Introduction to tort

1.1 Introduction

Studying law opens doors in ways that other courses quite simply do not. While many people may single out the power and prestige of lawyers as the two most compelling reasons to read law, the truth is that knowledge of the law provides other benefits, even to those who will not eventually practice law or work in government. First, reading law teaches precision, both as a matter of analysis and as a matter of communication. Those who have graduated with a degree in law have learned to choose their words carefully and to look very closely at any piece of writing that is given to them. While these skills are obviously important to barristers and solicitors, they are also incredibly useful to people in business or public service. Second, those who have read law realize that it is a multifaceted thing—criminal law, for example, is different from employment law, which is different from international law. Every area of specialization has its own quirks, so much so that questions about ‘the law’ usually lead practising lawyers to counter with ‘what kind of law do you mean?’

Thus, student lawyers learn, from day one, that broad, sweeping generalizations about ‘the law’ are problematic. Instead, students are introduced to different areas of study, such as property law, contract law, and constitutional law, all of which makes intuitive sense. Property law deals with real property, i.e. land. Contract law deals with contract, meaning business agreements (students quickly learn that a contract need not be commercial in nature, but at least the concept of a contract is familiar). Constitutional law deals with overarching rights against the state and how the government conducts itself. Tort law, on the other hand, does not provide an easy or familiar way in, and few new students even know what a tort is before their first day of class. However, understanding tort is easier when you have a basic understanding of the social context in which this area of law is set. Therefore, this chapter will proceed as follows:

• Defining tort;
• Characteristics of a tort;
• The purpose of tort law;
• Principles of tort law;
• Policy and procedure;
• Factors affecting liability in tort;
• Motive and intent;
• Analysing torts; and
• Structure of the current text.

We will take each issue in turn.

1.2 Defining tort

Tort is a relatively young area of law and has only been in existence as a distinct area of study in the United Kingdom since 1860, when C.G. Addison’s Wrongs and Their Remedies: Being a Treatise on the Law of Torts appeared on the bookshelves for the first time. However, the idea that tort law existed as a cohesive body of law was not readily adopted, and scepticism about the validity of tort as a separate branch of law continued for quite some time. In fact, one of the leading commentators of the day had problems even defining the term 50 years after Addison on Torts was originally published.

Sir John C. Miles, et al., Digest of English Civil Law, Book II (1910)

No such definition of a tort can be offered. A tort, in English law, can only be defined in terms which really tell us nothing. A tort is a breach of a duty (other than a contractual or quasi-contractual duty) which gives rise to an action for damages. That is, obviously, a merely procedural definition of no value to the layman. The latter wants to know the nature of those breaches of duty which give rise to an action for damages. And the only that can be given to him is: ‘Read this and the preceding volume.’ To put it briefly, there is no English Law of Tort; there is merely an English Law of Torts, i.e., a list of acts and omissions which, in certain conditions, are actionable. Any attempt to generalize further, however interesting from a speculative standpoint, would be profoundly unsafe as a practical guide.

Experts in other common law jurisdictions had similar difficulties in classifying the types of wrongs that fell under the heading of tort.


The definition of a tort may be said to have baffled the text-book writers not so much on account of the inherent difficulty of the conception as because of the implication of the conception in questions of jurisdiction. It is a creation of the common law, a fact which rules out on the one side personal rights created by equity, and on the other, rights created by ecclesiastical or admiralty law. Further, it is usual to exclude from the definition most if not all of the rights and duties arising out of the family relation—that is, as regards the
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Immediate parties. Again, a tort is usually defined negatively in such terms as to distinguish it from breach of contract, and sometimes also from the breach of duties, vaguely described as quasi-contractual. Perhaps none of the text-books succeeds in introducing all of these limitations into its definition.

As it turns out, the word ‘tort’ derives from the Latin ‘tortus’ or ‘twisted’, and was once in common usage in English as a general synonym for ‘wrong’. Nowadays, the term exists only as a legal term meaning a civil wrong, other than a contractual wrong, for which an action in damages exist. Although the acts or omissions giving rise to certain torts—most obviously assault and battery—can resemble behaviour that leads to criminal charges being brought, the nature of the two cases are different. A civil action—including an action in tort—addresses the alleged wrongs visited upon one private individual or legal entity, such as a company, by another private individual or legal entity. Public entities—such as a local council or the BBC—can also be subject to an action in tort. A criminal action, on the other hand, arises when the state, in the form of the Crown Prosecution Service, identifies an individual who has violated a provision of the criminal code. Criminal cases always involve the Crown against an individual defendant. If the Crown prevails, the defendant faces imprisonment or a fine payable to the state. In civil cases, a losing defendant never faces imprisonment and will pay any award of damages to the other party, not to the state.

