# Engineering Management & Society Tort (RevJ)

Ir C. S. HO

Tort Law Rev J

### What is a Tort?

- A word derived from an old French with the meaning of:
  - harm, wrong
- From Latin: Tortus which means "crooked" or "twisted".
- Longman Dictionary of Contemporary English:
  - Any wrongful act that can be dealt with by a civil action in a court of law.
- Longman Business English Dictionary:
  - An action that is wrong but not criminal and can be dealt with in a civil court of law.

### What is a **Tort?** (...cont...)

- Oxford Dictionary of Law:
  - A wrongful act or omission for which damages can be obtained in a civil court by the person wronged, other than a wrong that is only a breach of contract.
- Law Made Simple:
  - 'A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of trust or other merely equitable obligation.' (Salmond: Law of Torts)
- In English law, it denote certain Civil wrongs as distinct from criminal wrongs.
- Lord Dening: 'The province of tort is to allocate responsibility for injurious conduct.'

### What is a **Tort?** (...cont...)

- Wikipedia:
  - http://en.wikipedia.org/wiki/Tort
  - (Please also visit: <a href="http://en.wikipedia.org/wiki/Contract">http://en.wikipedia.org/wiki/Contract</a>)
  - Tort law is a body of law that addresses and provides remedies for civil wrongs not arising out of contract obligations.
  - A person who suffers legal damage may be able to use tort law to receive compensation from someone who is legally responsible or liable, for those injuries.
  - Generally speaking, tort law defines what constitutes a legal injury and establishes the circumstances under which one person may be held liable for another's injury.
  - Tort law spans intentional and negligent acts.

### **Types** of **Torts**

- Could be classified in several ways. One way is to classify by intention:
  - Intentional tort:
    - Tortfeasor intends the consequences of his/her act.
    - Burden of proof on the Claimant
    - Actionable even without damage
  - Negligence (i.e. carelessness; without intention):
    - Tortfeasor does not intend the consequences of his/her act, which however cause damage or injury to other.
    - Burden of proof on the Claimant
  - Strict Liability: (Rule of <u>Rylands v. Fletcher</u>)
    - Intention is not an issue, but the Defendant is held liable without the plaintiff proving the existence of fault.

### Tort vs. Contract

- Liability not based on agreement
- Obligations imposed by law
- Obligations owed to everyone whom the courts consider to be your 'neighbour'
  - Donoghue v. Stevenson (1932)
- Remedy is to compensate the injured victim for loss or harm:
  - Put the injured party back to the situation prior to the tortious act.
  - Whereas contractual remedy is to enforce the promises or rights or obligations of the parties — i.e. at position as if the contract was carried out.
  - In the form of unliquidated damages whereas contractual remedy could be liquidated or unliquidated damages.

### Tort vs. Criminal

- Purposes, Objectives and Function of Remedy/Sentence
  - In tort:
    - Compensation: To "bring" the injured party back to his/her "original state";
    - Deterrence: To warn the others not to do the same wrong
    - Corrective Justice: To rectify the injustice inflicted by one party to another
  - vis-a-vis
  - In criminal cases:
    - Retribution: to punish the offender on behalf of the victim
    - Deterrence
    - Denunciation: To show that the society abhor and not to tolerate the act
    - Rehabilitation
    - Incapacitation
    - Restoration



- Proceeding between parties
  - Tort: Between two or more Private Parties
  - Criminal: Between the State and Private Parties
- Burden of Proof:
  - Tort: Balance of the probabilities more likely than not: proved by the claimant
  - Criminal: Beyond a reasonable doubt: proved by the prosecution

### Law of Tort in HK

- No consolidated ordinance on Tort laws specifically
- But there are ordinances on specific area of liabilities:
  - OCCUPIERS LIABILITY ORDINANCE (OLO)
     Cap 314
- Common Law
  - Mostly established through cases laws
  - locally,
  - and
  - other common law jurisdiction, such as:
    - UK
    - Australia
    - Canada, US, etc.

### **Types** of Torts

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    - Intention is not an issue, but the Defendant is held liable without the plaintiff proving the existence of fault.

### **Tort of Negligence**

- One of the most important and common torts
- Origins found in trespass
- Developed and formulated in the 19th Century
- It now exists in its own right as a separate and independent tort
- Prior to 1932, there were numerous incidents of liability for negligence
- But there was no connecting principle formulated which could be regarded as the basis of all of them until 1883 when attempts were made in:
  - Heaven v. Pender (1883)
  - Donoghue v. Stevenson (1932)

## **Tort of Negligence**

- Meaning of "Negligence":
  - The legal meaning of "negligence" is not to be equated to the everyday meaning of this word.
- In everyday terms, negligence mean:
  - failure to pay attention to what ought to be done; or to take the required level of care.
  - Its everyday usage implies a state of mind (carelessness)



- Tort of negligence is concerned with:
  - The link between the defendant's behaviour and the risk that ought to have been foreseen.

