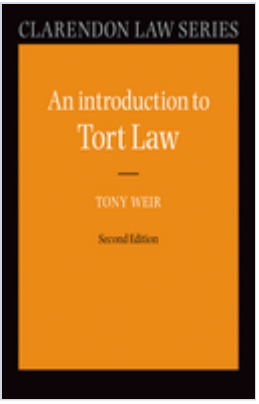

An Introduction to Tort Law (2nd edn)
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1. Introduction

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This introductory chapter provides an overview of tort law. It discusses the development of the law of tort in England; how the increase in tort liability is matched by a decline in the potency of contract; the differences between statutes and judge-made law; when conduct is tortious; the forum for a claim in tort; the three focal points of torts: conduct, harm, and causation; where torts happen; and the need to restrict the number of persons who can complain of any particular conduct.

Keywords: tort law, contract, English law, liability, statutes, judge-made law, conduct, harm, causation, claimants

Suppose a motorist knocks you off your bicycle; can you sue him for ‘damages’ (monetary compensation)? If a policeman stops you in the street for no good reason, is this a wrong you can sue him for? Your neighbours keep making an intolerable noise; can you get a court to stop them (injunction)? To find the answer you look in a book on tort law. If the courts would accept your claim, we say that the defendants are ‘tort-feasors’ and ‘liable’ to you. So the law of tort is about when ‘liability’ exists (leaving aside any other ground of liability, such as breach of contract), and ‘a tort’ is conduct which renders the defendant liable unless he has some defence.

All systems of law from the earliest times onwards seem to have afforded a person injured by someone else a claim to some reparation, subject to whatever conditions seemed appropriate in that society. At any rate all modern legal systems have a chapter on tort: in Scotland and Germany it is called ‘delict’, from the Latin,

while the French, from whom we get our word, call it 'responsabilité civile', that is civil (not criminal) liability, or, more suggestively, civic responsibility. Tort is one part of the law of obligations, which tells us when others are liable to us, usually to pay us money. The other parts are contract and unjust enrichment ('restitution'). Underlying each of them is an idea about how people in society should behave towards each other, but the actual legal rules cannot simply be inferred from the idea, as the natural lawyers thought: the legal scope of each is limited. This is right. The understandable urge to bring legal standards up to those of delicate morality should be resisted, or there would be no room for generosity or for people to go beyond the call of legal duty. For example, one issue on which strong views are held is this: is there, or should there be, a legal duty to try to help a stranger in mortal danger when one could do so without risk to oneself? In our legal system, unlike many others, the answer is 'No': you may ignore an infant drowning in a pond unless it is your infant or your pond or you are the lifeguard. The point was quite well put by Lord Atkin in 1932: '... liability is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ....'[1]

Lord Atkin was speaking of the tort of negligence, but his point can be expanded. Thus while contract is based on the notion that you should do what you said you would, you can only be *sued* for not doing what you said you would if you asked for something in return (consideration), though you may be *estopped* (prevented) from exercising your rights if you said you wouldn't, even if you asked for nothing in return. Restitution is based on the idea that you shouldn't take unfair advantage, as by keeping what you weren't supposed to have, for example, what has been given to you by mistake, but here again there is a limiting requirement: there must be an 'unjust' factor in the situation. Likewise in tort: although the underlying notion is that you shouldn't harm other people, you don't always have to pay for the harm you do: in many cases you only have to pay if you were at fault—at least careless—in causing it. Other systems, too, sometimes require fault and sometimes do not. In France, for example, the basic article in the *Code Civil* of 1804 (art 1382) makes you liable for any harm you are at fault in causing, but then comes another article (art 1384(1)) which makes you liable, even if you are not at fault, for harm done by any thing under your control, a provision whose importance can be seen when one realises that injury to the human body is generally due to the impact of a thing, especially a hard and fast thing such as a car or truck. Even this strict liability was thought to provide inadequate protection for the victim of highway accidents, and France has now introduced a much stricter system. Germany is different. It has no general principle of liability without fault for damage done by things, but it does allow victims of highway accidents to recover damages without proving fault. Britain is very unusual in holding that victims of traffic accidents get no damages at all unless they can find someone to blame, someone at fault; victims of industrial accidents, however, can quite often obtain damages without proving that their employer or the person in control of their workplace was in any way to blame. These two classes of accidents form the bulk of tort litigation, though courts are increasingly having to deal with accidents in hospitals, schools, and on holiday.

Development

This is no place for a detailed history of the law of tort in England, but the general trend must be noted. The development has been almost uniformly in favour of claimants, doubtless because a society is thought to be progressive to the extent that it increasingly meets its citizens' complaints, that is, gives judgment for the claimant, in tort, at any rate. This is clear if we consider what has happened in the last hundred years. Until 1934 you couldn't sue if the tortfeasor died (and this was regrettable since quite often the driver who injured you killed himself in the process); till 1945 you couldn't sue the tortfeasor if you were at all to blame for your injury (and this was regrettable since most accidents can be avoided if the victim takes greater care); till 1947 you couldn't sue central (as opposed to local) government (this was not too regrettable since most harmful activities are delegated by central to local government); till 1948 you couldn't sue your employer if a fellow-employee injured you, as was often the case; till 1957 it was hard for a guest to sue the host on whose premises he was injured; till 1960 you couldn't sue the highway authority unless it had actually made the road worse than it was; till 1962 you couldn't sue your spouse even if he injured you by bad driving; till 1964 you couldn't sue the Chief Constable for the torts of lesser constables; till 1971 you couldn't sue a farmer who carelessly let his beasts escape on to the highway and cause an accident; till 1972 you couldn't sue the landlord for culpable failure to repair the premises on which you were injured; till 1977 your claim might be barred because the defendant had exempted himself from liability; till 1997 you couldn't claim for harassment, unless you were threatened with immediate violence. And now we have the Human Rights Act 1998 which allows you to sue public authorities for invading the manifold rights it contains, or even failing to protect them from invasion by others.

Thus ever since 1846, when for the first time widows and orphans were allowed to sue the person who tortiously killed their husband and father, the trend has been almost entirely in the direction of increased liability. These changes were all brought about by statute; the legislature intervened because the judges refused to modify a rule which their predecessors had laid down, even though it had become unacceptable. Sometimes, however, the courts themselves have imposed liability where none had existed before. In 1789 they held that a liar was answerable for the harm caused by his deceit although he obtained nothing by his false pretences. In 1862 they held it tortious knowingly to persuade a person to break his contract with the plaintiff. In 1866 they held the occupier of premises liable for failing to make them reasonably safe for people who came there on business. In 1891 they allowed injured workmen to sue for breaches of safety legislation. In 1897 they held it tortious to play a nasty practical joke which made the victim ill. In recent years the courts have increasingly held defendants liable for failing to protect people against third parties, or even themselves; this really started in 1940 when an occupier was held liable to his next door neighbour for not defusing a danger created on his property by a trespasser, and it has since been expanded to many other cases where the defendant could and arguably should have prevented the occurrence of the harm, though he had done nothing to contribute to the danger.