**NOTE** Those who act wrongly can face several different types of actions simultaneously. For example, if Joe slaps Sheila across the face, Joe can be brought up on criminal charges by the state and can also face an action in tort, if Sheila decides to sue him for damages associated with his actions. Thus Joe could end up in gaol and could also have to pay Sheila for the harm that he has done her. The bringing of a criminal action by the Crown does not deprive a private individual of an action in tort.

Most definitions of tort stemming from common law jurisdictions distinguish a tort from contract actions, although this is not the case everywhere. As you will learn (or have learned) in your contract course, an action in contract is based on obligations that are set forth in an enforceable agreement between two parties. Causes of action in tort, on the other hand, often arise in the absence of any such agreement. Instead, obligations in tort are imposed on every person as a matter of law, whether or not that person agrees to adopt that code of conduct. In other words, actions in tort impose a certain standard of behaviour which is necessary for people to live in an efficient, harmonious, and civilized manner. Although a violation of this standard of behaviour will not result in a criminal action—since the acts constituting a tort do not threaten the fabric of social order in the same way that a criminal act does—those who have committed torts are still considered to have acted wrongfully. As a result, the state gives the injured party the right to pursue individual compensation in the courts. Doing so encourages civilized behaviour—since, by giving injured parties access to monetary damages, the state limits the likelihood of lawless self-help of the ‘eye for an eye’ variety—without involving the
state in numerous, potentially petty lawsuits. Allowing the wronged parties to decide for themselves whether to pursue a case provides a useful gate keeping function, since private citizens and entities are perfectly capable of evaluating whether their cases are (a) strong enough as a matter of law, and (b) important enough to them personally to incur the risk and potential cost of litigation.

One of the reasons why courts and commentators have had difficulty in describing tort law in any coherent manner is because the types of wrongs that fall under this heading are incredibly diverse. Some involve harms purposefully visited upon others (such as in assault and battery) while others involve unfortunate outcomes that the defendant may not have ever intended (as in negligence or products liability). Some torts protect interests in land (for example, trespass and nuisance), whereas others protect interests in a person’s social standing or commercial endeavours (as with defamation). The wide range of issues and concerns that fall within the field of tort have led no less eminent a commentator than Sir John Salmond to claim that there is no such thing as the law of tort but only a law of individual, unconnected torts. While academics may debate the theoretical underpinnings and proper nomenclature for this field of law, practitioners and students must ultimately focus on recognizing what falls into the realm of redressable wrongs and what does not.

Because tort is primarily a creature of the common law, it is particularly amenable to change, and courts are constantly expanding and contracting the boundaries of tort. For example, few parties had based their claims on the principle espoused in *Rylands v Fletcher* for many years, leading some commentators to argue that the tort had disappeared as a separate cause of action. However, *LMS International Ltd v Styrene Packaging and Insulation* [2005] EWHC 2065 (TCC) put the lie to the naysayers and demonstrated that the doctrine was still alive and well. Similarly, new causes of action are constantly being considered. For example, in *Khorasandjian v Bush* [1993] WLR 476, the Court of Appeal found that a woman who was subjected to numerous harassing phone calls from a former boyfriend could recover for the injury done to her, despite the fact that there was no statutory or common law action providing damages for harassment until that point. Although the point was overruled by a higher court in an unrelated case, Parliament stepped in and enacted the Protection from Harassment Act 1997 to address the kind of harm in *Khorasandjian v Bush* [1993] WLR 476. Courts are also at liberty to expand the categories of persons who can recover damages. Often these shifts will be in response to certain social changes (such as the Industrial Revolution, which led to the rise of actions in negligence, starting with groundbreaking cases concerning the liability of railways in the 1800s and taking a quantum leap forward with *Donoghue v Stevenson* [1932] AC 562), whereas others will be in response to a single event, such as the Hillsborough Stadium disaster. While change in the common law often comes at an incremental pace, under extraordinary circumstances, the courts will respond with a more radical leap. Parliament can also step in to provide a remedy for future claimants, either by reinforcing the common law’s position or by creating a cause of action out of whole cloth after the courts have considered themselves unable to act.
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1.3 Characteristics of a tort

