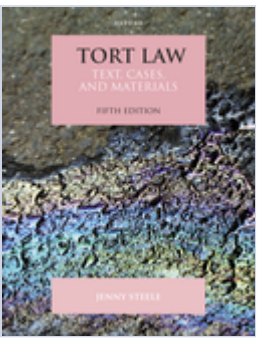

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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1. Introduction: The Shape of Tort Law Today

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter introduces the reader to tort law, with emphasis on its principles of liability and the approach taken to the interaction between parties. It first maps the various types of torts, including torts of strict liability and torts requiring intention, and the nature of the 'wrongs' with which they are concerned, in terms of protected interests, relevant 'conduct', and whether the tort requires 'actual' or 'material' damage. The chapter concludes by discussing two current challenges to the law of tort: 'compensation culture' and the costs of tort, and the influence of the Human Rights Act 1998.

Keywords: tort law, liability, torts, intention, wrongs, negligence, protected interests, damage, compensation culture, Human Rights Act 1998

Central Issues

i) In this introduction, we begin by mapping out the diverse torts which will be considered in this text, identifying in broad terms the nature of the 'wrongs' with which they are concerned.

ii) Tort law has significant social and economic impact. Over many years, legislation has particularly improved the ability of tort law to compensate for accidental harm and to spread the risks of such harm. Recently, however, there has been a sustained period of political

concern with over-extensive liability, and with the costs of tort. Caution surrounds the costs of tort litigation and the possible impact on defendants, including not only public bodies but also enterprises and ultimately the wider public. Tangible effects on the law and its operation have followed.

iii) A new era in tort was also signalled by the enactment of the Human Rights Act 1998; but it was not clear exactly what difference the Act would make. At the end of this chapter, we introduce the statute and its effects where tort law is concerned. Some such effects have been subtle and some have been unexpected. The unfolding influence of the Human Rights Act will be seen in many chapters of this book. As with the cost of liability generally, there has also been political controversy around the impact of the Act, and it is currently subject to a Government Consultation which is couched in critical terms. Some of the criticism is aimed at the effects on the law of tort and the development of tort-like liabilities, and the current proposals would, if pursued, affect a number of aspects of the law as it is encountered in the following chapters.

1 Torts as Wrongs, and The Map of Tort Law

Torts are 'wrongs'. To be slightly more precise, torts are civil wrongs for which law will provide a remedy. This remedy will be enforceable against one party, to the benefit of the other, and it will reflect (and perhaps correct) the wrong committed. There are other civil wrongs ↵ which are not torts, notably breaches of contract and of equitable obligation. Torts make up the most diverse bunch of civil wrongs in English law, protecting a wide range of interests against different types of invasion.

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Unfortunately, we cannot go much further than this in defining the law of tort. There is no widely accepted definition of a 'tort' which would distinguish clearly between torts, and all other civil wrongs (although the word 'tort' is considered clear enough in its meaning to be used in a statute).[1]

The following extract considers the proper categorization of tort alongside other elements of the law, and identifies some of its key features.

Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), 11–13; by permission of Hart

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> The law of tort is part of a larger body of civil (as opposed to criminal) law sometimes called 'the law of obligations'. Other parts of the law of obligations are the law of contract, the law of restitution and the law of trusts. The law of obligations may be contrasted with the law of property. The law of property consists of rules (which we might call 'constitutive rules') which establish (proprietary) rights and interests which the law of obligations protects by what might be called 'protective rules'. For example, tort law protects real property through the tort of trespass: to enter someone's land without their permission and without legal justification is to commit the tort of trespass to land. Property law defines who owns what land, and tort law protects the rights of the owner against unwanted intruders.
>
> Although contract law and the law of trusts may be treated as part of the law of obligations, in fact these bodies of law contain both constitutive and protective rules. The law of contract not only establishes an obligation to keep contracts, but also lays down rules about how contracts are formed or, in other words, about what constitutes a binding contractual undertaking which there is a legal obligation to fulfil. … By contrast, tort law and the law of restitution are purely protective—they establish obligations designed to protect interests created by constitutive rules of the law of property, trusts or contracts or which arise in some other way.
>
> Both the law of obligations and the law of property are part of what we call 'civil law' as opposed to criminal law. Civil law is a social institution by which we organize and interpret human conduct in a particular way. A central feature of civil (or, as it is sometimes called, 'private') law is 'bilateralness' or (more euphoniously) 'correlativity'.[2] What this means in simple terms is that civil law organizes relationships between individuals on a one to one basis. In the law of obligations, for instance, one person's obligation corresponds ('is correlative') to another person's right. …
>
> The idea of correlativity provides the framework within which I will analyze the law of tort. Every cause of action in tort and, therefore, every principle of tort liability, has two basic (sets 1 of)
p. 5 elements, one concerned with the position of one party to a bilateral human interaction ↵ (the 'victim' of the tortious conduct) and the other concerned with the position of the other party to that interaction (the perpetrator of the tortious conduct, or the 'injurer'). …
>
> The aim of this 'correlative analysis' is to understand and explain the law of tort as a system of ethical principles of personal responsibility or, in other words, a system of precepts about how people may, ought and ought not to behave in their dealings with others.

The view of tort law above makes a valuable starting point for our present project. Torts are wrongs, and the wrongs in question are defined by reference to the relationship between the parties.

Having said that, the existence of a liability in tort does not always mean that the defendant ought not to have behaved as he or she did. Admittedly it *will* mean this on many occasions. For example, one should not be negligent if one can help it, and one certainly should not engage in deliberate acts of deceit. But sometimes, there is liability even though it cannot be said that the defendant is to be blamed for not behaving differently. For example, the negligent party may be a learner driver who simply could not have driven better; or the

defendant may have carefully accumulated a dangerous thing, which has escaped through no fault of the defendant, causing harm to the claimant; or the defendant may have honestly believed that the umbrella they took home was their own, and not the claimant's. In all of these examples, there may be liability in tort, despite the fact that the defendant is not to be blamed for the way that they acted.[3] But in each of the three illustrations, the reason for imposing liability irrespective of blame may be quite different. The learner driver is held to an objective standard of care from which all road users can expect to benefit, despite her personal shortcomings. Failure to attain that standard is considered to amount to 'fault' for the purposes of the tort of negligence. It might be argued that the neighbour whose accumulated things escape and cause damage thereby takes responsibility for the outcomes of his or her own activity, despite their general reasonableness: the risk should be that of the accumulator, not of the victim.[4] The honest taker of an umbrella must compensate the owner in order to vindicate the latter's right over the property: this is a question of the definition and protection of proprietary rights. The difficulty perhaps is in squaring these different justifications with the notion of a 'wrong', or with the notion of a 'breach of duty'. Not all wrongs are 'conduct-based'; and 'duties' may be 'strict', in that their breach need not involve fault.[5]

1.1 Parties and Terminology

We should at this point introduce the parties and explain the applicable terminology.

Since 1999, the wronged party or 'victim' of the tort who brings an action has been referred to in England and Wales as the **claimant**. Previously, this party would have been referred to as the **plaintiff**, and that is the term still used in other common law jurisdictions. Since this book reproduces extracts from cases, statutes, and academic commentary, many of which ↵ predate this change, and some of which derive from other common law jurisdictions, the reader will encounter both sets of terminology.

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The alleged wrongdoer (the party who is said to have committed a tort) is referred to as the **tortfeasor**. The tortfeasor is not necessarily a party to the action. The appropriate term for the person who is on the receiving end of the claim in tort (who is generally *but not always* the tortfeasor) is **defendant**. In Scotland, where the subject is not tort but **delict**, the terms are **pursuer** and **defender**. A number of Scottish cases are extracted in this volume, not least the most famous of all UK tort cases, *Donoghue v Stevenson* [1932] AC 562.