Both the legislature and the courts have been very loth to restrict liability. Very rarely has an existing liability been abolished. In 1970 a husband lost his right to sue a third party for harbouring, enticing away, or committing adultery with his wife or (perhaps prematurely) seducing his children—but then all law goes peculiar when a family is involved. In 1982 an Act abolished the claim for the mere fact that one's life had been shortened, though one can still claim damages for feeling bad about it. For their part, the courts decided in

1991 that they had gone too far thirteen years earlier when they had imposed liability on a local authority for failing to save the buyer of a jerry-built house from his unfortunate purchase,[2] and in 1964 they made the mistake, while expanding liability for intentionally causing economic harm, of restricting the use of damages in order to punish the defendant rather than compensate the claim-ant.[3] Nevertheless the trend has pretty uniformly been in the direction of expanding rather than restricting liability in tort.

Without question, however, the two major steps taken by the courts to increase the range of liability were taken in 1932 and 1963, in the cases of *Donoghue v Stevenson* (snail in ginger beer)[4] and *Hedley Byrne & Co v Heller and Partners* (misleading banker's reference).[5] The former decision generalized the conditions of liability for unreasonably dangerous conduct and the latter, somewhat less generally, extended this to conduct which was not dangerous at all (in the sense of being likely to damage person or property), but only damaging to the claimant's pocket. They call for extended discussion later.

Tort and Contract

The increase in tort liability is matched by a decline in the potency of contract. In the nineteenth century it was axiomatic that individuals should be free to organise their lives within the limits of the practicable and acceptable, and this they did by doing deals with each other in the hope of mutual gain. Such contracts were to be upheld, almost as 'sacrosanct'. In 1875 it was famously said that 'if there is one thing more than another which public policy requires, it is that... contracts, when entered into freely and voluntarily, shall be held sacred...'.[6] Bargains, even bad bargains, were bargains. 'Vous l'avez voulu, Georges Dandin' as the man said. The courts were so reluctant to strike down agreements as being unreasonable, unfair, or 'contrary to public policy' that they allowed parties to exempt themselves from liability in tort, or at any rate liability in negligence: unless such 'exemption clauses' could be mis-construed—and the courts were quite good at misconstruing contracts, given their practice with statutes—they were upheld and the plaintiff lost his claim in tort. In 1977 the legislature intervened by enacting the Unfair Contract Terms Act, a statute rather wider than its title, which makes it impossible for any agreement or notice to insulate people from liability if they have caused personal injury or death by negligence.

This dramatises the triumph of tort law over contract. Nowadays 'the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied...',[7] and the almost subsidiary role of contract was emphasised by Lord Goff in a decision which held, effectively, that every negligent breach of contract is automatically a tort: he said that 'The law of tort is the general law, out of which the parties can, if they wish, contract',[8] but failed to add that the extent to which they can contract out of the law of tort is now very limited, though very occasionally the courts will refuse to impose liability for negligence where that would perturb the sensible arrangements of the parties. Individual human beings who deal with a business can now avoid not only exemption clauses but a much wider range of 'unfair' clauses; indeed, they can often change their mind about whole contracts already formed. Such ' consumer protection', largely emanating from Brussels, can be seen as mirroring the extensive protection offered by the law of tort to victims of personal injury, seeing that in both the dispute is almost always between an individual and a company, be it a supplier, an employer or an insurer.

Although a person's consent now plays a much reduced role in the law of tort, it is not yet entirely irrelevant. If you agree to go to the police station, you cannot sue for arrest, you cannot sue a surgeon for cutting you open if you have agreed to the operation, and if you go into the boxing ring you cannot sue your opponent for fairly and squarely hitting you. Consent is thus a defence to a claim in *trespass,* but where the defendant has been *negligent,* the general principle that one cannot claim for a harm to which one has consented is increasingly being disregarded. In one astonishing case a quite sane prisoner on remand strangled himself with his shirt in the police cell; although he very clearly intended to kill himself, the House of Lords held the police liable, for though they had kept him under almost constant surveillance they had been very slightly negligent in not closing a flap in the door of the cell.[9] Whether or not one regrets it, it is undeniable that the progressive socialisation of harm diminishes the responsibility, and thereby the autonomy, of the individual.

Statute and Judge-Made Law

It will be seen that the interplay between legislation and judicial decision has been very important in tort law, and since tort is commonly one of the first subjects to which law students are exposed, it may not be out of place to make some general observations about how the rules from these two sources differ.

Britons seem to find cases much easier to deal with than statutes, doubtless because in cases, referred to by the names of the parties, recognisable judges who are professionally trained to be persuasive tell a story in dramatic terms, whereas statutes deal in abstract categories and are drafted by anonymous civil servants in a cryptic, almost impenetrable manner. It is, however, *essential* to overcome one's understandable distaste for legislation, for almost all tort problems involve the application of some statute or other. These include, for example, all cases involving death, injury on another's premises, contributory fault on the part of the victim and multiple tortfeasors, as well as claims for damage done by animals, airplanes, or radiation. Statutes may not play a great part in civil liability for highway accidents, unless the highway authority itself is being sued, but in industrial injury cases statutes (or worse still, statutory instruments) are very important indeed. That is not to suggest that they are invariably well-conceived.

Statutes

Statutes are very diverse. Some impose liability quite openly. For example, the Animals Act 1971 provides that 'When a dog causes damage by killing or injuring livestock, any person who is a keeper of the dog is liable for the damage…'. Other statutes which do not speak openly of civil liability require or prohibit specified conduct, sometimes providing that there is a duty to do it, sometimes making it an offence to do it and laying down a penalty for contravention. Whether the infringement of such a statute generates a liability in tort is a very vexed question which will be attended to later. Yet other statutes, rather than imposing a duty, confer a power on a body to do something it would otherwise not be able to do. Most public bodies owe their powers, indeed their very existence, to statute, and it is an even more vexed question whether such a body (typically a local authority which has extensive powers as regards planning, education, social services, especially child-care, and highways) is liable for the harm resulting from failure to exercise its powers properly or at all.

Just as a visitor to an art gallery should not rush past a picture which the painter took years to perfect, or a reader scurry through a sonnet over which the poet laboured long and hard, one must read statutes with something approaching the meticulous care taken by the draftsman. For example, the Defective Premises Act of 1972 imposes liability (though it speaks in terms of 'duty') on 'A person taking on work for or in connection with the provision of a dwelling'. This does *not* mean 'a person taking on work in connection with a building', for by its terms, which cannot be extended by interpretation, it applies only where the work is in connection with the *provision* of a dwelling, and the building must be a *dwelling,* that is, a building for human beings to live in: the statute is simply inapplicable to kennels or office blocks, or to mere repairs to an existing home. One must therefore scrutinise the precise wording of the statute in order to see whether the facts of one's case fall within its purview: interpretation is not so much a matter of eliciting meaning as of ascertaining coverage.