Although the word ‘tort’ has resisted simple definition, the cause of action known as a tort displays several characteristics, regardless of its precise subject matter. First, a wrongful action can typically be considered a tort only if the injury which has resulted—or which may result—can be cured by monetary damages, although in some cases an additional remedy may also be available. Furthermore, a tort arises when one party breaches a duty imposed on it toward another party as a matter of law, regardless of whether the defendant agreed to take on that duty. In some cases (those involving strict or absolute liability), it will not even matter that the defendant took all reasonable or even all possible measures to avoid causing injury to others.

There is also no need for the defendant to know consciously that a duty exists. For example, many tort textbooks illustrate the duty/breach of duty scenario by referring to the duty incumbent on the driver of a car to avoid injuring others. As you know, a driver must take all reasonable actions to avoid damaging other vehicles, other road users (such as pedestrians) and property alongside the road (such as fences and street lamps). If the driver acts without using reasonable care and injures someone else’s person or property, a tort has likely occurred. As useful as this example is, it can be misleading because anyone who drives a car is required to pass an examination on the rules of the road and the proper standards of behaviour. Guidebooks are available that describe, in great detail, what drivers must do in any given situation. Therefore, this illustration suggests that torts can only arise in situations that are heavily regulated by the state or in situations where someone either knows or should know precisely what is expected of him or her.

In fact, a tort can arise even in situations where there is little state involvement and the defendant has not been specifically briefed on the existence of a duty, let alone the exact details of that duty, as is true with the car example. For example, Cynthia may inherit some land from her grandfather, not knowing that the property contains a reservoir that was dug in the 1800s. If that reservoir bursts its bounds the day after Cynthia inherits the property, flooding the neighbouring yard, Cynthia will be liable under Rylands v Fletcher for the escape of a non-naturally occurring thing (the accumulated water) that caused harm to the property of another. Cynthia is liable for the resulting damages even though she did not know about the reservoir, did not put it on the land, did not do anything affirmative to acquire the property, did not have time to inspect the property prior to the accidental release of the water, and did not have time to research any legal obligations associated with the property. She is still responsible to her neighbour for the damage to that neighbour’s yard.

There is a difference between being instructed as to the existence and extent of a legal duty (as is the case with the driver of an automobile) and being able to discover the existence and extent of a legal duty. The principle known as ‘the rule of law’ demands that any person must be able to know, in advance, what the law requires of him or her. In other words, the legal rules and principles must be published and available for inspection prior to any person’s being charged with a legal duty. In this second example, Cynthia has not been told that a duty to take reasonable care exists and what must be done to
discharge that duty, but she could have conducted legal research to learn whether the action (in this case, owning the property) could carry the risk of liability in tort. Indeed, that is precisely what businesses often do. Newspapers, for example, routinely consult with a solicitor or barrister in advance of publishing potentially defamatory material to make sure that they do not commit a tort by publishing the information. The fact that Cynthia did not have time to conduct any research is irrelevant—it is enough that the law regarding liability under *Rylands v Fletcher* existed prior to the act that resulted in Cynthia’s liability.

Another characteristic of tort is the imposition of duties towards people generally. Contract law imposes obligations between those who are parties to the contract; the duties are specific to certain individuals, rather than to society as a whole. In tort, a defendant will likely not know all the people to whom a duty is owed—certainly the driver of a car cannot name each and every person who is on or near the road every time the driver goes out for a spin, yet the driver owes a duty to each of these unnamed persons. So long as a potential claimant and defendant are in the proper sort of relationship—driver to passenger, landowner to neighbour, etc—that is sufficient for potential liability to arise in tort.

For the most part, tort law addresses past wrongs, since the existence and quantum (amount) of damages will not be known with certainty until after the injury has occurred. However, there are times when a party can seek the assistance of the court in prohibiting an activity that is likely to lead to grave or irreparable future injury. A common example would be a newspaper that was intending to print an article or photograph that would injure someone’s reputation. In that case, the court might stop the publication from being distributed, at least until the court had the opportunity to consider whether damage would result. Alternatively, a factory owner might be ordered to cease plans to manufacture a product that would cause poisonous waste to be expelled into the environment.