We have just mentioned that the defendant will not always be the tortfeasor (the person who actually committed the tort). This is an important feature of the law of tort. The defendant will not be the tortfeasor where the action is brought on the basis of **vicarious liability** for the torts of employees and agents (Chapter 10), or against an insurer pursuant to the Third Parties (Rights against Insurers) Act 1930 or 2010 (Section 4). In each case, it must be established that the *tortfeasor* (and not the defendant) has committed a tort. In a much larger group of claims, the named defendant *is* the tortfeasor, but the defence is paid for, conducted, and where appropriate settled by the defendant's **liability insurer**,[6] who will also be paying for any damages that may be awarded.

For the benefit of relative newcomers to the study of law, or readers who are not familiar with the legal system of the UK, it should also be mentioned that the most senior court in the UK has undergone a change, as part of significant constitutional reorganization.[7] The UK's highest court was, until its final judgments in 2009, the **Judicial Committee of the House of Lords** (generally simply referred to as the 'House of Lords'). From October

2009, that role has been taken by the **UK Supreme Court** (generally referred to here as 'the Supreme Court'). Decisions both of the House of Lords and of the Supreme Court will be encountered in this book; both are of the highest authority.

1.2 Torts

Some years ago, Bernard Rudden argued that (at the time of counting) there were 70 identifiable torts.[8] In fact, the boundaries are fluid and it is not impossible for new torts to be recognized, or old ones to be revived. For example, the action for misfeasance in a public office (Chapter 2, Section 8.2) has undergone a revival in recent years, having been presumed extinct, though it must be admitted that the volume of litigation involving this tort has not been translated into success for claimants.[9] From time to time, wholly new torts have been urged. Recent (unsuccessful) examples include a proposed tort of 'unlawful exile' (*Chagos Islanders v Attorney General* [2003] EWHC 2222), and of unlawful interference with body parts (*In re Organ Retention Litigation* [2005] QB
p. 7 506). A new tort of misuse of private ↵ information or images has emerged, influenced by close analysis of the Human Rights Act 1998 (explained in Section 4.2). More recently, the Privy Council opened the door to actions for malicious *civil* (as opposed to criminal) prosecution, which was rejected by the House of Lords only just over a decade previously; and the Supreme Court has ruled that this change represents domestic law.[10] The terrain of tort law is apt to change.

2 The Nature of Torts: Defining the 'Wrongs'

In *The Anatomy of Tort Law* (extracted in Section 1), Peter Cane argues that the ethical nature of the law of tort, which he considers to be based upon responsibility, will be best understood by breaking down the various torts into certain components. These components are **protected interests** on the part of the claimant; **sanctioned conduct** on the part of the tortfeasor; and **remedies** for the wrong. Between them, these three components strike a balance, in each case, between the claimant and the tortfeasor. They express the nature of tort law as concerned with what Cane calls 'correlativity' (the relationship between the parties). Cane argues that this approach is better than a more traditional exposition, which simply adopts and applies the existing requirements of recognized torts as 'legal formulae', without reflection on the ethical underpinnings of the wrongs concerned. On that approach, the structure of the law of tort is presented, uncritically, as largely the product of historical accident, and as though there is no more to be said about it than this.

Spelling out the various elements of different torts in this way can help us to map the diverse ways in which conduct of one party may interfere with interests of another party, so as to amount to an actionable wrong. In other words, this is a way of expressing the diversity of the terrain that is covered by tort law.

Cane goes on to argue against too much adherence to legal categories such as distinct causes of action in the form of different torts, or even 'tort' and 'contract'. He suggests that different causes of action with different criteria should not be available on the same facts, and that the ethical principles of personal responsibility discovered by unpacking the various torts in this way will be better applied without excessive reference to these categories.[11] But there are reasons to hesitate about this prescription. If the various torts describe different ways in which an interaction may be 'wrong', why and indeed how should we decide that a single

way of approaching the facts is valid? *Which* way should those facts be approached? This sort of thinking has contributed to the near demise of strict liability under the rule in *Rylands v Fletcher*, for example (Chapter 12). It has also led to the classification of trespass to the person as an 'intentional' tort (explained further in Chapter 2), while other forms of trespass are categorized as 'strict'. For example, the significant differences between the implications of a finding of trespass to the person (unlawfulness); misfeasance in a public office (damage caused by abuse of power); and negligence (damage caused through the defendant's lack of care), all potentially existing on the same facts, are highlighted by the litigation in *Ashley v Chief Constable of Sussex Police*.[12] Legal concepts should not be 'mapped' in too restrictive a way; and the field of tort is a dynamic and changing one.

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2.1 The Structure of Our Map of Tort

Table 1.1 sets out key components of a number of torts. The dimensions of our map are similar to the first two of Cane's categories, namely protected interests, and relevant 'conduct'. We also include a column specifying whether the tort requires 'actual' or 'material' damage, since this criterion provides a very important division between different torts. In torts which do not require damage, the invasion of the claimant's interest is 'actionable per se' (without more); although it seems that in the absence of damage, only 'nominal' damages are likely to be awarded (*Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, Chapter 2). There is no column relating to Cane's third element, remedies. Issues about remedies are hard to capture in this general table, since it is not possible to tie remedies very neatly to causes of action, and they are therefore left for later chapters. ↵ ↵

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Table 1.1 An introductory map

Tort(s)	Protected interests	Need to show 'damage'? ('DAMAGE-BASED'?)	Relevant 'wrongdoing': what must the tortfeasor do? (STANDARD OF LIABILITY)
1. Trespass to the person: a. Battery b. Assault c. False imprisonment	Bodily integrity/right of self-determination	No	Battery: unlawful interference with bodily integrity Assault: immediate threat which deliberately puts C in fear of a battery False imprisonment: total unlawful restraint of claimant's liberty *Contact, threat, or restraint* must be intended. Unlawfulness or harm need not be either intended, or careless INTENTIONAL AND STRICT ELEMENTS
2. 'The action in *Wilkinson v Downton*'	Freedom from mental harm	Yes	Intention to inflict mental harm; intention may be imputed where likelihood of such harm is obvious INTENTION TO HARM; BUT INTENT MAY BE IMPUTED; NEED NOT BE ACTUAL
3. Action for harassment under Protection from Harassment Act 1997	Freedom from harassment	No	Course of conduct amounting to harassment; constructive knowledge that this conduct would amount to harassment CONSTRUCTIVE KNOWLEDGE OF HARASSMENT
4. 'Unlawful means' economic torts and simple conspiracy	Economic interests	Yes	Intention to harm the claimant's interests; generally (and apart from simple conspiracy), **unlawful means** INTENTION TO HARM IN STRONG SENSE

Tort(s)	Protected interests	Need to show 'damage'? ('DAMAGE-BASED'?)	Relevant 'wrongdoing': what must the tortfeasor do? (STANDARD OF LIABILITY)
5. Inducing breach of contract	Contractual interests	Yes	Intention to procure the breach of contract INTENTION IN A STRONG SENSE
6. Deceit	Economic interests (and perhaps others)	Yes	Giving a false statement with: Intention that C should rely; and Knowledge of (or recklessness as to) the falsity of the statement INTENTION IN TWO SENSES
7. Malicious falsehood	Reputation and economic interests	Yes, except where defined by statute as actionable per se	Malicious publication of *falsehoods: 'malice*' comprises either Intent to harm; or Lack of belief in truth of statement INTENT TO HARM OR LACK OF BELIEF (BAD FAITH)
8. Malicious prosecution and analogous torts	Freedom from prosecution/intrusion through criminal or civil process;[13] liberty/economic losses/reputation?	Yes	Initiating prosecution/obtaining search warrant (etc.) with: subjective malice, criminal process, and lack of reasonable cause BAD FAITH AND UNREASONABLENESS
9. Misfeasance in a public office	Economic/personal?	Yes	Exercise of power by a public official with targeted malice (intent to harm the claimant); or Intentional or reckless abuse of power INTENT TO HARM, OR RECKLESSNESS
10. Negligence	Personal, property, or economic interests (from damage)	Yes	Careless conduct, but only if this amounts to breach of a duty to take care, owed to the claimant NEGLIGENCE