## **Definition of Negligence**

- Carelessness
- Oxford Dictionary of Law:
  - Carelessness amounting to the culpable breach of a duty: failure to do or recognize something that a reasonable person (i.e. an average responsible citizen) would do or recognize, or doing something that a reasonable person would not do.

## **Definition of Negligence**

(...cont...)

- Tortfeasor's act or omission causes harm to person(s) and/or property
  - Misfeasance vs. Nonfeasance
- Due to Carelessness
- Which is considered, at law, unreasonable

# **Four Elements** of **Tortious Claim**

### Presence of Duty

- Defendant owes Duty of Care to the Claimant
- There is **Breach of duty** by the Defendant(s)
  - Defendant failed to meet the Standard of Care

### 3. Injury or damage occurred

- But note that: actionable in some situation even when there is no injury or damage suffered by the claimant(s)
- 4. Causual Link between the Breach and the Injury/damage; and such link is not Remote

# **Four Elements** of **Tortious Claim**

#### The **Claimant:**

- bears the Burden of Proof of all these 4 Elements;
- In this sequence
- Standard:
  - Balance of Probability

(1) The claimant was owed a duty of care



(2) There was a breach of that duty of care



(3) The claimant suffered damage as a result of that breach (causation)



(4) The damage suffered was not too remote



### 1<sup>st</sup> Step: Duty of Care

- This concerns the relationship between the defendant and claimant:
  - To prove D owes duty of care to C:
    - must prove that there is an obligation upon the D to take proper care to avoid causing injury to the C in all the circumstances of the case.
- A question of law (not a question of facts)



### 1<sup>st</sup> Step: Duty of Care

- Common Law:
  - 2 ways to establish duty of care:
    - Defendant and claimant are within one of the 'established duty situations';
    - outside of these situations, according to the principles developed by case law
- By Statute: e.g. Occupiers Liability Ordinance

# **Examples** of **Duty Situations**

- One road user to other road users;
- Employer to his employee;
- Teacher to his student;
- Doctor to his patient;
- Solicitor to client; ... etc.
- Question: What about a manufacturer to its consumer?
  - (see <u>Donoghue v Stevenson</u> in the following slides)

## 1<sup>st</sup> Step: Duty of Care Historical Development

- A question of law (not a question of facts)
- Duty situations prior to 1932
- 'Neighbour' principle
  - Donoghue v. Stevenson (1932)
- Two-stage Test
  - Home Office v. Doreset Yacht Co. Ltd. (1970)
  - Anns v. Merton LBC (1977)
- Three-stage Test
  - Murphy v. Brentwood DC (1990)



### Donoghue v. Stevenson (1932)

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee are likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

# Duty of Care (...cont....)

- Duty situations prior to 1932
- 'Neighbour' principle
  - Donoghue v. Stevenson (1932)
    - Liability depends on Reasonable foreseeability
    - Liable to your 'neighbours'
    - Very wide concept

## How to deal with Novel Cases

- Single Test: Donoghue v Stevenson
  - Apply the Neighbourhood Principle
  - Lord Macmillan, in Donoghue v Stevenson, said:
    - 'The categories of negligence are never closed.'
- When no comparable category exists, it can be said that the possible duty situation is a novel one
- High water mark led to large potential increase in claims

## **Two-stage Test**

- Two-stage Test: Anns v. Merton LBC (1977)
  - "First, one has to ask whether ... there is a sufficient relationship of proximity ... in which case a prima facie duty arises.
  - Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any policy considerations which ought to negative or to reduce or limit the scope of the duty."

## **Two-stage Test**

- Home Office v. Doreset Yacht Co. Ltd. (1970)
  - Neighbour principle
  - Unless some justifications or valid explanation
- Anns v. Merton LBC (1977)
  - Sufficient relationship of proximity
  - Unless Policy consideration to negative or to reduce or limit the scope of the duty
- Lord Wilberforce's
  - emphasis on prima facie duties
  - Proximity = foreseeability



## Home Office v Dorset Yacht Co [1970] AC 1004

### **FACTS:**

- The boys escaped from a weekend outing;
- Damaged the plaintiff's yacht.