### 1.4 The purpose of tort law

When considering the purpose of tort law, it is again helpful to distinguish its function from that of contract law. The sole aim of contract law is to enforce the promises of others; any other interest—commercial stability, moral claims, etc—is subsumed within this single goal. Similarly, criminal law has as its purpose the protection of public interests, meaning those interests that are shared by everyone within society. Those interests are so important and so general that the state—in the form of the Crown Prosecution Service—steps in to act as the enforcement mechanism. The remaining body of law of civil wrongs—which focuses on the compensation of individuals for the infringement of individual interests—constitutes tort. Indeed, one commentator has focused on the concept of private compensation as perhaps the primary hallmark of tort law.
While no definition of a ‘tort’ has yet been made that affords any satisfactory assistance in the solution of the problems we shall encounter, the purpose, of function, of the law of torts can be stated fairly simply. Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another…

The study of the law of torts is therefore a study of the extent to which the law will shift the losses sustained in modern society from the person affected to the shoulders of him who caused the loss. It is obvious that no system of law will ever attempt to compensate persons for all losses… Actuated by some such view of social policy the law, about three hundred years ago, began to take into consideration, in imposing liability, something akin to ‘moral blameworthiness.’ Was the defendant in ‘fault’ in causing the plaintiff’s loss? Did he act ‘wrongfully’?

1.5 Principles of tort law

As the preceding excerpt suggests, fault and blameworthiness are central features of tort law, and ones to which we shall return. However, an even more fundamental principle of tort law is that liability results when the defendant’s conduct is socially unreasonable.

In some cases, the decision about what is unreasonable is decided in great detail ahead of time—thus, the driver of a car in Britain knows that driving on the right hand side of the road is unreasonable in British society and doing so will result in liability in tort, barring unusual circumstances such as a broken steering mechanism. In other instances, neither the court nor Parliament nor any of the state’s regulating bodies have considered the particular circumstances that have occurred in advance of the event, at least in any great detail. In those cases, the court must weigh the various countervailing issues to decide whether the conduct is unreasonable. Often, the court considers things such as (1) what it would cost (in terms of time and money) the defendant to act differently; (2) who is most able to bear the loss; (3) who is most able to protect against loss (through its actions or through the purchase of insurance cover); (4) the social value of the activity that caused the injury; (5) the social value of the interest which has been infringed upon, etc. While the court will have some guidelines to help it in making a decision, the outcome of many cases will depend on the particular facts, requiring the court to make an independent judgment about whether the activity was socially unreasonable. Finally, in a small group of cases—those known as strict liability cases—the court will not look at any facts other than whether the defendant in question was responsible for the act in question. There, it does not matter what the defendant did or did not do to protect
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against the harm; society, in the form of Parliament, has decided that the behaviour is so risky that any error will be considered socially unreasonable and the actor will be liable for any harm that results. The entire issue of whether the actor was reasonable has been taken out of the court's hands altogether.

Obviously, what is socially unreasonable differs according to one's point of view. A smoker may believe that lighting up in a public place is entirely reasonable, but a non-smoker may disagree. Though society—again, in the form of Parliament—for many years sided with the smokers, the tide has turned and society has now decided that it is unreasonable to allow people to smoke in public places. Similarly, one person may believe that it is entirely reasonable to crank up the stereo at 2 am, whereas another will disagree. Since the law must balance the interests of many different people, it cannot consider all perspectives equally valid and reasonable. It must decide which behaviours to allow and which to limit.