It is not, however, the original wording of the statute which is critical, but rather what the courts have made of it in the process of application, so that it is essential to discover and read the cases in which the enactment has been construed. Until recently our judges did not ask what the legislator meant to say but what was meant by what he did say; as one judge pungently observed, 'the courts are not so much concerned with what the legislature aims at as with what it fairly and squarely hits'.[10] Since 1972, however, when that remark was made, our courts have been very much influenced by the methods of statutory interpretation prevalent on the Continent, where legislation is regarded as primary (and rational) and the courts interpret it in a manner less logical than teleological (purposive). Indeed, our judges are now instructed by the Human Rights Act 1998 to interpret statutes compatibly with the European Convention on Human Rights 'so far as it is possible to do so', a provision which shows that several different interpretations are possible, that their number is not unlimited and that a particular one is to be adopted.[11]

Judge-Made Law

As to *cases* the technique of eliciting the rule is quite different. Whereas in a statute every word is law, the precise words of judges are not law at all, but merely an indication of it. After all, one can hardly imagine a statute enacted in five different wordings, but it is quite normal in the House of Lords for there to be five concurring opinions, all very differently expressed, as happened, for example, in *Hedley Byrne & Co v Heller and Partners*.[12] In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides *(obiter dicta)*. The aim is to ascertain the rule (the *ratio decidendi)* that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand. As an example of distinction, we can take cases relating to the question of whether a local authority could be sued for the unreasonable exercise of its child-care powers. In 1995, the House of Lords held that that it would not be 'fair, just and reasonable' to impose liability in this delicate area where Parliament had conferred discretion on the authority. In that case the local authority knew that a child was being abused at home,[13] but failed to take any action. Four years later that decision was 'distinguished': in the later case the authority had actually taken the child into care, and it was held that there might be liability[14] (perhaps because the original decision had been discountenanced by the European Court of Human Rights in Strasbourg).

A decision can only be an authority if it can be cited to a court: an attempt was made in 2001 to deter counsel from overcitation[15] but it seems to be proving as little efficacious as the injunction to submit arguments in 'skeleton' form. Nor, if citable, are all decisions of equal authority.

Apart from the status of the court in question and perhaps the age of the decision, one must take note of the litigational context. If the decision was made on facts established at trial it is of considerable value, but it can be distinguished if a particular and critical argument was not addressed to the court. Quite often, however, the decision is rendered on facts which have been merely alleged, not established by proof. In some ways this makes it easier to ascertain the scope of the decision, since the precise allegations are taken as being true; indeed, many leading cases (including *Donoghue v Stevenson* itself) were decided in this way, prior to any trial. Often, however, such a case is remitted for trial on the basis that the claimant's case is 'arguable' and that therefore the pleadings should not be 'struck out' or summary judgment given. Since many argued cases are lost, 'arguable' clearly does not mean 'bound to succeed', so such a decision must be treated with caution. Thus in a case where a woman returning from shopping saw her house afire and allegedly suffered a disabling shock, the Court of Appeal held it arguable that the men who were installing a gas fire in her home would, if shown to be negligent, be liable to her for the shock.[16] This case is no authority for the wide proposition that one can recover for shock occasioned by seeing one's property damaged, but even if it were, it might be inapplicable to a case where you saw your dog run over by a careless motorist, for in the case of the burning house the parties were not total strangers but were in a special relationship, namely occupier and visitors, and this might well be treated as a distinguishing feature.

Courts are increasingly ready to disregard a precedent on the ground that, though the case in front of them is not really distinguishable from it on the facts, they have been persuaded by an argument not raised in the earlier case. This indicates the important role of counsel in English litigation. Not only are counsel commonly specialists in the area, addressing a judge who, prior to elevation, was perhaps a specialist in some quite different area, but the judges are to a great extent forced to deal with the case in terms of the arguments addressed to them, and those arguments may well be constrained by the original pleadings, drafted possibly by a young barrister still wet behind the ears or a solicitor with nothing between them. Even so a decision may be right although the reasons given, following those of counsel on the winning side, are not quite appropriate. It is always safer to follow what the courts do than what they say, for they may well bend the arguments addressed to them in order to justify the decision which, thanks to a kind of trained professional intuition operating on a sense of justice, they know to be right. Of course decisions are not always right: although those of the Court of Appeal are authoritative until reversed or overruled, it is worth considering that in the year 2004 the House of Lords disagreed with the Court of Appeal in 23 out of 45 cases.

Interaction

It follows from the fact that statutes cover only what falls within their precise terms and that all litigated cases are inevitably different to some degree that judge-made rules are always applied *by analogy* and that statutory rules never are. An example may indicate the difference. Suppose Farmer Giles hears barking in his field at night, and on going out sees a dog harassing his sheep. He takes his gun and shoots the dog, which belonged to Hamish. Now here Farmer Giles has deliberately destroyed a piece of Hamish's property, by direct invasion, that is, a trespass to goods. He is presumptively liable. Does he have a defence? Well, there used to be a judge-

made rule that one was entitled to protect one's cattle by killing a dog if it was really threatening them and there was no other way of deterring it, but in 1971 the Animals Act was passed, at the behest of the Law Commission. This enactment expressly replaces the common law in the area to which it applies, and lays down the circumstances in which a person has a defence in proceedings for 'killing or causing injury to a dog'. But what is the law if my neighbour's cat is threatening my canary and I heave a brick at it? The *statutory* defence cannot possibly be invoked, because a cat is not even arguably a dog and a canary is not 'livestock', helpfully defined by the Act as including 'asses, mules, hinnies [!] ... and poultry', 'poultry' being further defined as 'the domestic varieties of ... fowls, turkeys, geese, ducks, guinea-fowls, pigeons, peacocks and quails'. So what law does apply? Answer: the old common law about damaging other people's creatures which are threatening to damage your creatures. The oddity is that the cases in which that rule was laid down were cases of dogs threatening cattle, the very cases in which the common law rule, having been ousted by the legislation, no longer applies.

When is Conduct Tortious?

There is no *general* principle in English law to tell us when conduct is tortious (not 'tortuous') and when it is not. Contract law is different in this respect, for although transactions such as employment, sale, tenancy, insurance, and so on are quite different one from another and are in many respects subject to particular rules, often embodied in a statute, there is an underlying general principle: almost any promise or undertaking which is part of a deal generates an obligation to perform or pay. Tort is more like criminal law, for just as there are different crimes, such as burglary or blackmail or driving without due care and attention, so there are several different torts; and just as one cannot say that a person is a criminal without specifying what particular offence he committed, so a person is not a tortfeasor unless he has committed a specific tort, that is, unless all the requirements for liability in that particular tort are met, all its ingredients, so to speak, present. So to get to know the law of tort one must get to know the different requirements of the various torts, and there are quite a lot of them. Some torts have relatively familiar names, such as negligence, trespass, nuisance, harassment, conversion, defamation (= libel and slander), malicious prosecution, misfeasance in public office, breach of statutory duty, inducing breach of contract, and so on. Sometimes a tort is named after the parties to the case which established it, such as *Rylands v Fletcher*.

