





Essential Law of Torts for Insurance Professionals
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Learning objectives

- Recognise the key legal principles of the law of torts typically encountered by those involved in the claims chain in the insurance industry.
- Understand the practical application of the key principles of law and how case law can be used to persuade a third party or a customer/client.
- Identify areas of the law of torts that are particularly contentious and how to develop arguments when dealing with cases where these areas may arise.



Tort, insurance and public policy


- Tort law is relevant to your professional liability and also in respect of your involvement in assessing liability in claims.
- Winfield & Jolowicz categorise tort as the “dustbin of laws.”
- Public policy plays a major role in the development of this area of law, including the idea of distributive justice.
- The extent to which the availability of insurance should be taken into account has been addressed by the courts.



➤ Lord Griffiths in *Smith v Eric S Bush* (1990) observed:

“There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of loss.”


➤ Some commentators blame the so-called ‘compensation culture’ on such views.



Using law in correspondence


➤ Caution should be used when presenting law to lay customers/clients. Remember, they are not necessarily interested in how the law of torts has developed over the past hundred or so years. Quote case law only when absolutely necessary.

➤ When dealing with a professional third party, try to avoid just simply saying things like “the case of *Donoghue v Stevenson* applies.” What does this actually mean?




➤ Whether you are dealing with a lay client/customer or a professional third party, you need to structure how you present the law when you are advising and persuading.

➤ The CLEO method is taught to students of law when they are learning how to solve problem questions. It is a very useful structure to adopt when presenting case law in correspondence. You just need to grade the language, depending on whether you are writing to a lay person or a professional person.




Claim
Law
Evaluation
Outcome




Establishing liability in tort

1. There was a duty of care
2. That duty was breached
3. The claimant has suffered loss and damage



Negligence and the duty of care

- > Duty + breach + causation = negligence.
- > If there is no duty of care, the equation falls at the first hurdle.
- > There are very strong public policy components to the duty of care.
- > There is a three stage test for novel situations, as set out in *Caparo v Dickman*: 1) foreseeability 2) proximity 3) fairness, justice and reasonableness.
- > The duty of care generally must be established and then in respect of the specific person in question (*Haley v London Electricity Board*).



The neighbour principle

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be 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 in question.”

Donoghue v Stevenson [1932] AC 562, 580 (HL) per Lord Atkin



- A distinction needs to be drawn between acts and omissions. An omission is when some sort of damage arises from a lack of action.
- There is no general duty to be a good samaritan – when dealing with omissions, a duty of care is often absent.
- Lord Goff in *Smith v Littlewoods* outlined the general exceptions to the general rule. The most commonly encountered is when there is a relationship between the parties which creates an assumption of responsibility on behalf of the defendant for the safety of the claimant.
- Public bodies will likely be regulated by specific statutory provisions and these cases are particularly contentious.



Pure economic loss

- Unless it is connected to some sort of tangible damage, pure economic loss is generally not recoverable. It is left to contract law to regulate this area.
- The 'floodgates' argument often arises. *Weller & Co v Foot and Mouth Disease Research Institute*. The defendant had negligently allowed the spread of foot and mouth disease. The claimant was an auctioneer and was adversely affected. Only farmers whose livestock had become ill would be compensated.
- There is an exception if there is a "special relationship" and there has been a negligent misstatement. Statements may include advice and references (*Spring v Guardian Assurance*).
- *Hedley Byrne v Heller* established the following test to establish the duty of care:
 - A relied on B's skill and judgement or B's ability to make careful enquiry;
 - B knew, or ought reasonably to have known, A was relying on B;
 - it was reasonable in the circumstances for A to rely on B.



The standard of care

➤ *Blyth v Birmingham Waterworks* - the general standard of care is the standard of the "reasonable person". Not someone who is excessively cautious and not someone who is unusually risk-taking. It is an objective standard. The question is a hypothetical one - what would the reasonable person have done in this situation?

➤ A harsh example - *Nettleship v Weston*.

➤ There are two exceptions to the general standard - when someone is exercising a special skill and children (*Mullin v Richards*).



➤ All the circumstances of each case must be considered and there is often a balancing exercise between risk and costs.

➤ The questions to be asked are - 1) What was the appropriate standard and how ought that person to have behaved in the circumstances? 2) Was that standard reached?

➤ The professional standards are to be judged by the post that person holds but within that no further account is taken of experience - *Wilsher v Essex Area Health Authority*.

➤ In the context of professional skills, the test is the standard of the ordinary person exercising and professing to have that special skill (*Bolam v Friern Hospital Management Committee*).