While some people might argue that the court should always look at the question of reasonableness from the point of view of the defendant—since the defendant is the person who will be liable for damages—that approach causes considerable problems. First, it may be difficult to figure out what the defendant was thinking at the time of the tort. Few defendants will admit to believing that they knew they were acting unreasonably at the time the accident occurred. Second, that kind of standard might unduly benefit reckless people, since the only people who could be held liable would be those who admit that they knew—or could be shown to have known—that they were behaving unreasonably at the time of the incident. Reckless people would never know they were behaving unreasonably and thus would be able to injure numerous people without ever having to pay the price associated with their conduct. Instead, innocent victims would have to pay the cost of the reckless person's choices. Since it doesn't seem fair to force victims to suffer loss, the courts decided to impose an objective standard of reasonableness, often referred to as the hypothetical 'reasonable man'. This objective standard may conclude that, while the actor's behaviour was reasonable from the perspective of the person in the actor's position (i.e. the subjective position), the common consensus would be that the action was unreasonable and that the actor should pay for the harm to the injured party. Thus, a trespasser who intrudes on another's property, thinking the owner won't object, may still be required to compensate the owner for the infringement of the property interest. Similarly, the person whose compost heap smells so strongly that it offends the neighbours may still be required to pay damages and cease composting, no matter how reasonable and beneficial composting is to the environment and society at large.

think point
The attention paid to individual characteristics is one of the hallmarks of tort law. Does this increase or decrease the predictability and 'justness' of the law?

think point
Feminist commentators have argued that formulating the standard as that of the 'reasonable man' reinforces certain invisible biases that can be detrimental to women. For example, tort law permits a defendant to use reasonable force to repel an attack. If person A attacks person B with fists and person B responds by grabbing a knife and slashing person A, the claim of self-defence may not exist under the objective, reasonable man standard. If, however, person A is a six-foot, four-inch tall man and person B is a five-foot tall woman, using a knife in self-defence seems slightly more reasonable.

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'Subjective' standards look at the issue from the defendant's point of view. 'Objective' standards look at the issue from the point of view of the hypothetical 'reasonable person'.
Because of its reliance on the reasonable man (or reasonable person) standard, tort law has become something of a proving ground for issues of social theory. Although tort law is a form of private law, in the sense that its focus is on compensating injured individuals for harms brought about by the acts or omissions of other individuals, the reality is that public interests are often at stake, even in so-called private disputes. For example, two neighbours may appear to be fighting over a smelly compost heap, but the court is likely to consider issues of public policy when it is determining what is reasonable (and thus what actions are permissible). One place where you can see the relationship between public policy and tort law particularly well is when established precedent is overturned or modified. For the most part, courts respect decisions that have been handed down in the past and try to issue judgments that are in accordance with those principles. One of the few things that will allow a change in the law is a change in the social circumstances on which the law is built. Similarly, courts explicitly consider issues of public policy when they are deciding a case of first impression, since there will be no legal precedent that is squarely on point and public policy at least provides a useful and principled grounds for decision-making. Although there may be good arguments made by both sides, courts will ultimately choose that which is deemed better for society as a whole.

TIP  Lawyers often use the phrase ‘public policy’ to describe the general principles or rationales that underlie more specific rules about particular conduct. What law students often fail to recognize is that public policy arguments always exist on both sides of a dispute. Therefore, it does not advance an argument one whit to say that ‘public policy suggests that X should prevail.’ When setting out a position, be explicit about what the public policy at issue is, whether it’s the need to preserve public resources, the desire to make the party who is most able to obtain insurance liable for losses, the need to protect the rights of private property owners, or something else. Describing competing policy considerations will often earn you extra points, though you should recall that public policy arguments are secondary to arguments based on specific laws.

Thus, tort law addresses the needs of both the individual and society at large. Individuals who come to court seek redress for a variety of wrongs and protection for a variety of rights and interests. On the one hand, these people want to enhance their personal security and be free from personal assaults. On the other hand, these people want to protect their livelihoods, their personal property, their real property and their ability to enjoy the fruits of their labour. Individuals also want to ensure that their workplaces are safe and free from unnecessary risks. The list of individual rights, wants, and desires protected by tort law could go on and on, just as the list of public concerns could.

Although the individuals involved in a dispute obviously have a great deal at stake, society also has at least two interests in the outcome of a tort case. First, society at large benefits from the just and efficient resolution of private disputes. In the absence of a workable legal system, the fabric of society begins to fray as individuals seek to resolve
Factors affecting liability in tort

Liability in tort depends on certain bedrock principles. First among these is the idea that the primary aim of tort law is compensation for losses. This compensatory principle differs radically from the criminal law’s goal of deterrence and punishment of wrongdoers and contract law’s goal of enforcing the performance of promises. In tort, the defendant is liable to the claimant for the damages caused, but no more than that. This approach is different from that used in some legal systems, where tort law can include punitive as well as compensatory damages.