In the old days there used to be different forms for the different torts, 'forms of action' being best thought of as the sort of forms you get from a post office, as it might be a green one for negligence or a blue one for trespass. In order to bring the action you had to have the right form, the form appropriate to the facts you hoped to prove. Nowadays, however, we are less formal: the claimant merely alleges the facts which in his view give him a 'cause of action', that is, a ground for a successful suit. The judge then scrolls through all the torts in the book, and if the requirements of any of them are met by the facts proved, the claimant wins. Of course his counsel will cite authorities and these authorities will inevitably be located in one or other of the chapters of a tort book, perhaps the ' Negligence' chapter or the ' Nuisance' chapter, but that is the only sense in which the claimant can be said to be suing 'in negligence' or 'in nuisance'. Such phrases are commonly used, but it is just a sloppy shorthand.

The Forum

A claim in tort is normally brought in the county court, and claims for personal injury, for example, must go there unless the sum in issue is £50,000 or more, an exception being made for medical (clinical) negligence claims. Claims of up to £5,000 go to the small claims court, unless the damages claimed for pain and suffering exceed £1,000; claims of up to £15,000 take the fast track. There will be no jury, except in cases of false imprisonment, malicious prosecution or defamation, and even in defamation cases the judge may now, and quite often does, refuse to empanel a jury and give summary judgment himself. Public money is not generally available for parties to a tort suit, unless there is a plausible human rights issue, so the claimant may have to find a lawyer who will take the case on a conditional fee basis—that is, make no charge if the claim is lost (with insurance to pay the costs of the successful defendant), but up to double the normal fee if it succeeds, when the costs, including the insurance premium and the success fee, will be paid (up to a point) by the defendant who lost. This can be very costly for media defendants sued by dodgy claimants backed by chancy solicitors.[17]

In order to persuade parties to settle rather than bother the court with a full-scale trial, the rules as to costs are modified if either party offers to settle for a sum which is refused and proves at trial to have been adequate. Of such offers made by defendants about two in five are accepted. Indeed, in 2004 no less than 60% of claims instituted in the Queen's Bench were settled, struck out or withdrawn, leaving only 991 to be tried, of which 65% were personal injury cases.

Focal Points

Although the requirements of the various torts are different, the differences between them turn on just a few focal points. Since the basic complaint in a tort case is 'You hurt me', the three crucial focal points are, quite evidently, first, what the alleged tortfeasor did, secondly, what the claimant suffered in consequence, and thirdly, how the suffering resulted from the conduct. It is very important to keep these matters distinct, and it is not at all difficult. How the defendant behaved (the cause) is clearly distinguishable from what the claimant suffered (its effect): both of these are provable facts. How the conduct resulted in the harm is not quite a fact, it is a relation between the two other facts, and we call it 'causation'. Thus our focal points are conduct, harm, and causation.

The Defendant's Conduct

The defendant's conduct may take different forms. He may have done something or merely spoken. Acts and speech operate differently in the world we know—even Beatrice's saying to Benedick 'Kill Claudio!' didn't kill Claudio—so the law tends to distinguish them. Thus some torts, such as trespass, require an act, while others, such as misrepresentation, fraudulent or negligent, require a communication of some sort. But the distinction is not clear-cut. Gestures can be rude, and actions can speak—louder than words, it is said—and people have been known to talk of body language and fashion statements. Although *Hedley Byrne v Heller* was a case of

misrepresentation, a misleading letter, and liability was in principle imposed on that basis, this liability was quite quickly extended to the careless misperformance of services of all kinds. And as Lord Steyn has said: 'A thing said is also a thing done'.[18]

Speech and action have one thing in common, however: they are both positive—the speaker or agent adds something to the previous situation. What if the defendant neither spoke nor acted, but remained passive and silent? Here again the law draws a distinction. It is much readier to impose liability on a person who does or says something than the person who does and says nothing. Where the defendant is charged not with positively endangering or damaging the claimant but of failing to protect him from a danger or damage we speak of 'liability for omissions'. Again, the distinction between acts and omissions is not watertight—liability under *Hedley Byrne* was extended to cover an indolent solicitor who did nothing[19]—but an excellent justification for it may be found in Lord Hoffmann's speech in *Stovin v Wise,*[20] where an embankment beside the highway obstructed the sight lines at an intersection and the highway authority failed to exercise its power to have it removed.

The distinctions between act and speech and between act and omission are at the level of perceptible fact and are quite easy to draw, even for a layperson who doesn't see why they should be drawn at all. The matter is more complicated when the conduct falls to be evaluated rather than simply described. Did the defendant's conduct fall short of the standard which the court or the legislator holds appropriate? Is the defendant to be blamed? Was he driving too fast (the word 'too' always indicating that some criterion, commonly unstated, has been applied)? Did the surgeon pull too long on the emergent baby? Was the driver's conduct unreasonably dangerous? Should the writer have realised that what he said was inaccurate or misleading? These judgments are commonly semi-objective, independent of the defendant's internal attitude or even abilities: the learner driver may be held liable for the way he drives, though we know he is doing as well as he can. Sometimes, however, there must be an inquiry into the defendant's mind. Was he conscious of what he was doing or simply inattentive? Did he know that what he was saying was false, did he realise that he was acting outside his powers? These distinctions matter, because in some torts there is no liability unless the defendant's conduct was objectively unreasonable, in others he must be shown to have behaved disreputably, and in yet others he is liable just for having caused the harm, even though his conduct was neither unreasonable nor disreputable; in this last case we say that his liability is 'strict'.

Effect on the Claimant

The harm suffered by the claimant may also take different forms. His leg may be broken or his car wrecked. This is physical damage, damage to his tangible person or property. Such damage usually entails economic harm as well, such as the loss of wages or the cost of cure or repair. In other cases, however, the harm may be what we call 'purely economic', not consequent on any physical damage, as where the defendant misleads the claimant into making a bad bargain or deprives him of a prospective advantage. The claimant's complaint then is not that the tortfeasor has disabled him personally or damaged his property but only that he has been made poorer, not as rich as he was or would have been. The law of tort makes a clear distinction between these two cases. As Lord Oliver once said, 'The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not'.[21] Thus while the careless manufacturer of a defective chattel is responsible at common law for the personal injury or property damage

it foreseeably causes, he cannot be sued (except in contract) for the equally foreseeable economic loss which the purchaser or consumer may suffer from the mere fact of its being defective or unproductive.[22] Likewise the House of Lords has held that a doctor who carelessly allows a woman to conceive or remain pregnant must pay her for the pain of bearing the unwanted child but not, if it is healthy, the cost of maintaining it.[23] The distinction between purely economic loss and physical harm, even if it is only to property, is not just a bugbear of conservative tort lawyers: for example, in the foot-and-mouth disease fiasco of 2001, the government was prompt to pay those whose physical property in the form of sheep, cows, and pigs had been destroyed but offered hardly anything in comparison to those, hotel keepers, auction houses and the like, whose harm was purely economic, though equally foreseeable. And one might reflect on the fact that while taxation—the extraction of money—is perfectly, if reluctantly, acceptable, expropriation, the taking of physical property, is not.