➤ A person is not guilty of negligence if they have acted in accordance with a practice accepted as proper by a responsible body of men skilled in that particular art. Best practice and professional guidelines will be relevant.

➤ It is all about balancing risk:

Likelihood and severity of damage (cost of running the risk)


v

Ease of taking precautions (cost of avoiding the risk)



➤ *The Wagon Mound 2*

➤ The Compensation Act 2006 - section 1 suggests that when considering the standard of care, the court should have regard to how the imposition of safety requirements may impact upon 'desirable activities'.



Causation in fact


➤ Causation is divided into two parts – causation in fact and causation in law.

➤ In fact the test is the 'but for' test.

➤ If you can answer yes to the following question there is no causation in fact, whereas if you answer no, there is causation in fact:

But for the defendant's breach, would the damage still have occurred?

➤ *Barnett v Kensington & Chelsea Health Management Committee* – a doctor failed to examine the plaintiff who fell ill after drinking tea and he later died. It turned out to be arsenic poisoning. Think of the question above.




➤ Material contribution – *Bonnington Castings v Wardlaw*.

➤ Material increase in risk – *Fairchild v Glenhaven Funeral Services*.

➤ This was an asbestos claim involving many employers who had exposed the claimants to asbestos.

➤ There was a departure from the 'but for' test and the court used a test of 'material increase in risk'.

➤ Compensation Act 2006 – section 3 – joint and several liability for asbestos-related mesothelioma.



Causation in law

- The chain of causation may be broken by an intervening act – *novus actus interveniens*. This can be an act by the claimant (*McKew v Holland*), a third party (*The Oropesa / Knightley v Johns*) or a natural event (*Carslogie Steamship Co Ltd v Royal Norwegian Government*).
- Contributory negligence may be a more appropriate finding.
- Remoteness – what damage was reasonably foreseeable? *Jolly v Sutton* – the precise manner of how the damage is caused and the extent of damage need not be foreseeable. There will be a focus on the facts of each individual case.
- The 'thin skull' rule.



Employers' liability and vicarious liability

- Employers' liability relates to the employer's duty in respect to the physical safety of employees. Common law duties include:
 - to provide a competent workforce
 - to provide adequate plant and equipment
 - to provide a safe place of work
 - to provide a safe system of working
- The 'six pack'.
- Level of obligation - shall v reasonable practicability – *Stark v The Post Office / England v IBC Vehicles Limited*




Enterprise and Regulatory Reform Act 2013

- Section 69 amends the law so that there is no civil liability for breach of health and safety regulations made under the Health and Safety at Work Act. This applies to accidents from 1 October 2013 onwards.
- Regulations can be referred to as evidence of standards expected and breach may well be treated as prima facie evidence of negligence.
- The aim was to redress the balance between employer and employee.



➤ Workplace stress claims and the *Hatton v Sutherland* guidelines:

- no jobs are inherently stressful.
- stress is a subjective concept.
- what is 'reasonably foreseeable' must be determined in relation to the individual worker, rather than in a general sense.
- Issues to be considered in relation to foreseeability include the nature of the work, the work, and any signs from the employee.
- Unless there is evidence to the contrary, the employer is entitled to assume that the employee can cope with the normal stresses of the job.
- The precautions to be expected from the employer depend on the size of the operation, his resources, whether it is public or private sector, and the interests of other employees.




➤ Vicarious liability is a good example of distributive justice.

➤ The essential ingredients are as follows:

- a tort has been committed
- it was committed by an employee
- it was in the course of employment (but see later)

➤ For hired-out employees it is a question of control and the court may disregard any contractual agreements.




➤ *Century Insurance v Northern Ireland Transport Board*.

➤ *Lister v Hesley Hall* and the move towards "close connection".

➤ *Mohamud v WM Morrison Supermarkets* - "field of activities".

➤ There may be a possibility of an indemnity from the employee but there is the need for very strong evidence of wilful misconduct or collusion.



Product liability

- Common law product liability is based upon the law of negligence. Furthermore, it goes to the safety of the product and not value or quality, that is the realm of contract law.
- Statutory product liability is dealt with under the Consumer Protection Act 1987. This imposes strict liability.