Another fundamental principle affecting tort liability involves the moral culpability of the defendant’s conduct. Although a few areas of tort law impose liability regardless of the defendant’s mental state, typically a defendant in tort must have acted in a blameworthy way, either through an affirmative action or through an omission. The necessary mental element will depend on the tort alleged. Some torts, such as battery, assault, and false imprisonment, require a specific intent to carry out the tortious act. Others indicate that a tort exists if the defendant either knows or should have known an injury could arise as a result of the defendant’s actions. Because tort relies heavily on the standard of reasonable behaviour exemplified by the reasonable person, the law of tort tends to
reflect popularly held ideas of morality. When tort law was in its youth, most people believed that a person who hurt another, either intentionally or even through pure but foreseeable accident, should be required to make good the losses of the injured party. Those sentiments about who should properly bear the loss still hold true today, which is why tort law has continued and grown as it has.

When considering whether a defendant’s behaviour is blameworthy enough to require him or her to pay compensation, courts distinguish between legal fault and moral fault. The law is not and never has been entirely consistent with the moral code held by society, so courts cannot be used to address purely immoral behaviour. True, tort law finds ‘fault’ in the failure to live up to an ideal standard of conduct which may be beyond the knowledge or capabilities of any particular individual, but that ideal standard is based on acts which are normal and usual in society as it currently stands. Because tort law imposes liability even in instances where the tortfeasor has acted innocently or even in good faith, there is not the same kind of moral reproach attached to a claim in tort as there is, for example, in criminal law, which penalizes acts that society deems both blameworthy and morally reprehensible. Thus, tort law fails to address some acts which some people may find immoral while simultaneously providing compensation for harm which has been innocently (i.e. non-intentionally) caused. Furthermore, tort law does not encourage affirmative acts of morality; there is no mechanism in tort for encouraging wealthy people to share their riches with the poor or for requiring passers-by to come to the aid of an ailing stranger on the roadside. Finally, tort addresses behaviour rather than belief. Therefore, tort law does not act as a purely moral code of conduct.

The key to understanding the terms ‘fault’ and ‘blameworthiness’ in tort is to see that in all cases, tort law is attributing some element of volition to the actor—even when the injury is caused by an innocent mistake, tort law takes the so-called ‘moral’ view that the actor still could have done something to take more care to avoid the accident. Alternatively, one can take the view that fault or blameworthiness in tort law is synonymous with anti-social behaviour, meaning acts or omissions that injure society (often personified by one individual claimant) in some way. In this second approach, the defendant incurs ‘blame’ by failing to live up to the standard of behaviour required for the reasonable protection of others.

The concept of fault or blameworthiness can apply even in situations involving strict liability. For example, even though the defendant in those cases may have taken all reasonable and unreasonable efforts to avoid harm, one could say that society has deemed the activity so dangerous or tangential to the social good that, by deciding to undertake the act in the first place (thus meeting the volition test of fault or blameworthiness), the defendant has breached the standard of normal or usual social behaviour and thus must pay compensation for any harm that results. Alternatively, one could say that deciding to undertake an act that has dubious social value means that any injury that occurs violates the requirement that everyone act for the mutual protection of others. Tort law’s emphasis on the protection of others becomes readily apparent when one considers that strict liability in tort attaches most readily in cases involving product liability. Here, manufacturers gain a great deal of profit as a result of developing and marketing new products. Although the creation of new products for sale—including medicines and

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A ‘tortfeasor’ is a person who has committed a tort.
machinery—is socially valuable, society wants to ensure that no corners are cut and no products are sent to market before all the flaws have been discovered and cured. Therefore, the law supports the creation of new products by allowing production to continue, but puts a high price on the activity by holding manufacturers strictly liable should anything go wrong. In this system, manufacturers know that it is in their own best financial interests to test their products rigorously before sending them to market, lest all their profits disappear in tort compensation awards. Society benefits from the development of new products, but is also protected from harm to the highest degree possible.