New kinds of harm are occasionally admitted. If so, liability is naturally expanded. In the year 2000 the House of Lords held that a reduction in a child's level of achievement could constitute actionable harm, the conduct in that case being failure to diagnose and alleviate the congenital condition of dyslexia.[24] By contrast, the occurrence of pleural plaques in a person negligently exposed to asbestos fibres does not, the Court of Appeal has held, constitute actionable damage even if they indicate an increased risk that an actual disease might develop and also cause anxiety about that possible outcome, since neither of these separately or in conjunction amount to actionable harm.[25]

The law is often criticised for making needless distinctions, but an example may show that the distinctions just mentioned are necessary, or at any rate useful. Take the daily occurrence of a traffic pile-up on the motorway resulting from crass driving by someone up front. A passenger in the following car has his head cracked open and dies; his widow suffers shock at hearing of the accident, and the firm which employs him loses his valuable services; the driver of another car suffers a broken nose but survives, while a third drives into the mess and his car is damaged, but he himself is uninjured. Meanwhile there is a whole slew of traffic backed up, at a standstill for hours, and in consequence many of the drivers and passengers lose time and money as well as their tempers. These are all perfectly foreseeable and harmful consequences of a single act of negligence, but given the different types of harm, it could not be right to treat all these victims the same.

Harm and Rights

Common to all these cases is that the claimant has suffered actual harm or damage, and he doesn't need a lawyer to tell him so. Sometimes, however, the claimant has suffered no actual harm but is aggrieved because he thinks his rights have been invaded. The law of tort is ready to assist him, if he is correct, because one of its roles, apart from determining whether compensation is payable for harm caused, is to vindicate essential rights when they have been invaded. English law has traditionally been reluctant to speak openly in terms of rights (as opposed to duties). As one judge put it 'In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action. It is not in accordance… with the principles of English law to analyse rights as being something separate from the remedy given to the individual'.[26] To see that this has changed one need look no further than the Human Rights Act 1998 which lists the rights of the citizen and makes it unlawful for a public authority, including the courts, to act incompatibly with them. But in reality the change falls short of being entirely revolutionary. Since very early

times a person's rights in his person and in property in his possession have been protected by the English law of tort in the form of trespass: anyone, even an official, who deliberately restricted a person's freedom of movement or touched his person or any of his possessions could be sued, even if no actual harm resulted, and it was up to him to establish, if he could, some legal justification for his act. This may apply only to rights protected by trespass law, for when the Court of Appeal held that no damage need be proved if a person's 'constitutional' rights had been maliciously thwarted,[27] the House of Lords reversed and sidelined a decision 300 years earlier that a person who was prevented from exercising his right to vote had a claim in tort although, as his candidate was actually elected, he had suffered no actual loss, only a grievance.[28]

It is quite easy to tell when the law of tort is performing its vindicatory rather than its compensatory role: first, there need be no proof of damage; secondly, the claimant need prove only that the right was invaded, not that the defendant was wrong to act as he did. The defendant must then show, if he can, that he was entitled to do what he did. Thus it is presumptively wrong to thump anyone, but you are entitled to do it in self-defence. This is structurally very like the European Convention on Human Rights, which first states the right and then lists the purposes for which alone invasion is permissible, the right being very generously construed, the defences subjected to careful scrutiny. The Convention confers many more rights than are protected by our common law of trespass, which covers only the right to freedom of movement, corporeal integrity, and undisturbed possession of property, landed or moveable: for example, Article 8 provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. But whereas a claim in trespass lies against persons of all kinds and invariably carries a right to damages, the Human Rights Act 1998 explicitly binds only public authorities and offers damages for infringement only as a last resort.[29] On the other hand, and very importantly, liability in trespass attaches only to positive acts, whereas under the statute 'an act includes a failure to act' and the authority may be liable for failing to protect citizens from invasions of their rights by others, who are not themselves bound by the Act.

The rights protected by the law of trespass and defamation are rights which the judges have recognised; like the more relative rights which arise from contracts, they exist at common law. Many rights, however, have their source in a statute. Alongside common law rights in tangible property we have statutory rights in intangible property, such as copyrights, patent rights, and design rights; these are called 'intellectual property' since they are perceptible only to the mind or intellect, not the senses. These, too, are protected, in the ways specified in the legislation, by the law of tort or something quite analogous.

Causation

In the tort of trespass the invasion of the right must result *directly* from the defendant's act. Contrary to what many students seem to think, 'direct' is not a word apt to describe either the conduct or the result; it refers only to the link or relationship between them, indicating immediacy, the absence of anything intervening between the conduct, which is the cause, and the harm or invasion, which is its result. Thus in one case where the claimant's foreshore was polluted by oil from the defendants' tanker, the defendants were not liable in trespass because they had pumped the oil on to the sea and not directly on to the claimant's property, though it was bound to end up there, and soon, through the intervention of wind and tide.[30] The defendants would have been liable in negligence, however, had they been at fault (in fact they had to lighten the vessel to save the crew in an emergency for which they were not shown to be at fault), for in negligence the requirement is

not that the result be directly caused by the defendant but that the harm be the *foreseeable* result, whether or not it is directly caused. Indeed, in another pollution case in which the claimant's wharf was burnt down as a clear result of the defendant's careless spillage of oil in Sydney Harbour the defendant was held not liable because all the experts said that the oil on the water could never be ignited.[31]

Foreseeability seems to be the link predominantly required in the law of tort today. Thus in yet another pollution case, this time on land, small quantities of a industrial chemical which the defendants had allowed to leak into their land gathered in the water table and polluted the claimant's water supply; this was not a claim 'in negligence', since there may be liability for such an escape even in the absence of any negligence, but the defendants nevertheless avoided liability because the pollution of the water supply was a quite unforeseeable result of the escape.[32] The 'propensity to percolate through underground channels and contaminate hidden springs' was said in another case to be a characteristic of defamatory statements.[33] Here the rule used to be that the originator of a defamatory statement was not liable for its being repeated unless he had authorised the repetition, but when newspapers reviewed the previous evening's television programme the Court of Appeal held that the BBC might well be liable for this further dissemination of its contents. 'There cannot' it was said 'be a difference in principle between negligence and other tortious conduct' and the test of foreseeability (or 'natural and probable consequence') was adopted as against the earlier rule. Here the change of test expanded the range of consequences for which liability was imposed, whereas in the pollution case it restricted it. The wrong way round, one might think.

In some torts, however, a stricter criterion is used: the result may have to be the 'calculated' effect of the conduct, meaning that it was very likely to result. Sometimes, indeed, it must be shown that the result was actually intended by the defendant or that it was one whose likelihood he recklessly ignored. But though different torts have different requirements for the link between the defendant's conduct and the harm or invasion complained of, it must always be shown that the latter was indeed the result of the former, that the defendant can properly be said to have caused it or contributed to its occurrence. Unfortunately causation is a very elusive concept, about which much more will be said in Chapter 4.