Tort(s)	Protected interests	Need to show 'damage'? ('DAMAGE-BASED'?)	Relevant 'wrongdoing': what must the tortfeasor do? (STANDARD OF LIABILITY)
11. Private nuisance	Relevant interests in land (Use and enjoyment; easements)	No	Unreasonable interference with relevant interests. Careless conduct not required in most cases UNREASONABLE INTERFERENCE; MAY BE STRICT IN TERMS OF CONDUCT
12. Public nuisance	Personal and property interests	Yes	Interference with comfort or convenience of a class of Her Majesty's subjects UNREASONABLENESS; STRICT AS TO CONDUCT
13. The action in *Rylands v Fletcher*	Interests in land	Yes	Accumulation of a dangerous thing; non-natural user of land STRICT; SUBJECT TO NON-NATURAL USER
14. Occupiers' liability	Personal and (for visitors) property	Yes	Breach of occupancy duty: failing to ensure that premises are 'reasonably safe' REASONABLENESS—NEGLIGENCE?
15. Defamation: a. Libel b. Slander	Reputation	No[14] (libel); Yes (most forms of slander)	Publication of a defamatory statement referring to the claimant (No need for intention or carelessness) STRICT
16. Publication of private information and images	Privacy in respect of information and images	No	Publication of information or images where there is a reasonable expectation of privacy STRICT

Tort(s)	Protected interests	Need to show 'damage'? ('DAMAGE-BASED'?)	Relevant 'wrongdoing': what must the tortfeasor do? (STANDARD OF LIABILITY)
17. Product liability under the Consumer Protection Act 1987	Personal and property interests (against damage)	Yes	Manufacture or first supply of a product containing a defect STRICT
18. Breach of statutory duty	Various: as the statute prescribes	Yes/no depending on what is protected by the statute	Breach of the statutory duty: may be strict or fault-based VARIABLE: MAY BE STRICT
19. Trespass to land	Possession of land	No	Interference with right to possession. Entering land must not be 'involuntary', but trespass may be entirely inadvertent STRICT
20. Conversion	Right to possession of goods	No	Action inconsistent with the rights of the claimant. Intent to assert dominion over the goods. Bona fide acts (without knowledge of C's rights) may amount to conversion STRICT

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2.2 Conduct and the Special Case of Negligence

It will be noticed that there are many torts of strict liability and several torts requiring intention, but only one general tort which truly depends on 'negligence'.[15] This invites a number of comments.

p. 12 ↵ First, most undergraduate courses in the law of tort are substantially concerned with the tort of negligence. This is understandable given the practical importance of negligence and the sheer volume of case law it generates,[16] but it means that, typically, courses in tort law are not particularly representative of the whole subject. Second, 'negligence'—in the sense of the careless infliction of harm—has been broadened into a very general principle, while other 'wrongs' have remained confined in their scope. Indeed, we will see that 'fault-based' thinking has tended to affect the interpretation of other torts also. This feature of the law of tort—the generalization of a negligence principle—may reflect the fact that liability on the basis of fault is considered to express a suitable approach to the relationship between the parties; alternatively, it may reflect the fact that such liability is thought to pursue a relevant and appropriate objective.

On the other hand, the progress of the tort of negligence can also be used to illustrate the *dangers*—or even the impossibility—of a general approach. A great deal of difficult case law is generated by the need to set limits to the tort of negligence. One of the most abstract ideas in the law of tort is the 'duty of care in negligence'. The ambit of negligence is confined largely by considering whether it is appropriate for such a duty to be imposed.[17]

2.3 Protected Interests

Protected interests could be defined in very broad terms (dignitary interests, interests in the person, economic interests, property interests). But this would give us little detailed information concerning the precise ambit of some of the torts above, and may actually be misleading.

'Property interests' provide a good illustration of the detailed differences between protected interests. Property interests *of different sorts* are protected *against invasion of different types* by various torts. So **negligence** protects against **damage** to property; **private nuisance** overlaps with negligence but more broadly protects against **interference with use and enjoyment** of land; **trespass to land** protects against **interference with possession** of land, and need not involve any diminution in value at all; and **conversion** protects title to chattels against actions which are actually *inconsistent with* the claimant's rights (most particularly, where the defendant *treats the chattel as their own*). When comparing these four actions, one must bear in mind the different property interests protected *and* the difference this variation may make to the remedies awarded.

2.4 The Structure of This Book

There are different ways of structuring the law of tort. This text follows a broad progression from the torts which require intention; through those which require carelessness or other unreasonableness; to those which are broadly strict (requiring no fault). It is not claimed that this direction is entirely without anomalies or

p. 13 controversies. 'Intention' appears to be ↵ the very antithesis of strict liability (liability irrespective of

fault) when it takes the form of intentional causation of harm (as in the tort of deceit); yet elements of intention and strict liability combine in trespass to the person: physical contact must be intentional; but the wrongfulness of that contact may even be unknown to the defendant. The approach is selected because it offers the best chance of understanding the broad spectrum of the wrongs involved in the law of tort, whilst not oversimplifying the rights and interests that various torts protect. In other words, this approach has been chosen as a means of organizing and indeed revealing the diversity of torts.

There is also some essential material common to all torts. This material is included in Chapters 8, 9, and 10. The reason for presenting this material in the centre of the text, rather than leaving it to languish at the end as is more traditional, is that the issues are at least as important as the substantive rules of liability. The majority of undergraduate courses in tort law will be primarily concerned with the tort of negligence, although very few, if any, are restricted to negligence. Since no understanding of negligence is complete without considering issues concerning recoverable damages and potential remedies, contribution between parties, and vicarious liability, it is important that these issues should not be separated too far from the substantive principles of negligence. But these issues also have much broader application. To the extent that other torts raise different or distinctive issues concerning remedies, those issues are considered in appropriate chapters. This way of organizing the material is chosen in order to enliven and make more immediate the issues surrounding remedies, costs, limitation, and distribution of liability between different parties.

An obvious alternative to the present approach is to group torts according to protected interests. If done consistently, this would require certain torts, including negligence, to be broken down into different pieces. A 'protected interests' approach is particularly valuable if the goal is to set out the remedies available through tort law alongside other potential sources of remedies, protection, or compensation (industrial injuries schemes, social security benefits, insurance schemes, and so on).[18] For some years, that functional approach was in the ascendancy, whereas a new interest in the contours of private law as a whole has heralded a shift away from functional analysis. Although this text does not adopt a 'protected interests' approach, it is still important that some of the insights of such an approach should be retained. In particular, it should not be assumed that the *only* goal of tort law is to remedy wrongs perceived in terms of the relationship between two parties; or that the real-world *impact* of tort liability is unimportant.

