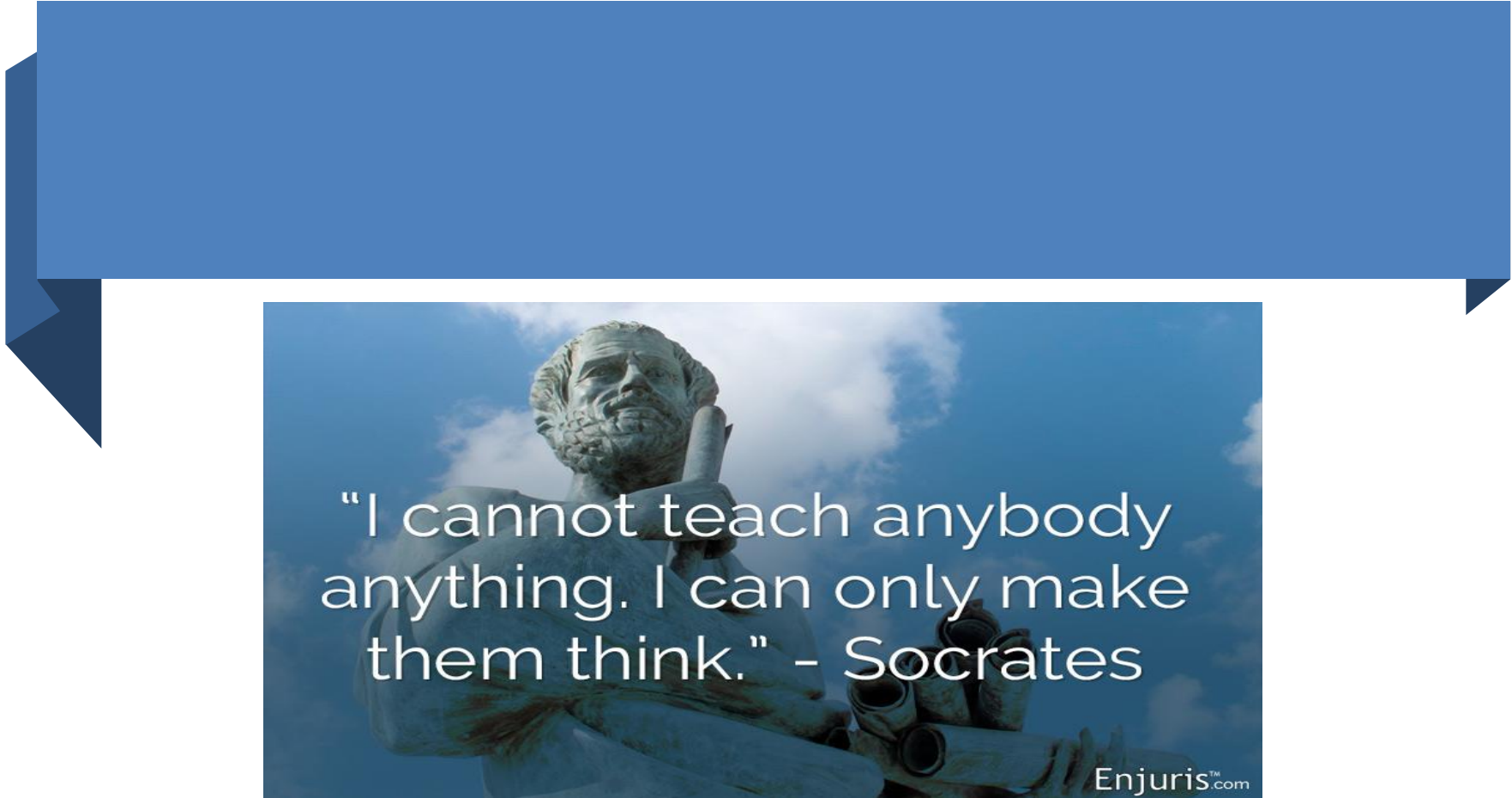


# **Principles of Tort and Contract Law I**

## **Substantive Aspects and Main Elements**

Principles of Common Law

18 October 2022



“I cannot teach anybody anything. I can only make them think.” - Socrates

Enjuris<sup>™</sup>.com

<https://www.youtube.com/watch?v=qx22TyCge7w>

**Lecture 5: Part 1**

**History of Tort Law**

**Intentional Torts**

**Negligence**

**Readings for Lecture 2 on Torts**

**Mandatory: Geldart Chap 7**

**Emergence of Fault: Case of Thorns**

## Hernandez Case

- Intent to commit murder
- Victims' rights
- Judicial opinion balances these interests
- Principle of abatement *ab initio* as recognised by case law *Stare Decisis*
- Mass lower court recognises abatement principle as grounds to extinguish Hernandez's conviction which was on appeal