Relationship of Parties

The nature of the tortfeasor's conduct, the harm suffered by the claimant and the link between them are crucial in any tort claim, but other factors may also play an important part. One such factor is the previous relationship, if any, between the parties. Sometimes the parties are total strangers, like ships that collide in the night, but very often they are not. Relationships in life vary a great deal. The parties may be cheek-by-jowl, in the same family or as neighbours, living much closer to one another than they would like. Special considerations are bound to apply. The relationship may be that of consumer and producer, where the consumer, targeted by the producer, selects the product because of its provenance. The parties may be in a voluntary relationship, as when you enter a shop, visit a tenant, or hitch a lift. The relationship may be fully contractual, as between employer and employee, or one of bailment, where one person is in lawful possession of goods belonging to another, as when you take your car to the garage or let a friend borrow it. The application of the rules of tort may be greatly affected by the relationship between the parties. This is quite right, for the law is there to answer people's reasonable expectations (a product is defective if it is not as safe 'as persons generally are entitled to expect'), and people's expectations of others depend on their relationship

to them, especially when they are justifiably relying on them for advice or protection (as one relies on one's doctor or other apparent expert). In short, whether you get damages depends on whom you are suing as well as what you are suing him for. How could it be otherwise?

Where Torts Happen

Most accidents occur in the home, on the highway or on other people's property, often a factory or building site. Accidents at home are usually the result of the victim's own negligence, but they may be attributable to a defect in an appliance—the toaster which blows up, the unstable ladder in the shed—so that one can sue the producer, or due to some structural defect in the premises, so that one can try suing the landlord, or to some temporary hazard—the carpet-layer failed to nail down the carpet or the workman left his hammer lying about for someone to trip over. Most domestic accidents, however, tend to be the fault of the victim or another member of the household, and lawsuits are relatively rare.

By contrast, suits arising from accidents on the highway, which includes the high seas, are extremely common; this is not surprising, given that so many hard and heavy metal objects are moving about at high speed. Although there are some pure accidents, when no one is to blame, injuries on the highway are most often due to some fault of the person in control of the vehicle's movement or condition. Sometimes, however, the highway itself (including the pavement) has been badly maintained or inadequately signposted. Sometimes a builder leaves an unlit skip or debris on the highway, sometimes a branch of a tree or part of a building falls on to it from neighbouring premises. Other incidents on the highway may give rise to tort problems, such as obstructing the movement of traffic or access to a business.

If you are neither at home nor on the highway when you are injured, you must be on someone else's property. Ever since 1866 when an employee of the gas company fell into an unfenced vat in a sugar factory,[34] accidents on private property have received special attention from the law. Nowadays the Occupier's Liability Act 1957 lays down in some detail the 'common duty of care' owed by the occupier to his 'visitors', persons invited, allowed, or entitled to be there; unwelcome entrants such as burglars and errant children (a perfectly absurd conjunction) are owed a slightly lower duty under the Occupier's Liability Act 1984. If the scene of the accident was a factory or other workplace, the chances of the injured workman recovering damages are very high. This is because breaches of the very numerous safety regulations which the occupier is bound to heed have long been held to give rise to liability. Often, of course, the occupier of the workplace is also the victim's own employer, whose duty for the safety of his employees may be even higher than that of the occupier towards his visitors.

Other places rife with accidents are hospitals, schools, and holiday resorts. As to the latter, Brussels, ever conscious of the wants of tourists while reducing the attractions of travel abroad, has greatly stiffened the liability of package tour operators, and it may be possible to sue them here. Nor does one have to return to the scene of the injury if one is run over in the street while abroad: thanks to the Fifth (!) Motor Insurance Directive (2005), the foreign motor insurer is bound to maintain a claims representative in Britain and can be sued here.

Even for physical accidents the place of occurrence is not always relevant: a person injured by a defective chattel can sue the producer no matter where the injury took place. In the economic torts, including misrepresentation and most forms of professional liability, it will be the transactional rather than the physical context of the wrong which is most important.

Human and Other Bodies

Only human beings can suffer personal injury or death, the harms traditionally in issue in a tort claim. Property damage and financial harm, on the other hand, can be suffered by merely legal persons, which, if not inhuman, are certainly not human. It is worth emphasizing the fact that the legal world contains two quite different kinds of players, individual human beings on the one hand and, on the other, firms, companies, governmental units, quangos, all those (non)entities called 'bodies'— rather oddly, seeing that they have no body at all. It is a serious mistake to suppose that a trading company, for example, is really its human employees and shareholders (many of the shareholders, such as pension funds, being themselves merely legal). A legal person is by no means just human beings in a group, and one must resist the temptation to think it is. Companies do not exist naturally in the way people do: they are *deemed* to exist by lawyers and economists. This fact is rather obscured by the anthropomorphism unavoidably rampant in legal discourse: even in this book companies are treated, spoken of, believed in, *as if* they were people. The fiction is taken for fact. This is not to deny that companies, like the square root of minus one, have their uses, but it must always be remembered that they are devices invented by individuals for their own benefit, and occasionally the benefit of others as well. For example, it is established law that only the company itself can sue if the company's assets are diminished by a tort and the actual loss is suffered by the shareholders, even if there is only one of them.[35]

In the contract books companies and other legal persons are very big players, because contracting is an act in law, and in law companies are persons. In the law of tort, however, they sit oddly, because tort law is principally concerned with acts in fact. In the Newtonian world in which we move, physical harm can be caused only by physical force, and while human beings are capable of physical force, companies are not, because they do not physically exist. Companies cannot drive cars or hit people in other ways, but it would be intolerable if they were therefore incapable of liability in tort, for they often have lots of money and can pay (or be liquidated), payment being a legal act of which they are well capable. To ensure that companies can be made liable the law has two devices at its disposal. The first is to impose liability for failure to act (non-existent bodies are very good at *not* doing things, since in fact they can't do anything), as by making the occupier of premises liable for failing to make its visitors reasonably safe, by making the bailee liable for failing to look after the goods properly, and the employer for failing to institute a safe system of work. The second device is to make the employer (normally corporate) pay for the torts committed by its employees (invariably human). This is called 'vicarious liability', and it is a vitally important feature of the law of tort which will be discussed in Chapter 6.

Lawyers tend to prefer clients which are corporate rather than human, because companies don't burst into tears in the office and usually pay the bill. In consequence the law tends to accord to legal persons rights which properly belong to individuals. Companies may sue for defamation, for example, and, perhaps

surprisingly, enjoy some of the rights contained in the Human Rights Act 1998. This is explicit as regards the peaceful enjoyment of possessions, but the Strasbourg Court has granted them other rights as well; indeed, one of the first declarations of the incompatibility of a British statute with the Convention was pronounced in favour of a pawnbroking company![36] Brussels, on the other hand, is surprisingly ready to discriminate. Thus a company cannot invoke the Consumer Protection Act 1987 in respect of damage due to a defective product, since the underlying Directive applies only to personal injury, death, and damage to consumer property, not including commercial property. Again, only 'individuals' can invoke the Directive on Unfair Terms in Consumer Contracts.[37] Less obvious, perhaps, is the fact that many important tort claims are simply not available to companies: they cannot in the nature of things complain of stress, shock, or wrongful imprisonment; it is not clear whether or not they can complain of 'harassment' under the Act of 1997, and while a company may certainly protect its confidential information it is doubtful whether it can complain of invasion of privacy as fully as human beings can, for it has neither the 'family life' nor 'home' which ' everyone' is entitled to have respected under Art. 8 of the European Convention. Suppose that a vital employee is injured through negligence. Can the company sue? In a case where a star footballer was disabled as a result of bad medical advice, the football club could not sue the doctor, though it regularly paid his bills.[38] Much less can a company sue if an employee is killed, for only human relatives are qualified to sue under the Fatal Accidents Act 1976. Companies can, of course, sue for damage to, or deprivation of, their property, and they are in the forefront of claiming damages for economic loss, whether caused by competitors or by others. Indeed, the damages awarded to companies tend to dwarf those awarded to human beings: in one famous case in Texas, Pennzoil obtained an award of $11,120,976,000 against Texaco, which had allegedly horned in on Pennzoil's purchase of Getty Oil.