3 Tort Law and Social Purpose

So far, we have discussed the shape of tort law in terms of its principles of liability and the approach taken to the interaction between parties. The idea that tort law might also have a 'function' outside remedying of wrongs is perhaps less fashionable than it once was. But the evidence is overwhelming that in some instances the law of tort is used in order to distribute losses and compensate injuries.

p. 14 **Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge: Cambridge University**

Press, 2013), 32

> … there have been many legal developments in the last eighty years or so which have been designed to facilitate the operation of the fault-based tort system of accident compensation. These include the system of compulsory third-party insurance to cover liability for road accidents, and of compulsory insurance to cover liability of employers to their employees. There is also a body called the Motor Insurers' Bureau (MIB) which is designed to fill the gap in the compulsory motor insurance system caused by failure of vehicle owners to insure in accordance with the legal requirements; in addition, the MIB accepts liability in some hit-and-run cases and in cases where the party at fault was insured but the insurer has become insolvent.
>
> The operation of tort law as a compensation mechanism has been expanded in various other ways by legislation. The Law Reform (Miscellaneous Provisions) Act 1934 allows actions to be brought against the estate of a deceased negligent person; the Law Reform (Contributory Negligence) Act 1945 changed the law to allow claimants to recover some damages despite having contributed by their own negligence to the injuries suffered; the Law Reform (Personal Injuries) Act 1948 abolished the doctrine of common employment and enabled employees to sue their employers where they suffered injury as a result of the negligence of a fellow-employee; and the Occupiers' Liability Acts of 1957 and 1984, among other things, simplified the law by making the occupier of premises liable for negligence.

The first part of this extract points out that legislators have in some of the 'core' areas of tort law aimed to provide a route to compensation through liability insurance; while the second points to a much broader set of statutory developments. As to the first of these, in the case of road traffic accidents (which currently make up around 80 per cent of personal injury claims), and in relation to claims against employers, liability insurance is compulsory. The following extract continues this theme, explaining that there is more to the observable desire to compensate victims of tort, than simply a legislative provision requiring insurance.[19]

R. Merkin and J. Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013), Chapter 9,

'Compulsory Liability Insurance', 256–7; by permission of Oxford University Press[20]

> Compulsory insurance necessarily represents a legislative choice. Generally speaking behind the choice is a decision to ensure (to one degree or another) that a person suffering harm receives indemnity or compensation. In the UK, the only existing instances of compulsory insurance by legislation (referring here to private rather than national insurance) relate to liabilities. The choice of compulsory liability insurance also amounts in some sense to choosing *liability*. Where liability is delivered through the law of tort and analogous regimes, with the choice of liability comes not only a reliance on breach of duty (defining the risks to be distributed), but also, unless it is adapted by legislation, a choice of the tort measure of damages.
>
> p. 15 ↵ The introduction of compulsory liability insurance, assuming that both liability and the tort measure of damages are to be retained, nevertheless brings with it further legislative choices. Apart from compulsion itself, will further legal resources be deployed to ensure that insurance *does* mean cover? In this respect, a first question surrounds policy defences. As a matter of ordinary insurance contract law, insurers may have one of many defences to a claim, including breach of the duty of utmost good faith, lack of coverage or failure by the assured to comply with policy terms, and the operation of these defences may remove the source of funds for compensation. An important question is whether legislation allows the insurers to rely upon their defences or whether it modifies rights under the policy so that the proceeds are payable to meet a third party claim even though they are not so available in respect of first party loss. Where this occurs, it is plainly a further step away from the idea that insurance relationships are 'fortuitous', and that they are a matter between assured and insurer, not concerning the tort claimant. It is a step which has clearly been taken in the UK. As will be seen below, compulsory policies issued in respect of road traffic losses and injury at work both modify policy terms. Partial relief is also given under the Third Parties (Rights against Insurers) Acts 1930 and 2010 to a claimant who brings an action against an insolvent assured when the assured has failed to comply with his post-claim obligations under the policy. The latter point is not confined to compulsory insurance. This in turn illustrates a general point, that legal actors and policy-makers have learned progressively through the interactions of tort and insurance against the backdrop of evolving social policy. Component parts of different solutions—themselves sometimes pragmatically oriented to grasping the advantages of existing market responses—have been translated to and absorbed by new contexts, increasing the cross-fertilisation to which we have already referred.

In their book, Merkin and Steele explore a number of dimensions of the relationship between tort and insurance,[21] emphasizing the complexity of this interaction and citing the suggestion by Baker and Siegelman that 'little or nothing makes sense in Tort law except in the light of liability insurance'.[22] However, the answer to the question of *how* liability insurance affects tort will vary from one context to another and its implications are complex.

4 Two Current Challenges

Here we consider two continuing challenges to the law of tort. Both illustrate that political controversy and questions of public interest surround the operation of private law, though in quite different ways.[23]

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4.1 'Compensation Culture' and The Costs of Tort

Tort law has been the subject of political debate over a number of years. Part of this debate has invoked the spectre of a 'compensation culture'. This has shaded more recently into 'rights culture', which is treated as putting the individual (and not always deserving individuals) above the collective interest: we will see recent evidence of this in 4.2 below. Critics of the (supposed) 'compensation culture' suggest that there is an unhealthy preoccupation with seeking compensation for any loss, insult, or disappointment that is suffered; and sometimes that this is tending to sap the moral fibre of the nation, to disrupt the provision of public services, and to deny individuals and the economy the benefit of healthy risk-taking. More prosaically, the 'compensation culture' is said to be driving up the costs of tort to an unhealthy and unnecessary level, as well as creating undesirable incentives to avoid risk.

The rise of a 'compensation culture' rhetoric is often associated with a particular idea of individual responsibility, emphasizing that victims of accidents do, to some extent, have responsibility for their own safety, and perhaps also for making financial provision in relation to the risks they face. That debate continues across national boundaries. In Australia, a 'crisis' was experienced in the availability and cost of liability insurance, and was itself precipitated by the fall of a major insurer, HIH. Whether tort law, or other factors, were to blame for this state of affairs is debatable. A Committee was set up and instructed to consider how best to restrict tort liability in order to avoid such problems in the future. The end result has been extensive legislative adjustment to the principles of tort law in Australia.[24]

UK tort law has not endured quite the same pressure for thorough and extensive change to the principles of liability in order to stem the tort tide, although there are some important exceptions (Chapters 14; 17). But the idea of a pervasive 'compensation culture' is still used—by government ministers, amongst others—despite empirical reviews suggesting that the overall level of claiming has not, in fact, been rising in the short or long term.[25] It might be said, however, that concerns surrounding the cost and impact of tort have become more specific. For example, there has been a particular focus in recent years on the need to control the costs of litigation; on the costs of health and safety duties for businesses; and on the rising costs of motor insurance.

On this last theme, in the article extracted below, Richard Lewis and Annette Morris explain that increased claiming is indeed a hallmark of one particular category of personal injury claims, namely road traffic ('RTA')[26] claims; but emphasize that this is an exceptional case. In this particular category, a compulsory liability insurance regime facilitates recovery where liability is established. The point made by Lewis and Morris is that the regime also facilitates and encourages claiming.

p. 17

R. Lewis and A. Morris, 'Tort Law Culture in the United Kingdom', (2012) 3 Journal of European Tort Law,

230, 263

> Overall, … The process of encouraging, processing and resolving RTA claims is heavily institutionalized when compared to other types of claim. In addition, given their financial attractiveness, RTA claims have become more of a commodity. Whilst the impact of advertising is unclear, CFAs and payments for referral have certainly played a role in increasing our propensity to claim after an RTA. A circular process has occurred whereby demand has driven supply and supply has driven demand. It is clear that our propensity to claim compensation depends as much on institutionalized ways of handling different types of dispute as upon broader cultural propensities to litigate. Practices of claiming encouraged by this institutionalization inevitably, however, feed into and become embedded in our wider culture. With claiming after an RTA becoming increasingly common, the experiences of other people may encourage us to claim because we feel they are no more deserving. We may naturally think about compensation after an accident and even come to expect it. The overall result is that a stronger 'cultural link' has developed between RTAs, injury and compensation.