- Section 1 defines products and includes component parts (substances, ships, vehicles and aircraft are included).
- Section 2 provides a hierarchy of potential defendants, as follows:
 - Primary liability rests with the producer.
 - The importer of the product into the EU.
 - An 'own brander' who holds out as a producer.
 - If any of the above can't be identified in a reasonable period, liability may rest on the supplier.
- Section 3 – the claimant must prove that there is a defect in the product and the safety of the product is not such as persons generally are entitled to expect. The following will be taken into account:



- the manner and purpose of marketing, the use of any marks, instructions and warnings.
- what might reasonably be expected to be done with the product; and
- the time at which the product was supplied.
- There are various defences under section 4 but perhaps the most commonly pleaded is that the defect did not exist at the time of supply.
- Section 5 – it is important to note that there will be no compensation for loss or damage to the product itself



Occupiers' liability

- Occupiers' Liability Act 1957
 - A duty of 'occupancy' rather than 'activity'. Source of damage must be related to the premises themselves.
 - Who the occupier is depends on the degree of control (section 1(2)). Normally who is best able to control entry.
 - The standard of care is in section 2(2):

"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."
 - Section 2(3)(a) – must be prepared for children to be less careful than adults.



- Section 2(3)(b) – person of a special calling will need to appreciate and guard against any special risks ordinarily incidental to it.
- Section 2(4)(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. Consider the difference between "Caution – slippery floor when wet" and "Do not pass".




- Section 2(4)(b) – there may be a defence if damage is attributable to a **competent** independent contractor.
- Remember section 1 of the Compensation Act 2006 and considering the impact on desirable activities (The Scout Association v Barnes – playing a game in the dark increased the risk and playing in the dark added nothing of value, so the duty was breached.)
- Section 2(1) – the occupier can restrict, modify or exclude liability but it is subject to the reasonableness test and the Unfair Contract Terms Act 1977.



➤ Occupiers' Liability Act 1984 and causing harm to trespassers. According to section 1(3), an occupier owes a duty when they:

- a) are aware of the danger or have reasonable grounds to believe that it exists; and
- b) they know or have reasonable grounds to believe that the trespasser is in the vicinity of the danger or that they may come into the vicinity; and
- c) the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.




➤ There is no reference to exclusion of liability under the 1984 Act but it must be assumed there is a right to exclude, otherwise a trespasser is treated more favourably than a lawful visitor.

➤ Section 1(4) - the duty is to take such care as is reasonable in all the circumstances.

➤ *Tomlinson v Congleton DC* - despite a sign saying "Dangerous water: no swimming", the 18 year old claimant dived into a lake on the defendant's property. The defendant had assessed the need for further deterrents steps but these had not been carried out. Section 1(3)(b) was satisfied. Section 1(3)(c) had not been satisfied because the danger arose more from the defendant's actions than the state of the lake, which was particularly shallow. Furthermore, the risk should have been obvious.

➤ For adults a warning notice may be adequate but for children it is likely to be necessary to take steps to prevent entry.



Remedies and defences

➤ There are three main remedies in tort:

- Self-help
- Injunction
- Damages (pecuniary and non-pecuniary)

➤ The main defences are as follows:


- Contributory negligence - Law Reform (Contributory Negligence) Act 1945 - apportionment of damages according to what the court considers is just and equitable. Causation must be proven.



➤ Volenti non fit injuria – there must be an agreement that was voluntarily made and with full knowledge of the risks (*Morris v Murray* – drunken pilots). Beware of exclusions or disclaimers (Unfair Contract Terms Act 1977).

➤ Illegality – very narrowly applied. *Ashton v Turner*, a case involving a claimant injured in a get away car after a burglary is a classic example.


➤ Limitation Act 1980 (discretion may be applied)



Over to you ...




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A practice scenario


Susan is a chartered surveyor and she prepared a structural report on a property that John was interested in buying. Susan's report concluded there was no structural issues. Based on that report, John purchased the property for £220,000. It transpired there was subsidence at the property and Susan should have highlighted this in her report. John now intends to sell the property because he doesn't want the hassle of repairs. The revised value of the property is £130,000. John makes a claim against Susan.

Susan contacts you and asks whether John can sue her because she heard from her friend that John can't claim for pure economic loss.

Advise Susan.



The claim by John is for pure economic loss and generally this is not recoverable in law. However, the law states that where there is a special relationship (surveyor/client) and someone has relied on your professional skill and judgement to their detriment, they may be able to recover damages for pure economic loss. In your case, John engaged you as a professional and he relied on your professional skill and judgement. You knew, or ought to have known, that John was relying on your advice and it was reasonable for him to do so. Unfortunately, the advice was not correct and he relied on this to his detriment. The outcome is that John will be able to pursue a claim for pure economic loss.



Thank you and please stay in touch



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