Insurance Companies

One kind of company is especially significant in the tort world. That is the insurance company. The characteristic of insurance is that whereas most other contracts envisage reciprocal profit or mutual advancement, the insurance contract is designed not for the profit of the customer— indeed, from most kinds of insurance he is not permitted to profit—but to protect him against loss or liability, that is, precisely the central concerns of tort law. Insurance companies are involved much more often than is evident in the law reports. This is because an insurance company is frequently lurking behind either the claimant or the defendant and sometimes both, so that what seems to be quite interesting litigation between individuals is really a dispute between insurers of very little moment. Take a standard highway accident, appearing in the reports as *Smith v Jones*. Jones will certainly be insured against liability, since as everyone knows, those who use a motor vehicle in a public place are required by law to have a policy of insurance against the risk that they may be held liable to those they injure. Such 'liability insurance' protects careless motorists from being bankrupted and ensures that their victims get paid. If Smith's claim is for damage to his car, his own insurer may also be involved, for sensible people insure their own cars, although they are not bound to, since after all one's car may be damaged without anyone's fault but one's own. This kind of 'property insurance' benefits claimants, and is often called 'first party insurance'.

Although insurance companies of both types are involved in almost every lawsuit about property damage, neither is ever mentioned in court. As was said in the House of Lords as recently as 1994 'At common law the circumstance that a defendant is contractually indemnified by a third party against a particular legal liability

can have no relevance whatever to the measure of that liability.'[39] Although in England one can sue the tortfeasor's employer directly, without joining the tortfeasor himself, it is only in the case of traffic accidents (and then only because of an intervention from Brussels) that one can sue the tortfeasor's insurer without suing the tortfeasor first. In many cases, therefore, the tortfeasor's liability insurer (who is usually in complete control of the defence) goes unmentioned. There is also a coy silence about the claimant's property insurer. This has a different explanation, namely that the insurer which has paid out on its policy is entitled by law to use the insured's own name in order to exercise any rights the insured may have had to claim compensation for the insured damage or loss. The reason for this is that since both property insurance and tort damages are designed to compensate the insured victim, but not to overcompensate him, he cannot be permitted to keep both the proceeds of the insurance and the tort damages, so in order to prevent his being unjustly enriched the insurer is able to claim back out of the tort damages the amount it paid him under the policy.

The technical name for this chicanery is 'subrogation': the insurer is 'subrogated' to the rights of the insured. Not only is the property insurer subrogated to the rights of the insured victim against the tortfeasor but the tortfeasor's liability insurer is subrogated to the tortfeasor's right to claim contribution from any other person liable for the same damage, even though the tortfeasor himself, being insured, would never have exercised that right. So again you never know for sure whether the named human party is acting for himself or is merely a puppet whose strings are being pulled by his insurance company. At least two foreign systems have laid down the sensible rule that if insured property is damaged by negligence, only the insurer is liable: the negligent tortfeasor is not. Note, however, that subrogation benefits only property and liability insurers: it does not apply to personal accident insurance, where you pay a premium to an insurer in return for its promise to pay you certain sums if you suffer accidental bodily injury. Thus if Smith suffers personal injury he may keep both the proceeds of such a policy and any damages he can obtain from the tortfeasor (or his liability insurer)—another indication that victims of personal injury are preferentially treated by the law.

Public and Private Bodies

Insurers and other trading companies operate in the private sector, but many bodies are public in one sense or another. Fluid though the distinction was even before the (semi)privatisation of public services, it is important, because public and private law have different procedures and qualities. On the one hand, it might be said that public bodies, set up for the public good, should behave better, more responsibly, than private ones, which are out to make a profit; on the other, when a private body is held liable only its shareholders suffer, whereas making a public body pay damages may reduce its ability to perform its services to the public. Thus hospital trusts which have to pay damages out of their normal budget have less money available for the cure of the sick. It was therefore nothing short of outrageous that for many years, until stopped by the House of Lords,[40] our courts made them pay the cost of bringing up a perfectly healthy child born as a result of their negligence: it was robbing sick Paul to pay healthy Peterkin.

Salmon LJ once said: 'The doctrine that the executive is subject to extraordinary legal liabilities is dangerous. It is but a short step from that doctrine to the doctrine that the executive may enjoy corresponding extraordinary legal rights. This is entirely contrary to one of the fundamental principles of the common law, namely that it regards all men indifferently. The cabinet minister by virtue of his office has no greater legal rights or liabilities than his humblest constituent. All are equal before the law. This surely is one of the pillars

of freedom'.[41] His Lordship was objecting to the decision of the House of Lords in 1964 that a public official might be liable in punitive damages when a private actor would not.[42] His objection was unavailing. Indeed, the differential treatment has increased since then. Only 'public authorities' are expressly subjected to the duty to respect the rights contained in the Human Rights Act 1998; only public bodies, as emanations of the state, are bound by EC Directives which the government has failed to enact properly; only officials can be guilty of the tort of misfeasance in public office. It is clear, therefore, that the nature of a body as public may lead to increased liability.

If special liabilities attach to public bodies, do they enjoy special immunities also? The matter is very controverted and complex. Of course officials are given special statutory powers to invade the basic rights of the citizen—policemen may arrest where a citizen may not, and numerous civil servants are empowered to enter premises to rummage about in search of incriminating matter—and they are protected from liability in trespass if they can establish that they exercised these powers reasonably and within the conditions laid down by statute. But most of the powers granted to public bodies are to do acts which are not trespassory at all, such as those which cause merely economic loss, and certainly it is not *trespassory* to fail, however negligently, to do what one should have done, though a public authority may be liable under the Human Rights Act 1998 if it fails to protect one citizen from an invasion of his rights by another. The courts are very conscious that in granting powers to bodies, Parliament intended the body (and not the courts) to be free to decide how to use them—within limits, of course, which it necessarily fell to the courts to determine in the context of the enabling legislation. As a matter of administrative law a decision was apt to be quashed only if it was extremely unreasonable (' *Wednesbury* unreasonable'), that is, downright irrational, but even then damages might not be available, for as Lord Goff said 'in this country there is no general right to indemnity by reason of damage suffered through invalid administrative action'.[43]

In private law, however, simple unreasonableness of conduct suffices to constitute a breach of duty, supposing that a duty of care exists, so when the tort of negligence expanded to cover omissions which led to merely economic harm, as it did in 1978, life became very difficult for public bodies and their staff. One technique employed to protect them was to deny the existence of a common law duty of care as regards the exercise of statutory *powers* (i.e., what statute allowed, but did not require, the body to do). It could be held that it was not 'fair, just and reasonable' to impose such a fetter on the exercise of discretionary powers. Thus it was held by the House of Lords that the police owed no duty to anyone as regards their activities in investigating crime,[44] and that a local authority owed no duty to exercise its powers to protect children who were being abused at home.[45] This device had the advantage (for the public body) of protecting it not just from liability but also from any investigation into what it had actually done or, more commonly, failed to do, though the value of the device was later weakened when the courts held that though the body itself was under no duty it could be made liable for negligence on the part of those to whom it delegated its role.[46] A greater bodyblow came in the form of a decision in Strasbourg which held that English law must, on pain of being held defective, provide a remedy where a public authority had culpably failed to protect the Convention rights of a person from invasion by a third party. By qualifying as 'unlawful' all acts and failures to act of public authorities which infringe the Convention rights of the individual, the Human Rights Act might seem to bridge the gap between administrative and tort law.