### Question:

 Whether a duty of care was owed by the prison authorities in respect of the actions of youth offenders in custody.



### Anns v. Merton LBC (1977)

#### Facts

- The local authority (building authority) approved building plans for a block of flats
- Flats were built later that year
- By 1970 structural movement had begun to occur in the properties causing cracking to the walls and other damage, causing the properties to become dangerous.
- The claimant tenants sue the local Council in 1972 in negligence for its failure to properly inspect the building walls to ensure the foundations being laid to the correct depth shown in the plans.



### Anns v. Merton LBC (1977)

### Issues

- (1) Whether the council owed a duty of care to the claimants in respect of the incorrect depth of the foundations laid by the third-party builder.
- (2) Whether the claim was statute barred.

# Anns & Home Office Cases Raised Some Questions:

- Would I be Liable to:
  - A) Omission?
    - Answer: YES
      - "The act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened."

# Anns & Home Office Cases Raised Some Questions:

- Would I be Liable to:
  - B) Acts of third parties?
    - Answer: ??

# Would I be Liable to Acts of third parties?

- No general duty to act; and No general duty of care in relation to the acts of third parties:
  - Smith v Littlewoods Organisation Ltd [1987] AC 241 (HL)
- Unless there is a special relationship with that third party.
  - Example: <u>Stansbie v Troman</u> (1948] 2 KB 48 (CA), a decorator was entrusted with the key to a house that he was painting. He failed to secure the premises and the house was burgled.
  - Tucker LJ stated that a duty of care existed where:
  - [T]he act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened."
- Also: Vicarious Liability



## Home Office v Dorset Yacht Co [1970] AC 1004

### **HELD:**

The House of Lords held by a **majority** of four to one that there was a **duty of care** owed by the Home Office to the plaintiff.

# Home Office v Dorset Yacht Co [1970] AC 1004

#### **EFFECT & CONSEQUENCES:**

- It was recognized that in so doing, it was extending the Donoghue v Stevenson neighbour principle into circumstances which were novel for two reasons:
  - First: Because the wrong against the plaintiff had not been committed directly by the defendant (or his employees) but rather by a third party, the boys. Any liability of the defendant would then be based upon an omission that is, his failure to control the actions of the boys;
  - Second: The defendant was a public body and thereby subject to statutory and resource constraints.

# Duty of Care 3-stage Test

- Three-stage Test
  - Murphy v. Brentwood DC (1990)
    - Overruled Anns v. Merton (1977)
    - Adopt 'incremental' approach
  - Caparo Industries plc v. Dickman (1990)
    - 1. Reasonable foreseeability
    - 2. Proximity
    - 3. 'Fair, just and reasonable' to impose a duty



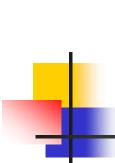
### Facts

- Caparo is a shareholders of a Company which was not running well.
- Caparo, after reading the report produced by Dickman, the Company's Auditor, decided to buy out, i.e. taking over the Company.
- However, it was later found that the results of the report had misrepresented the profits of the firm, in turn causing a loss for Caparo.
- Caparo sued Dickman for negligent misstatement.



### **Held** (by House of Lords):

- Reversed the decision of the Court of Appeal
- No duty of care had arisen in relation to existing or potential shareholders.
- The only duty of care the auditor`s owed was to the governance of the firm.



### Caparo Industries plc v. Dickman (1990)

#### Held

- To establish Duty of Care, three factors had to exist:
  - Proximity: Knowledge of who the report would have been communicated to and for what purposes it would have been used.
  - it is reasonable to impose a duty of care
  - There had to be knowledge that the shareholders or investors would rely on the report in regards to the transaction.

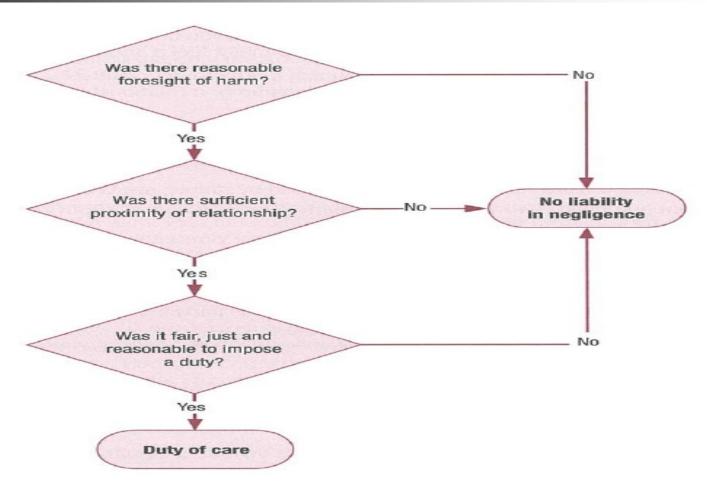
### Caparo Industries plc v. Dickman (1990)

- Furthermore, the judges noted that audit reports of the Company were regularly carried out which differs from reports carried out for specific purposes and for an identified audience.
- Thus, the accountants owed no duty to the entire public who might or might not rely on the report when making financial decisions.
- Moreover, appointing liability would open the floodgates to society.