*> Mass Supreme Court held that the common law doctrine of Abatement ab initio is outdated. Instead, «when a defendant dies Irrespective of cause, while a direct appeal challenging conviction is pending the proper course is to dismiss the appeal as moot and Note in the record that the conviction removed the presumption of innocence, but that the conviction was appealed and neither affirmed or reversed because the defendant died'»*



[https://www.masslive.com/news/index.ssf/2015/01/aaron\\_hernandez\\_murder\\_trial\\_w.html](https://www.masslive.com/news/index.ssf/2015/01/aaron_hernandez_murder_trial_w.html)

## History of tort law

- Right of victims to receive redress regarded as a right of an Englishman.
- Blackstone's *Commentaries* published in 1760s-70s contained a volume on "private wrongs" as 'torts'.
- US law influenced by English law and Blackstone's treatise, with several state constitutions specifically providing for redress for torts and US constitution 7<sup>th</sup> amendment provided for jury trial for civil actions

## **Tort: the law of non-criminal wrongs**

- Tort law = a branch of civil law whose aim is to prevent harm or provide remedies for damage to a victim
- A way of protecting people's interests through looking at how people should (or should not) behave in relation to others
- Notion of individual responsibility
- Protected interests:
  - Bodily health
  - Bodily freedom and autonomy
  - Interests in property
  - Reputation / privacy

## Contrast with Criminal Law

- Concerns conduct which is undesirable by the State
- A general rule: criminal liability does not attach to a person who merely acts with the absence of mental fault.
- Exception: strict liability crimes.
  - ❑ Prove only actus reus
  - ❑ *mens rea* refers to the mental element of the offence that accompanies the *actus reus*. In some jurisdictions, the terms *mens rea* and *actus reus* have been replaced by alternative terminology.

## Main torts

- **Negligence** – standard of care, duty to maintain standard of care, breach of duty that causes foreseeable damages to plaintiff
- **Intentional harm to plaintiff** – assault, battery, false imprisonment and deceit to obtain property under false pretence
- Physical intrusion or meddling with **property** owned by someone else – ie. conversion of personal property (not covered)
- **Unintentional harm** - voluntary act resulting in damage to property or person.



## Modern tort law

Tort law developed differently by courts of common law jurisdictions. US case law developed in 19<sup>th</sup> century doctrine of **strict liability** for products

- Limitations of various immunities (e.g. sovereign immunity, charitable immunity comparative negligence, more relaxed rules for admission of evidence in tort cases
- Increased damages for emotional distress, punitive damages, and class action lawsuits, ie., securities fraud.
- But tort reform in many US states limiting damage awards and shorter statute of limitations in medical malpractice. But limitations on tort actions ruled as infringement on constitutional right to access courts for wrongs.
- Modern tort actions heavily affected by insurance companies settling most claims to avoid litigation and trial. Insurance only covers the policy's limits, imposing a limit on possible payment.

## Intentional Torts

- Requirements:
  - Overt act
  - Intention to commit said act = voluntary
  - Causation
- Transferred intention doctrine
- Intention also includes subjective recklessness about whether or not harm to someone will occur = the defendant foresees a consequence of his action but goes ahead with the action anyway

## Intentional Torts – Trespass to the Person

- Assault
- Battery
- False imprisonment
- Civil half (compensation of the victim), not criminal (punishment of the wrongdoer)
- Intentional acts that are reasonable foreseeable to cause harm to an individual, and that do cause the harm
- Actionable per se = no need of proof of damage (but could only mean nominal damages)

## Assault

- Behaviour in such a way that causes another person to apprehend the infliction of immediate, unlawful force on his person.
- Intentional recklessness as to the claimant apprehending the application of unlawful force
- Claimant must **reasonably** (objectively apprehend the threat of immediate unlawful force (no assault if the defendant's words contradict his aggressive gestures)
- The threat must be of application of immediate or direct force. If the defendant physically cannot touch the claimant, then no assault.

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## Examples

- A points gun at B but does not shoot = assault, even if the gun was not loaded and B did not know that
- A points the gun and then shoots B = assault and battery
- A points and shoots but misses B = assault, no battery
- A says “I am going to shoot you” but B does not know/cannot see the gun = no assault, no battery
- A shoots B while B sleeps = only battery, no assault

## False imprisonment

- Unlawful imposition of constraint on another's freedom of movement from a particular place
- Full deprivation of the claimant's freedom of movement = does not apply if there is another (even if longer) way to get somewhere or if there is an obvious reasonable escape. Not inconvenience.
- Intention or recklessness as to restrict the claimant's movements, not necessarily unlawfully = defendant's belief of lawfulness irrelevant
- Restriction done without lawful authorisation = if the police stops you from going somewhere because it might be dangerous, it is lawful