Nevertheless there remains a difference as regards remedies, for the 1998 Act provides that damages are to be awarded only if necessary to aford the claimant just satisfaction, and our courts follow Strasbourg in holding that a declaration of the unlawfulness of conduct may constitute 'just satisfaction'.[47] Still, it seems that damages are appropriate when a living claimant has sufered actual harm, though we surely need not follow that court in awarding damages to the relatives of persons into whose death no adequate inquiry has been held, especially since at common law there is no duty to hold any inquiry.[48] The upshot is that the courts are now readier to impose liability in damages on public authorities whose unreasonable exercise of statutory powers causes harm to an individual, and are indeed extending the kinds of harm which they regard as adequate, such as educational impairment. Indeed it seems that it is only budgetary decisions which the courts will treat as 'non-justiciable'.

The matter is treated slightly diferently where the authority has been charged with a duty. Normally a breach of duty is an actionable wrong, but the general tendency of the courts is to deny that Parliament, in creating the duty, intended it to confer a right to damages on the victim of its breach, especially if any other remedy is available. Consider highway authorities. The Highways Act 1980 imposes on them a duty to 'maintain' the highway (s. 41). This duty (which did not, until recent corrective legislation, include keeping it clear of snow and ice) certainly generates a claim for damages on breach, but the 'duty to promote road safety', which the Act also imposes on them (s. 39), has been held by the House of Lords to be a 'target' duty such that not only is a breach of it not actionable as a breach of statutory duty but no common law duty of care should be annexed to it.[49] Rather like the reluctance to hold that a body with power to act is under a common law duty to act, the reluctance to hold that breach of statutory duties generates a claim for damages certainly benefits public authorities, though it is not confined to them.

Parliament itself is not a 'public authority' for the purposes of the Human Rights Act 1998. It can freely enact statutes which are incompatible with Convention rights, and if the statute cannot be construed so as to make it compatible, the courts must apply it, and cannot sanction the Minister who implements it. The consequence is that the United Kingdom will be held liable in Strasbourg. European Union law is different. Our Parliament cannot validly enact statutes which conflict with Community law or the rights it grants, nor may the courts apply such enactments; indeed, they must hold the State itself liable for Parliament's shortcomings, if sufficiently serious.[50] So much for the sovereignty of Parliament, if sovereignty means, as it does, the power to enact laws that your courts will enforce!

Number of Claimants

A theme which runs throughout the law is a concern to restrict the number of persons who can complain of any particular conduct. In contract this was done by the rule ('privity') that only the promisee himself could sue the promisor, that is, only the buyer could sue the seller, not the person for whom the goods were intended, a rule only slightly modified by recent legislation. In property law only a person with a precise right in the property can claim, as we shall see in the tort of nuisance (land), conversion (goods) and even negligence (both). Even clearer is the rule in the tort of public nuisance: the person who blocks the highway is guilty of a common law offence, but the only possible claimants are those who have suffered a 'particular' harm, not the generality who have been seriously put out. Again, in order to claim under the Human Rights

Act 1998 you have to be the 'victim', according to the jurisprudence of the Strasbourg Court. In public law, too, there are problems about 'locus standi' or standing to complain. We shall see the force of this viewpoint in the law relating to financial harm and nervous shock resulting from a clear act of negligence, where foreseeability is not enough, precisely because too many people may foreseeably suffer such harm as a result of a single incident: we may have to distinguish between 'primary' and 'secondary' victims.

Notes

1 *Donoghue v Stevenson* [1932] AC 580.

2 *Murphy v Brentwood DC* [1990] 2 All ER 269.

3 *Rookes v Barnard* [1964] 1 All ER 367.

4 [1932] AC 580.

5 [1963] 2 All ER 575.

6 *Printing and Numerical Registering Co* (1875) LR 19 Eq 462 at 465.

7 *X v Bedfordshire County Council* [1995] 3 All ER 353 at 380.

8 *Henderson v Merrett Syndicates* [1994] 3 All ER 506 at 532.

9 *Reeves v Commissioner of Police* [1999] 3 All ER 897.

10 *Charter v Race Relations Board* [1972] 1 All ER 556 at 566.

11 *R v A* [2001] 3 All ER 1.

12 [1963] 2 All ER 575.

13 *X v Bedfordshire County Council* [1995] 3 All ER 353.

14 *Barrett v Enfield LBC* [1999] 3 All ER 193.

15 Practice Direction (Citation of Authorities) [2001] 1 WLR 1002.

16 *Attia v British Gas* [1987] 3 All ER 455.

17 See *Campbell v MGN* [2005] UKHL 61, especially Lord Hoffmann at 29 ff.

18 *R v Ireland* [1997] 4 All ER 225 at 236. 10 [1996] 3 All ER 801 at 806.

19 *White v Jones* [1995] 1 All ER 691.

20 [1996] 3 All ER 801 at 806.

21 *Murphy v Brentwood DC* [1990] 2 All ER 908 at 934.

22 *Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705.

23 *McFarlane v Tayside Health Authority* [1999] 4 All ER 961.

24 *Phelps v Hillingdon LBC* [2000] 4 All ER 504.

25 *Rothwell v Chemical and Insulating Co* [2006] EWCA Civ 27.

26 *Kingdom of Spain v Christie's* [1986] 3 All ER 28 at 35.

27 *Watkins v Home Office* [2006] UKHL 17.

28 *Ashby v White* (1703) 92 ER 126.

29 *R (Greenfield) v Secretary of State* [2005] UKHL 14.

30 *Esso Petroleum v Southport Corp* [1953] 3 All ER 864.

31 *The Wagon Mound (No 1)* [1961] 1 All ER 404.

32 *Cambridge Water Co v Eastern Counties Leather* [1994] 1 All ER 53.

33 *Slipper v BBC* [1991] 1 All ER 165 at 179.

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39 *Hunt v Severs* [1994] 2 All ER 385 at 395.

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41 *Broome v Cassell & Co* [1971] 2 All ER 187 at 204.

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43 *Factortame Ltd v Secretary of State (No 2)* [1991] 1 All ER 70 at 119.

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46 *Phelps v Hillingdon LBC* [2001] 2 AC 619.

47 *R (Greenfield) v Secretary of State* [2005] UKHL 14.

48 *In Re McKerr* [2004] UKHL 12.

49 *Gorringe v Calderdale MBC* [2004] UKHL 15.

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