### Current test for duty of care in a novel situations

- As laid down by Lord Bridge in the case of Caparo v Dickman (1990). According to Lord Bridge three criteria must be satisfied before a duty can be found:
- The damage must be foreseeable, and
- There must be proximity of relationship between the parties, and
- It must be 'fair, just and reasonable' for such a duty to exist. This third element is the one in which policy comes to be considered. Tort Law Rev 1

## **Current test** for **Duty of Care** in a **Novel Situations**



# **Statutory Law** of **Tort in HK**

- OCCUPIERS LIABILITY ORDINANCE (OLO) Cap 314
  - S.3 Extent of occupier's ordinary duty:
  - (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
  - (3) (a) an occupier must be prepared for children to be less careful than adults.

## OCCUPIERS LIABILITY ORDINANCE

- OCCUPIERS LIABILITY ORDINANCE
- S.3 Extent of occupier's ordinary duty:
  - (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-
    - (a) where damage is caused to a **visitor** by a **danger** of which he had been **warned** by the occupier, the warning is not to be treated without more as **absolving** the **occupier** from **liability**, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

## OCCUPIERS LIABILITY ORDINANCE (...cont...)

- OCCUPIERS LIABILITY ORDINANCEORDINANCE
- S.3 Extent of occupier's ordinary duty:
  - (4) In determining whether .... (for example)-
    - (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.



## Question: Is a **trespasser** a **visitor** being protected as well?

### Authority:

- Addie v Dumbreck [1929] AC 358
- British Railways Board v Herrington [1972] AC 877
- Wong Wing Ho v Housing Authority [2008]1
   HKLRD 352 (CACV 28/2007, 28/12/2007)

# Compare two authorities: Addie and Herrington

- In <u>Addie</u>, the House of Lords had held that an occupier of premises was only liable to a trespassing child who was injured by the occupier intentionally or recklessly.
- In *Herrington*, their Lordships held that:
  - a different approach was appropriate in the changed social and physical conditions since 1929.
  - They propounded the test of 'common humanity'
    - which involves an investigation of whether the occupier has done all that a humane person would have done to protect the safety of the trespasser.

## British Railways Board v Herrington [1972] AC 877

#### Facts:

- A six year old boy was electrocuted and suffered severe burns when he wandered from a play park onto a live railway line.
- The railway line was surrounded by a fence however, part of the fence had been pushed down and the gap created had been used frequently as a short cut to the park.
- The defendant was aware of the gap in the fence which had been present for several months, but had failed to do anything about it.



- Issue
- Could the trespasser recover as they were injured on the property which the defendant had control over?
- Argument of the Defendant:
  - Under existing authority of <u>Addie v Dumbreck</u>
     [1929] AC 358 no duty of care was owed to trespassers.

# British Railways Board v Herrington [1972] AC 877

#### Decision of House of Lords

Yes, claim successful. The Board was held liable

#### Reasoning

- The House of Lords was entitled to overrule itself after the 1966 practice statement, therefore this case overruled <u>R Addie & Sons v</u> <u>Dumbreck [1929]</u>.
- A humanitarian attitude is expected towards trespassers, however there is only a requirement to take reasonable steps to allow a trespasser to avoid risks. The claimant was a 6 year old child.
- The result would now be the same under the Occupiers' Liability
   Act 1984.

## **Duty of Care & Standard of Care of Occupiers to Visitors**

- The common law traditionally recognised that the occupier of premises owed a certain duty of care, in regard to the safety of the premises, to persons lawfully entering them.
- The standard of care varying according to the category into which the visitor fell.
- Persons entering by the occupier's 'invitation' or 'permission', express or implied, were divided into the two corresponding categories:
  - 'invitees' and 'licensees'
  - Broadly speaking, if the occupier had a material interest in the purpose for which the visitor came, the latter was an 'invitee'
  - if the occupier had no such interest, the visitor was a mere 'licensee'.