The nature of the specific RTA claims environment has produced an increase in claims, some of them unmeritorious and fraudulent, but this is at odds with the general picture in relation to tort.

Costs

Focus has shifted in recent years to the costs and burdens of tort litigation. The need to protect potential defendants from the threat of litigation is a common theme, whether potential defendants are public authorities (where the perception is that public services may be put at risk by tort), enterprises (where the threat is of red tape as much as excessive liability), insurers (where the fear is of inflated insurance premiums), or publishers of statements of one sort or another (where the fear is of disincentives to publication). There has been considerable legislative activity aimed at curtailing the costs of litigation, and the perceived negative impact of tort claiming. The most notable change is a wide-ranging overhaul of the costs regime applicable to civil litigation, with implications at least as significant for the operation of the law of tort as any change to the principles of liability or of damages. These changes are reviewed in Chapter 9. The Justice Secretary directly linked these changes with the assault on 'compensation culture', announcing the reforms with the comment that: 'We are turning the tide on the compensation culture. It's pushing up the cost of insurance, and making it more expensive to drive a car or organize an event. It's time the whole system was rebalanced.'[27]

Legislative Changes to Liability

There have also been specific, but important legislative changes designed to moderate the impact of the law of tort by adjusting specific principles of liability. The Defamation Act 2013 includes both substantive and procedural elements, and is designed to moderate the threat of defamation actions and to 'rebalance' the law
p. 18 of defamation. This move has attracted ↵ all-party support in Parliament,[28] and would perhaps have been undertaken quite independently of 'compensation culture' debate. Nevertheless, the idea that the threat of litigation may have adverse effects is in harmony with the prevailing political outlook on the law of tort more generally. In a different context, further significant change is effected by section 69 of the Enterprise and

Regulatory Reform Act 2013, part of the war on 'red tape' and a striking reversal of well over a century of development in strict liability of employers to their employees.[29] This provision was passed with relatively little consultation and has not attracted much comment by comparison with reform of defamation. Both are considered in depth in later chapters. Also notable is the Social Action, Responsibility and Heroism Act 2015, extracted in Chapter 3. This statute does not seek to change the general framework for determining whether there has been a breach of duty, but aims to ensure that the merits of deserving defendants' actions will be taken into account. The goal is to avoid the perceived deterrent effect of potential tort liability.

The overriding impression is that policy-makers are currently either defendant-centred, or at least wary of the possible impact on defendants and on society not only of tort liability, but of tort litigation. While tort liability may be a tool to be deployed in the public interest, it is also perceived as a danger. In the courts too, a number of cases have indicated a renewed culture of restraint in the law of tort.[30] In such a context, whether or not the label 'compensation culture' eventually begins to fade away, the concerns that lie behind it seem to have achieved a secure foothold at the level of legal policy, both legislative and judicial.

4.2 The Human Rights Act 1998

The Human Rights Act 1998 (HRA) significantly changed the contours of English law. It gave a new status to the rights guaranteed by the European Convention on Human Rights, so that they are not solely accessible by bringing a case against the state itself in an international court. Rather, they play a role in domestic litigation in domestic courts. Naturally, the influence of the HRA is far broader than the law of tort, with which we are concerned here. So far as tort law is concerned, however, it is significant that the HRA makes violation of applicable rights by a public authority actionable in domestic courts (rather than merely in Strasbourg); it therefore makes it possible to pursue a public authority, such as a Chief Constable or local education authority, directly in relation to violations of such rights. It also obliges all public authorities to respect the specified Convention rights, and defines 'public authorities' in such a way as to include courts and tribunals. The impact on private law (including tort) has been complex.

Human Rights Act 1998 (c. 42)

The Convention Rights

1. (1) In this Act the Convention rights means the rights and fundamental freedoms set out in

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

p. 19 ↵ as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1. …

Interpretation of Convention Rights

2. (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention, decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

…

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Acts of Public Authorities

6. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section public authority includes

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) Parliament does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

Proceedings

7. (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

p. 20 ↵ but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

...

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) 'legal proceedings' includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

Judicial Remedies

8. (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

...

(6) In this section—

(i) 'court' includes a tribunal;

(ii) 'damages' means damages for an unlawful act of a public authority; and

(iii) 'unlawful' means unlawful under section 6(1).

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... Freedom of Expression

12. (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> any relevant privacy code.
>
> (5) In this section—
>
> (i) 'court' includes a tribunal; and
>
> (ii) 'relief' includes any remedy or order (other than in criminal proceedings).

We have not extracted the relevant Convention rights here. They are extracted in later chapters as and when they are appropriate to particular issues.

Actions Under Sections 7 and 8

The HRA creates free-standing rights of action in cases where a Convention right has been violated *by a public authority* (section 7).[31] A 'public authority' may be a 'person certain of whose functions are functions of a public nature' (section 6(3)(b)),[32] a possibility captured in the idea of 'hybrid' public authorities (which are 'public' when performing some functions, but not otherwise). A civil remedy may be available in an action under section 7, by virtue of section 8. An action under section 7 is not an action in tort. There is a shorter limitation period, of one year,[33] although this may be extended if the court thinks it equitable to do so. Further, the damages remedy is subject to restrictions which are not present in the law of tort. Courts will consider whether damages are necessary and appropriate, and must consider the principles applied by the European Court of Human Rights when determining both *whether* to grant damages, and what the *quantum* of those damages should be (section 8(4)). In some circumstances, only a declaration may be awarded; or damages may be set at a relatively low level. On the other hand, it is significant that the HRA may offer a remedy in circumstances where tort will not.

p. 22 ↵

The Influence on Tort Law

Here we identify three broad questions.

(a) Horizontal Effect

When the statute was enacted, the chief controversy among private lawyers was whether it would have 'horizontal effect'. Clearly, the statute is intended to have 'vertical effect', creating new actions and remedies against public authorities. But is it intended to affect private law in cases where the defendant is not a 'public authority'?

One potential trigger for such an effect is section 6. Section 6 specifies that 'it is unlawful for a public authority to act in a way which is inconsistent with a Convention right'. By section 6(3), 'public authority' *includes* 'a court or tribunal'. Therefore, it is unlawful for a court or tribunal to act inconsistently with a Convention right. There has been considerable discussion of what this should be taken to mean for the future development of private law.

Widely divergent views were initially expressed as to whether section 6 would give 'horizontal effect' to Convention rights. Sir William Wade argued that the Convention rights would have *direct* horizontal effect after the HRA, becoming applicable even in disputes between private parties ('Horizons of Horizontality' (2000) 116 LQR 217, supported by J. Morgan, 'Questioning the "True Effect" of the Human Rights Act' (2002) 22 LS 259). Others denied that the rights would be directly applicable in this way, but conceded that the Convention rights would have 'indirect' horizontal effect.

A 'weak' interpretation of indirect horizontal effect would mean that courts would be in some way influenced by the Convention rights in their interpretation of the law. (See, for example, H. Beale and N. Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law', in Friedmann and Barak-Erez, *Human Rights in Private Law* (Hart Publishing, 2001).) A stronger interpretation of indirect horizontal effect holds that courts will consider themselves under a duty to interpret, apply, and develop the common law in such a way as to ensure that the Convention rights are protected. This 'strong' interpretation of indirect horizontal effect would suggest that existing common law doctrines would come to be transformed.

After twenty years, what does experience suggest about the horizontal effect of the Convention rights in tort law in particular?