## Defences

- Consent (tattooing, medical operations)
- Necessity (grabbing someone to stop them from stepping in front of a car)
- Self-defense
  - Honest and reasonable belief that the claimant was about to be attacked



## Defamation and Privacy

- UK Defamation Act 2013
- Defamatory statements are lies intended to harm someone's reputation. They must be published, not whispered to one friend.
- A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- Defence of truth: publication of truth is not defamatory.
- No defence of justification, but defence of honest opinion /criticism
- No statute on privacy, but Art. 8 ECHR (protection of privacy and family life). Mainly against journalists or government.
- Right to privacy comes from case law, but case-by-case approach.

## Occupiers' Liability

- Duty of care owed by those who occupy real property
  - to visitors: Occupiers' Liability Act 1957
  - to trespassers: Occupiers' Liability Act 1984
- Occupier is owner, tenant or licensee
- A visitor is someone with permission to come onto the property
- A trespasser is not a visitor, goes onto the land without invitation and whose presence can be unknown to the occupier
- Main point: duty to warn of reasonable dangers
- Standard of care similar to common law negligence

## Product Liability

- US: Restatement (Third) of Torts: Products Liability
- UK: certain sections of the Consumer Protection Act 1987
- EU: Product Liability Directive 1985
- Largely linked to consumer protection and strict liability
- Area of defective products moving out of the common law and into codified law in statute, regulations or EU law
- Requirement: injury must have happened during reasonable use of the product, otherwise it is the consumer's own fault.
- Dangerous products must be labelled with appropriate warnings.

## Intentional Trespass to Property

- Any intentional physical interference with the property rights of another (the plaintiff)
- Trespass to land: walking on another's property, violating land rights
  - Not physical (noise, smells) → nuisance
- Trespass to chattels: breaking someone's moveable property
- Conversion: dealing with another's property inconsistently with their rights, civil theft (the civil side of criminal theft)

### Case of Thorns (1466)

- “Defendant was trimming thorns on his property and some landed on Plaintiff's property. When attempting to retrieve the thorns, Defendant damaged some of Plaintiff's crops. Plaintiff then sued Defendant for trespass and for damages related to his destroyed crops. Defendant tried to defend the claim with the argument that because he was justified in trespassing to retrieve the thorns (i.e. acting lawfully), Plaintiff should have no cause of action.”

## Negligence

Seminal case: *Donoghue v Stevenson* (1932)

In August 1928, Mrs Donoghue went to a pub with a friend who purchased a bottle of ginger beer for her. Mrs Donoghue drank some of the beer before discovering the remains of a decomposing snail at the bottom of the bottle. She then suffered from shock and digestive problems (physical effect) as a result.

Stevenson was the defendant producer of the ginger. The problem was that Mrs Donoghue could not sue him under contract law or any equivalent provisions of consumer protection law as she had not purchased the beer herself, but rather her friend. As such, there was no contractual relationship between Donoghue and Stevenson.

- Case introduces the notion of **duty of care** and **negligence** into English Law
- Pre- Donoghue: liability for traffic accidents and dangerous goods
- Donoghue could not sue in contract law

## Negligence

- **Idea:** members of society have a responsibility for the consequences of their actions and omissions on the wellbeing of others.
- Lord Atkin, House of Lords: “*The rule that you are **to love your neighbour** becomes in law, [so] you must not injure your neighbour.*”
- Who is my neighbour? – Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I [act or omit to act].”
- One’s neighbours are those who could, to a reasonably foreseeable extent, be affected by one’s acts and omissions.
- As such, neighbours are owed a duty of care.

## Negligence

Steps for establishing a claim in Negligence:

- 1) Defendant (alleged tort-feasor) owed Plaintiff a **duty of care** through a special relationship (e.g. property owner who welcomes guest onto property, or doctor-patient relationship) or some other type of relationship.
- 2) There has been a **breach** or violation of that duty
- 3) Plaintiff suffered damage as a result of the breach or violation
- 4) Defendant or alleged tort-feasor directly **caused** the injury
  - **'But for' test** – but for the defendant's actions, the plaintiff would not have suffered an injury.
  - Factual causation (pre-condition) and legal causation (liability)
- 5) **Remoteness** test – the damage was not too remote from its cause. The breach or violation must be a foreseeable cause of the damage or injury

## Negligence

Development of the Law: *Caparo Industries v Dickman* (1990)

The law has expanded on the “neighbour principle” from Donoghue with further conditions for the duty of care:

- 1) The damage must have been reasonably foreseeable as the result of the defendant’s action
- 2) The parties must be in sufficient legal proximity, and
- 3) It must be fair, just and reasonable to impose liability