- The standard of proof with respect to occupiers is an objective one.
- The standard of proof that the invitee needed to satisfy with respect to the occupier is to demonstrate on the balance of probabilities that the occupier failed to take reasonable care to prevent injury from unusual dangers of which the occupier knew or ought to have known, and
- the duty to the licensee was usually said to include warning of concealed dangers or traps known to the occupier.

# 2nd Step: Breach of the Duty

- Professor Fleming in The Law of Torts.
  - 'conduct falling below the standard demanded for the protection of others against unreasonable risk of harm.'
- Occurs where:
  - The foreseeability of a defendant's unreasonable conduct outweighs
  - the burden upon the defendant to take precautions to prevent that harm, and,
  - the defendant's actual failure to take those precautions.
- A question of facts

### **Breach of the Duty**

(...cont...)

- Foreseeability:
  - Predictability on:
    - Scope of the risk
    - Likelihood of an event occuring
  - Factors affecting Scope of the risk:
    - Lawfulness of the activity
    - Gravity of injury
    - Usefulness of defendant's conduct
    - Possible justification for the risk

### **Breach of the Duty**

(...cont...)

### Foreseeability:

- Objective standard
  - 'you, the defendant, as a reasonable person, knew or should have know.'
- Determined before the occurrence of the event:
  - 'turning back the clock' [i.e. without hindsight 'wisdom'] to assess and identify the subject matters and issues
  - Eight factors to be considered

### **Breach of the Duty**

(...cont...)

- Foreseeability:
  - Eight factors to be considered:
    - Location
    - Activity
    - People
    - Human nature assumption expected behaviour of participants
    - Preparation
    - Historical data any prior knowledge of similar or identical occurrences in the past
    - Specific sensory data what human senses perceive
    - Common sense

### 3rd Step: Causation

#### Factual causation

- But-for test
- The usual method of establishing factual causation is the but-for test. The but for test inquires 'But for the defendant's act, would the harm have occurred?' A shoots and wounds B. We ask 'But for A's act, would B have been wounded?' The answer is 'No.' So we conclude that A caused the harm to B. The but for test is a test of necessity. It asks was it 'necessary' for the defendant's act to have occurred for the harm to have occurred.
- that causation is to be understood "as the man in the street" would: <u>Yorkshire Dale Steamship Co v Minister of War</u> <u>Transport</u> [1942] AC 691 (<u>HL</u>), or by supplementing it with "common sense"



### Legal causation

- Is the act blamable?
- Notwithstanding the fact that causation may be established in the above situations, the law often intervenes and says that it will nevertheless not hold the defendant liable because in the circumstances the defendant is not to be understood, in a legal sense, as having caused the loss.

### Causation

- Legal causation
  - Proximate Cause rule:
    - proximate cause is an event sufficiently related to an injury that the courts deem the event to be the cause of that injury.
    - The legally liable cause is the one closest to or most proximate to the injury. This is known as the. However, this situation can arise in strict liability situations.



- Consequences of a conduct are endless
- If a defendant was responsible for his actions ad infinitum, no activity could be practically performed.
- There must be cut-off point

## Remoteness of Damage (...cont...)

- Remote hence not liable: if a reasonable man would not have foreseen them.
  - The Wagon Mound (1967)
- Liable for ALL DIRECT consequences, whether a reasonable man would have foreseen them or not, no matter how unusual or unexpected.
  - Re Polemis and Furness, Withy & Co. Ltd. (1921)



- The defendant's vessel, The Wagon Mound, leaked furnace oil at a Wharf in Sydney Harbour due to the failure to close a valve.
- Some cotton debris became embroiled in the oil and sparks from some welding works ignited the oil.
- The fire spread rapidly causing destruction of some boats and the wharf.



## The Wagon Mound No.2 [1967] 1 AC 617 Privy Council

#### Held:

If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the defendant is liable in damages.



## Re Polemis & Furness Withy & Company Ltd. [1921] 3 KB 560

#### Held:

- There was no requirement that the damage was foreseeable. The defendant was liable for all the direct consequences of their action.
- NB This was overruled in Wagon Mound
   No 1

# The Wagon Mound No.2 [1967] 1 AC 617 Privy Council

#### Given that:

- Leakage has taken a considerable time and must had been noticed for a long while.
- Defendant ought to have known that it is possible to ignite this kind of oil on water.
- Ought to have known that this had in fact happened before, albeit rare.
- Does not mean that a reasonable man would dismiss such a risk from his mind and do nothing when it was so easy to prevent it.