In Chapter 15, we will explain that the House of Lords has indeed denied that *new causes of action will be recognized* as a result of the HRA (*Campbell v MGN* [2004] 2 AC 457). But we will also note that that case endorsed change in the rules of an existing cause of action (following the Court of Appeal in *Douglas v Hello!* [2001] QB 967) to protect 'privacy' in its own right. This was certainly influenced by the requirements of Article 8 ECHR. In the law of defamation, too, the terms of debate have changed considerably since enactment
p. 23 of the statute, and both reputation and speech are recognized to be associated with protected ↵ rights. Nevertheless, the transformation to the law of privacy wrought in the name of the Convention rights does not suggest general, theoretical acceptance of a 'strong' form of horizontality.[34] The developments in this area of the law have not been replicated elsewhere.

(b) Tort Developing New Rights Protection?

The availability of an action under the Human Rights Act has on a number of occasions influenced the development of tort law in 'vertical' cases. However, the existence of a Human Rights Act remedy has on some important occasions been considered a reason *not* to develop the common law.

An early case is *JD v East Berkshire NHS Trust* [2004] 2 WLR 58, where the Court of Appeal decided not to follow an earlier decision of the House of Lords (*X v Bedfordshire* [1995] 2 AC 633). Since an action would lie in future under section 7 of the HRA, the policy issues which had led the House of Lords to decide that no duty of care was owed *in tort* in respect of the claim were considered to be no longer tenable. It is highly unlikely that such a move would be made by the Court of Appeal today, though the correctness in principle of the outcome in *D*

has been accepted by the Supreme Court (*Poole v GN* [2019] UKSC 25, Chapter 5.3). On the other hand, the Court of Appeal has on one recent occasion suggested that it would have been prepared to depart from a decision of the Supreme Court and adopt a *more recent* interpretation of the Convention delivered by the Strasbourg Court, on the basis that the Supreme Court would of course follow Strasbourg where interpretation of the Convention was concerned.[35] This, however, was not a route it felt compelled to take, because the Supreme Court's interpretation was not considered inconsistent with Strasbourg decisions. (Ironically, the Supreme Court itself on appeal disagreed with this last point, and reversed its own earlier position (and therefore the Court of Appeal)). The episode underlines that the power of the Convention rights—here, their power to affect the operation of precedent—– has been unpredictable. These decisions have contributed to concern at a political level with the impact on public services.

However, in a number of important cases, courts have taken the view that tort law ought *not* to develop in order to reflect Convention rights, since sections 7 and 8 provide a more appropriate and proportionate means of vindicating such rights in the manner envisaged by the statute. This view was articulated by the House of Lords in *Watkins v Home Office* [2006] UKHL 17, and reiterated by Lord Brown in *Chief Constable of Hertfordshire Police v Van Colle; Smith v Chief Constable of Sussex Police* [2008] UKHL 50, at [138]. In *Michael v Chief Constable of South Wales* [2015] UKSC 2, a claim for compensation under the HRA proceeded to trial in a case where no duty of care was recognized. In all of these cases, the House of Lords and Supreme Court have emphasized the difference in *remedies* between these actions, proposing that they reflect the different purposes of the actions themselves. That difference, however, is very difficult to establish with precision, since tort remedies may very well be said to 'vindicate rights'.[36] The existence of new remedies under the HRA ↵ focuses attention on the extent to which tort protects and vindicates rights, either as an inherent part of, or in addition to its more widely recognized function in redressing losses.[37]

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(c) Tort-like Remedies Against Public Authorities under the HRA?

If tort as a whole is not to be adjusted to protect the Convention rights, to what extent does the HRA nevertheless allow for distinctly 'tort-like' remedies, in circumstances where tort does not? There are some areas where remedies for breach of Convention rights on the part of public authorities have been developed in such a way as to resemble tort actions.

The most evident instance concerns positive duties to protect rights to life under Article 2. More than one positive duty under Article 2 has been recognized. We are most concerned here not with the broad 'framework' duty on states to protect citizens (from violent crime, for example), but with an *operational* duty, which resembles the tort of negligence, requiring steps to be taken to protect particular individuals from imminent danger. However, remedies are available to a wider range of parties than would be the case in tort, because a claimant need only show they are a 'victim' of a rights violation. Remedies may also be available in a broader range of circumstances, for example, where courts have decided *not* to recognize tort remedies for policy reasons.[38] The implication is that restraints imposed on tort law may be 'circumvented'. The operational duty has been referred to as creating what is essentially a tort remedy, emanating not from the domestic courts, but from Strasbourg jurisprudence.[39]

In two significant cases, the UK Supreme Court afforded an HRA remedy, resembling tort, in circumstances where the Strasbourg court had not ruled that a remedy should be available.[40] These cases are among those criticized by the Government's 2021 Consultation on the Human Rights Act.

Reform?

In December 2021, the Government published its Consultation on *Human Rights Act Reform—A Modern Bill of Rights.* The case for reform is itemized in the summary accompanying Chapter 3, and this gives a flavour of the criticisms aimed at the developments above:

Chapter 3: Summary

> The government wants to strengthen the UK's long tradition of protecting human rights. It supports the fundamental rights set out in the Convention but believes that the framework for the application of human rights has proved flawed. In particular, we have seen:
>
> - the growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest;
> - the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline;
> - public protection put at risk by the exponential expansion of rights; and
> - public policy priorities and decisions affecting public expenditure shift from Parliament to the courts, creating a democratic deficit.

p. 25

These criticisms are much broader than the law of tort and associated remedies. Nevertheless, some of the issues surrounding tort law and tort-like remedies identified by the authors along these lines will seem familiar already, as the idea of 'rights culture' has much in common with 'compensation culture', explored above. The general argument is that the rights of individuals are being applied in a way which is contrary to the public's interest and perhaps contrary to democratic mandates. Rights are getting in the way of public services and unsettling decisions about distribution of resources.

***Human Rights Act Reform—A Modern Bill of Rights* (2021)**

> 107) The tendency of the 'living instrument' doctrine to expand the scope of rights, and effectively create new rights in some instances, can also be seen in other less notorious cases down the years. The wording of the Article 8 right to respect for private and family life has been stretched to give rise to human rights capable of stipulating environmental policy, for example, in the context of noise from airports, as we saw in Hatton.
>
> 108) Similarly, the Convention has enabled successful human rights claims to be brought both against the government for not acting quickly enough to remove children from abusive parents, and to allow parents to bring litigation against social services where they do intervene to protect children.

These paragraphs draw attention to decisions of the Strasbourg Court, rather than domestic courts. The decision in *Hatton* is mentioned in Chapter 11 (Nuisance); and the cases mentioned in para 108 relate to the House of Lords' decision in *X v Bedfordshire*, whose significance is debated in Chapter 5.3. However, the Consultation also points to the use made by domestic courts of s.2 (above), as well as a number of other developments. Where tort and tort-like liabilities are concerned, given the need to avoid both litigation and liability, there is a focus on resources.

> 113) First, the Human Rights Act contains a requirement for the UK courts to 'take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights' so far as it is relevant to the proceedings (section 2).
>
> 114) In practice, this led the UK courts to conclude that Parliament had instructed them to keep
p. 26 up with, and match, the Strasbourg Court's case law, rather than apply the Convention rights in a UK context, and within the margin of appreciation that the Convention allows. Whilst the courts have retreated a little from this maximalist position, the ambiguity of section 2 continues to give rise to legal uncertainty and promote an over-reliance on the Strasbourg case law, at the expense of promoting a home-grown jurisprudence tailored to the UK tradition of liberty and rights.