## Duty of care

- Obvious relationship of trust between claimant and defendant: parent to child, doctor to patient (cf. medical negligence), lawyer to client, teacher to student etc.
- Situations where the claimant had no choice: public office cutting down the bushes near the street
- Every day life situations: you have to be careful not to hurt someone when opening a door into a corridor
- NB. The **existence** of a duty of care is a separate question of whether there was a **breach** of that duty vs. whether the duty has been appropriately discharged
- No breach if **standard** of care has been met
- Eg: cases of police duty of care, discharged if reasonable behaviour

## Foreseeability

- Objective test
- Would a reasonable person in the defendant's position have foreseen that the claimant might be injured or harmed?
- If a reasonable person would not have foreseen the possible injury or harm, then there is no duty of care owed.
- Real cases:
  - Foreseeable that children would break into D's closed cinema and start a fire that damaged other buildings? No.
  - Foreseeable that a horse left alone in the street could get scared and run off, hurting people? Yes.

## Damage

- Physical: *Donoghue v Stevenson*
- Property: damaging someone's car
- Psychiatric
  - Primary victims: active participants, direct contact
  - Secondary victims: watching it on tv (*Alcock case*),
    - question of proximity: case usually fails
- Pure economic loss: for example as a result of negligent misstatement, or factory deprived of electricity did not produce

## Alcock case

- Claimant who is a "secondary victim" must perceive a "shocking event" with his own unaided senses, as an eye-witness to the event, or hearing the event in person, or viewing its "immediate aftermath".
- requires close physical proximity to the event (excluding TV viewers)
- The shock must be a "**sudden**" and not a "gradual" assault on the claimant's nervous system.
- If the nervous shock is caused by witnessing the death or injury of another person the claimant must show a "**sufficiently proximate**" relationship to that person, usually described as a "close tie of love and affection".
- It must be **reasonably foreseeable** that a person of "normal fortitude" in the claimant's position would suffer psychiatric damage. The closer the tie between the claimant and the victim, the more likely it is that he would succeed in this element. However, the defendant must "take his victim as he finds him" and pay for all the consequences of nervous shock (see ["Eggshell skull" rule](#)).

## Damage: Egg Shell Skull rule

- Very illustrative of English Law and pragmatism
- Foreseeability of damage: the type of damage must be foreseeable, not the extent.
- Once the type of damage is foreseeable, the defendant is liable for the full extent of the harm they caused, including any pre-existing medical conditions or weaknesses.
- The defendant must take their victim as they find them.

## Redress

- Compensatory damages = compensation of the victim
- Specific performance (awarded at the discretion of the court)
- Injunction (more for intentional torts)
- Punitive damages available in US = vindication
- Threat of punishment to regulate society = deterrence

## Defences

- *Volenti non fit injuria* - "to a willing person, injury is not done"
- *Ex turpi causa non oritur actio* – "from a dishonorable cause an action does not arise"
- *Novus actus interveniens*: action by third party/external factor broke the chain of causation and the defendant's liability.
- Contributory (UK) or comparative (US) negligence of the victim
- **Proof**: always on the balances of probabilities (as opposed to beyond any reasonable doubt in Criminal Law)

## Public policy considerations

- Opening of floodgates argument
- Very careful with the police: difficult to establish duty of care, even harder to establish breach.
  - Duty of care of the police is general to society
  - Not to stop one crime on one specific person
  - Unless that person was in clear danger (Osman v UK)

[1998] ECHR 101. The ruling of the European Court of Human Rights was that such blanket immunity would be a breach of article 6 of the [European Convention of Human Rights](#), but that there was no breach of articles 2 and 8

- “Fair, just and reasonable” useful test for judges



## Sample Problem Question English Tort Law (1h)

–A motorcycle driver (A) gets drunk in barman (B)'s pub, then drives off breaking the speed limit, and knocks down an old lady (C) who was trying to cross the street. The old lady had been unable to see if there was any oncoming traffic from the safety of the pavement as the local council (D) had failed to cut back the bushes on that particular stretch of the road. The accident is witnessed by a young woman (E) who is five months pregnant. As a result of the psychiatric shock from seeing the blood, the young woman suffers a miscarriage and is rushed to hospital. The overworked, underpaid doctor (F) on-call at the underfunded state hospital (G) mistakes her for a different patient of his (J) who required an amputation of the left leg. J dies from sepsis as a result of his gangrene-infested leg not being treated in time. Meanwhile, the young woman (E) not only has an amputated leg preventing her from continuing her job as a professional athlete, but is now unable to ever have children in the future due to the irreparable damage to her womb from the untreated miscarriage.

–Discuss all possible claims and liabilities in Tort Law.