The decision in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2 (Chapter 5.3) is particularly described (at para [134]) as creating difficulties and uncertainties for those providing front line services; and the growth in positive obligations is identified as a source of cost and uncertainty. Accompanying this is a pervasive focus on the notion that the 'undeserving' tend to benefit from human rights, while public services suffer; and that the provision of resources should be a matter for elected representatives. Combining both of these features are the following observations about the impact of the ECtHR's decision in *Osman v UK* (Chapter 5.3)– that the police owe a duty to warn where there is an imminent threat to life:

> 149) Since those engaged in serious crime are disproportionately likely to face 'a real and immediate risk to life', they (rather than ordinary members of the public) are more likely to need the protective services required by the Osman ruling. One force reported that up to 75% of all Threat to Life notifications—required by the Osman ruling—may be issued to serious criminals or gangs. As a result of the straitjacket approach required by human rights case law, a substantial amount of police time is being diverted to provide witness protection to serious criminals. This inevitably displaces police resources allocated to protecting wider society and means that forces are constrained to act in a risk-averse way, taking measures to prevent costly litigation rather than spending resources on protecting the public.
>
> 150) The expansion of human rights law by courts, imposing overly prescriptive 'positive obligations' on police forces, and other frontline public services across the UK, risks skewing operational priorities and requiring public services to allocate scarce resources to contest and mitigate legal liability—when that public money would be better spent on protecting the public. We take a principled view that decisions on the allocation of resources should be determined by elected law-makers, and by operational professionals in possession of the full facts, who are answerable to the public.

It might be asked whether this criticism of use of 'Osman warnings' is really so sound. Is it necessarily true that those 'involved in serious criminality' should not be a priority when their lives are subject to imminent threat? What would it mean for those who are not involved in such criminality, if the positive duty were to be abandoned? Either there is to be discrimination between deserving and undeserving on the basis of a criterion that itself will be controversial to define, or the protection of the warning would be removed altogether. Not all will be convinced that 'operational professionals' have shown themselves to be entirely reliable decision-makers.

Concern is also expressed about *expansion* in the coverage of rights in terms of 'judicial legislation'.

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229) The Convention rights have been interpreted and incrementally expanded by the courts to require the state to discharge various 'positive obligations'. Whilst that content can make for common sense policy and guidance to operational decision-making, transforming it into individually judicially enforceable human rights has created significant problems, as described above.

230) The expansion of such 'positive obligations' has involved extending the Convention by judicial implication, which has created uncertainty as to the scope of the government's (and other public authorities') legal duties, thereby fettering the way it can make operational decisions, determine policy in the wider public interest, and allocate finite taxpayer's resources. The government is interested in looking at ways to restrict the circumstances in which these obligations are imposed by what can amount to judicial legislation.

231) We would like to consider how we can restrain the imposition and expansion of positive obligations, allowing the government and those delivering public services to take appropriate decisions for everyone in society, in order to avoid such decisions and priorities becoming distorted by the outcomes of individual litigation.

The extra-territorial impact of the Human Right Act, developed in cases such as *Al-Skeini v UK* (55721/07) and *Smith v Ministry of Defence* [2013] UKSC 41 (Chapter 5.3), is also criticized.

Equally far-reaching for the law of tort, should it translate into changes to the law, are the observations about freedom of expression. As we will see in Part VI of this book, the law relating to defamation and the action for misuse of private information depend on balancing freedom of expression against the protection of reputation and privacy, with the balance effected in different ways in these different areas of law. The Consultation seems to propose a significant reorientation. The action for misuse of private information currently proceeds on the basis that there is no priority between the interests in expression, and privacy, while the law of defamation incorporates a patchwork of protections for expression which make it hard to say whether there is in any sense a formal 'priority' between the interests in reputation and expression. The Consultation marks a break from this, in that it suggests that consideration should be given to priority for freedom of expression.

215) The government would also like the Bill of Rights to provide more general guidance on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations. The government does not believe such principles should be merely left to the courts to develop. Instead, it believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament. We are considering whether we can draw any lessons or guidance from other strong models of protection for free speech such as those found in the United States, South Africa or other countries.

Until this point, Parliament and the courts have appeared to work together to develop the relevant balance, particularly in the law of defamation, so that a new mistrust of the courts expressed in this paragraph may be significant.

p. 28 ↵ Overall, some general issues relating to the Consultation document, so far as tort and tort-like liabilities are concerned, may be pointed out as follows.

First, the Consultation is heavily dominated by a concern with 'clarity', and is highly critical of rights that are developing or expanding. There is a clear wish to define rights so that they do not escalate or expand. It might be asked whether 'rights' could ever be susceptible to clear statement, or could ever be anything other than a 'living tree'. How can a single statement be so clear and enduring as to allow of no expansion? And would this be genuinely desirable given expanding ways of interfering with individual interest?

Second, the Consultation promotes the idea of separation of powers as a reason why courts should not set out obligations—including positive obligations—which are not clear and which might conflict with the solutions adopted by legislative or other democratic means. The point is made that 'all interests' are considered (and all voices heard) in such democratic decision-making. Not everybody will be convinced by this portrayal of the democratic process and particularly its ability to weigh up the likely harm to the rights of those who are most marginalized, or most at risk.

Third, there is a heavy emphasis (as will be seen above) on 'responsibility', and a strong sense that those who have acted 'irresponsibly' do not deserve protection. Many will be unconvinced, or even troubled, by this division into the deserving and undeserving of protection. How will these distinctions be drawn? And is it acceptable to limit certain rights—those that are not considered truly 'fundamental'—to those whose behaviour is judged acceptable?

5 Conclusions

i. Tort law is a diverse category, encompassing a number of different torts. This chapter has 'mapped' the range of torts according to the interests that they protect; whether they require damage or are actionable 'per se', and what form of 'wrongdoing' they require. Torts in this book are loosely ordered around the nature of wrongdoing or standard of liability, from 'intentional' torts, through negligence liabilities, to stricter liabilities. Each of these categories contains quite a diversity of causes of action, with their own purpose and logic. The temptation to see negligence as 'the' modern law of tort should not lead us to neglect other significant areas of liability. Indeed, in each new edition, some of the most important developments in the law do not take place within the realm of negligence at all. Indeed, some of them are concerned not with substantive legal principles, but with process.

ii. We have also noted two contemporary challenges for the law of tort, both of which have influenced the shape of the subject. First, there has been growing political concern with the economic burden of the law of tort, both in relation to liabilities, and in relation to the cost of the process itself. These fears are sometimes encapsulated in the notion of 'compensation culture', a notion which also suggests that tort law may become over-protective, and that individuals should be less quick to blame others. There is much dispute over whether compensation culture really exists; but the costs of tort litigation are

undoubtedly real. For the most part, UK courts have effectively confined the growth of tort law, and wide-ranging 'tort reform' has been unnecessary. The costs regime applicable to civil litigation has, however, been the subject of significant reform.

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iii. The second challenge is the embedding of 'Convention rights' in domestic law through the Human Rights Act 1998. This raised a multifaceted challenge for the law of tort, and unsurprisingly, the judicial response has not been uniform. On the whole, the early case law saw a greater willingness to change the common law to reflect the Convention rights, while later tort cases have been more circumspect. But by no means is this a consistent pattern. When interpreting the HRA itself, the courts have shown themselves willing to recognize and indeed expand the range of 'tort-like' liabilities to protect Convention rights. A Government Consultation in 2021 identifies this judicial expansion as one of the 'adverse' effects of the Human Rights Act. Among a range of other potentially significant impacts on the law of tort, it seeks ways of limiting any future expansion, reducing the impact on public services and finances and steering decision-making away from the courts to the extent it affects public resources.

Further Reading

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Notes

[1] Private International Law (Miscellaneous Provisions) Act 1995: see *Douglas v Hello! (No 3)* [2006] QB 125 (Chapter 14).

[2] We have omitted a lengthy footnote here which contrasts Cane’s analysis of correlativity *between the parties* with a different and more challenging idea—expounded by Ernest Weinrib in *The Idea of Private Law* (Harvard University Press, 1995)—to the effect that rights and obligations are *themselves* ‘correlative’ (an obligation is inherent in the existence of the right).

[3] The torts in question are negligence, the action in *Rylands v Fletcher*, and conversion (respectively).

[4] As we will see, *which* risks are placed with the accumulator in such cases have been steadily reduced, so that common law does not use this logic very often (Chapter 12).

[5] See, for example, the discussion of limitation periods in relation to trespass to the person, in Chapters 2 and 8 trespass generally is a breach of duty, but does not require fault.

[6] A *liability insurer* agrees to indemnify the insured party for civil liability that they may incur to others. A *first party insurer* agrees to indemnify the insured party for losses they suffer directly, not through liability to others.

[7] Part 3, Constitutional Reform Act 2005. The aim was to create a clear and secure division between the legislative and judicial branches. Previously, the Lord Chancellor has been a political appointment who could nevertheless sit as a judge of the House of Lords, for example. For debate, prior to implementation of the change, see the special edition of *Legal Studies* edited by Derek Morgan, *Constitutional Innovation: the creation of a Supreme Court for the United Kingdom* (Butterworth, 2004).

[8] B. Rudden, ‘Torticles’ (1991–2) 6/7 Tulane Civil Law Forum 105.

[9] There may be no recent case where a claimant has been awarded damages in this tort, and where they would not have secured damages in some other tort. Yet it is clear that claimants continue to assert misfeasance claims, and it is possible that this influences settlements. In *Amin v Imran Khan & Partners* [2011] EWHC 2958 (QB), a court accepted that solicitors’ failure to add a claim for misfeasance amounted to actionable negligence in the circumstances, as it was likely to have weakened the claimants’ bargaining position.

[10] *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another* [2013] UKPC 17, an appeal from the Cayman Islands; *Willers v Joyce* [2016] UKSC 43; [2016] 3 WLR 477. The issues are discussed in Chapter 2, Section 8.

[11] It is sometimes said that the argument on the basis of different torts should no longer happen since we have done away with the 'forms of action'. But rather the reverse is true: since claimants no longer have to choose the right procedure ('form'), they are free to argue the substantive merits in alternative ways ('cause').

[12] [2008] UKHL 25; (2008) 2 WLR 975. See further Chapter 2, Section 2.

[13] This tort has been expanded to embrace civil process, as well as criminal: *Crawford Adjusters v Sagicor* [2013] UKPC 17; *Willers v Joyce* [2016] UKSC 43.

[14] Although there is a new statutory requirement for 'serious harm', the Supreme Court has clarified that this is harm to reputation itself, and does not introduce a new 'material damage' requirement that would change the basis of the tort: Chapter 14.

[15] Occupiers' liability may be described as a special case of negligence where the duty relates specifically to *keeping premises reasonably safe*, rather than (more generally) acting in a reasonable way.

[16] The part of this book dealing with negligence is also the longest; but many of the most actively developing areas lie in other torts. For example, major changes have occurred across the diverse range of 'intentional torts' since the first edition in 2007 (see Chapter 2).

[17] See Chapter 5, which is entirely concerned with application of the 'duty of care' idea—and is by far the longest chapter in this book.

[18] The leading work in this tradition is *Atiyah's Accidents, Compensation and the Law*, now in its eighth edition, which is extracted in Section 3.

[19] The interaction of different factors in shaping tort claiming is elaborated in the next extracted source.

[20] Footnote references have been removed from this extract.

[21] A sustained analysis of the interplay between tort law and liability insurance in the United States can be found in K. Abraham, *Liability Century: From the Progressive Era to 9/11* (Harvard University Press, 2008).

[22] T. Baker and P. Siegelman, 'The Law and Economics of Liability Insurance: A Theoretical and Empirical Review', citing T. Dobhanzy, 'Nothing in Science Makes Sense Except in the Light of Evolution' (1973) 35 *American Biology Teacher* 125. Examples are illegality; duty questions; vicarious liability; and the funding of litigation.

[23] Readers will notice that 'Brexit' has not been identified as a core challenge for the law of tort. The majority of the principles included in this book are derived from domestic cases and legislation which are therefore unaffected by exit from the EU. There are some specific areas of the law of tort which are, however, more affected by Brexit than others. In particular, the provisions of the Consumer Protection Act 1987, discussed in Chapter 16, were designed to give effect to an EU Directive. Also affected are certain actions for breach of a statutory duty (Chapter 17—depending on the duty in question).

[24] See B. MacDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Law in Australia' (2005) 27 Syd Law Rev 443; J. Goudkamp, 'Statutes and Tort Defences', in Arvind and Steele, *Tort Law and the Legislature: Common Law, Statute, and the Dynamics of Legal Change* (Hart, 2013).

[25] For a review of the response to the evidence and nature of the debate see A. Morris, 'The "Compensation Culture" and the Politics of Tort', in T. T. Arvind and J. Steele, *Tort Law and the Legislature* (Hart Publishing, 2013).

[26] The compulsory insurance regime is currently enshrined in the Road Traffic Act 1998. It originated in the Road Traffic Act 1930.

[27] <https://www.gov.uk/government/news/turning-the-tide-on-compensation-culture <*https://www.gov.uk/government/news/turning-the-tide-on-compensation-culture*>>.

[28] Defamation Act 2013, discussed in Chapter 13.

[29] Chapter 16.

[30] Prime examples are *Tomlinson v Congleton* (Chapter 13) and *Michael v Chief Constable of South Wales* (Chapter 5). Of course there are counter-examples where liability has expanded, notably *Willers v Joyce* (above) and *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] AC 1430 (Chapter 3).

[31] Some guidance on the meaning of 'public authority' is set out in section 6 itself. It is a much-analysed expression. In *YL v Birmingham City Council* [2007] UKHL 27, it was held not to include a private care home providing accommodation for people funded by a local authority (see M. Elliott, '"Public" and "Private": Defining the Scope of the Human Rights Act' (2007) 66 CLJ 485–7). The effect of this case has been reversed on its facts by statute (Health and Social Care Act 2008, s 145).

[32] For example, in *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 WLR 363, a registered housing association was held to be carrying out a public function when it terminated a tenancy. See S. Handy and J. Alder, 'Housing Associations: "Sufficient Public Flavour"' (2009) JHL 101.

[33] The limitation periods applicable in tort claims are explored in Chapter 8.

[34] G. Phillipson, 'Privacy: The Development of Breach of Confidence—The Clearest Case of Horizontal Effect?', in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011).

[35] *Smith v Ministry of Defence* [2013] UKSC 41. This related to Art 1 ECHR, on territorial extent of the Convention. Here there was no scope for a local 'margin of appreciation' in interpretation.

[36] For an analysis of tort in general in terms of the protection of primary rights, see R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007).

[37] See K. Barker, 'Private and Public: the Mixed Concept of Vindication in Torts', in Pitel, Neyers and Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013).

[38] For example, in order to protect police functions in investigating and suppressing crime: *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646.

[39] *Rabone v Pennine Care NHS Trust* ([2012] UKSC 2; [2012] 2 WLR 381, [121]).

[40] *Rabone* (n 37); *Smith v Ministry of Defence* (n 33). See further Chapter 5.

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