A third element affecting liability in tort involves the historical context of the law of tort. First, as a primarily common law remedy, tort is strongly affected by precedent. While some common law torts have now been superseded by statute and a few torts have been initially created by statute, the vast majority of actions have developed through the common law. Thus, anyone considering bringing a claim in tort must consider the historical antecedents of the modern cause of action, since the courts will consider the origins of the action when deciding whether to expand the law in any particular direction. For example, when considering whether to require an element of foreseeability in a claim based on Rylands v Fletcher, a land-based tort, the Court of Appeal in Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 2 AC 264 investigated the extent to which Rylands v Fletcher was historically based on an action in nuisance, another land-based tort. Second, tort is strongly influenced not only by social mores (which change with the times) but by other historical movements. Thus, the Industrial Revolution led to certain developments in the law of tort, just as the rise of the electronic age in more recent years has done. Understanding the social, economic, and political climate in existence at the time any particular case was decided provides a useful framework for analysis. Changes in social and political realities will often lead to changes in the law. Furthermore, knowing the environment in which a case was brought helps lawyers and courts faced with a new dispute decide whether an opinion can and should still be considered good precedent. While historical arguments will not trump good legal precedent, they—like good public policy arguments—can be persuasive, so long as they are adequately explained and analysed.

A fourth element affecting liability in tort involves the limited resources of the courts. Some behaviour—though blameworthy in the normal tort sense—will not be deemed actionable in courts because the conduct is so common that allowing a cause of action would lead to a massive influx of similar claims, swamping the courts. For example, the law at one time did not allow recovery for damages to feelings or for psychiatric harm unassociated with physical harm, allegedly on the grounds that such claims could not be adequately quantified or proven, but really based on the fear that recognizing these types of injuries would lead to a huge increase in the number of cases brought each year, thus putting a huge amount of administrative pressure on the judicial system. When the courts finally did allow recovery for these sorts of losses, they set strict guidelines on who could recover and under what circumstances, thus restricting the number of claimants who could obtain damages for these sorts of injury. Similarly, in the years
leading up to the adoption of the Human Rights Act 1998, courts and commentators both feared that allowing litigants to rely on the European Convention on Human Rights in domestic actions would open up wide vistas of tort liability. In actuality, that has not been the case. For example, one area where a new cause of action seems to have been established as a result of the 1998 Act—the right to privacy—has not seen rampant litigation, but has instead been growing in small, measured steps. Overall, cases have been brought slowly and conservatively, allowing the law to grow modestly and ensuring that the courts have not been overwhelmed in the process.

The fifth factor that courts consider when deciding whether to establish liability in tort is the parties’ ability to bear financial loss or distribute it among other entities. For the most part, litigation is a zero-sum equation, meaning that the losses associated with an injury fall entirely on one or another of the parties. Although there are mechanisms for attributing fault among the various parties and thus placing financial loss on more than one party in individual cases, as a general matter tort takes very much into account the ability to bear or anticipate a risk of loss. The analysis does not look so much at the relative wealth of the parties but rather at the ability to avoid the loss entirely (through preventative measures or insurance) or absorb the loss (either because of financial resources gained over time or by passing the loss on to others in smaller portions, such as through raised prices).

This analysis is particularly useful when the defendant is in a position to anticipate and possibly protect itself from loss through the adjustment of prices, rates, taxes, or insurance, as is the case when the defendant is a private or public corporation, a commercial enterprise, a car owner, a property owner, etc. Tort law tends to take the view that such persons or entities are more able and more likely to protect themselves from loss than a private individual going about his or her business—walking down the street, shopping in the grocery store, riding on a train—would be. While private individuals can take out what is called first-party insurance—where the individual insures him or herself from unknown dangers and injuries caused by others—such cover is difficult to find and expensive to obtain. Furthermore, a private individual—who tends not to have the same resources as a commercial enterprise or insurer—is more likely to be ruined by a single catastrophic event than these other parties. It is much easier and more cost-efficient for those in the first group—the corporations, car and property owners, etc.—to find and purchase insurance to cover risks associated with their activities. Thus, as a matter of economics, courts prefer to place the loss on those who can ensure or guard against it in the easiest and least expensive manner.

However, courts will not always force industry to bear the risk of loss, since to do so could force businesses out of the market, with a detrimental effect to society as a whole. Tort law is particularly cautious about requiring businesses to bear liability that extends to an unlimited number of unknown persons or liability that cannot be estimated or insured against in advance. Courts may also tend to protect new or growing industries, at least in their early years, since to do otherwise might thwart a socially valuable activity.

Finally, when imposing liability in tort, courts will consider the extent to which the allocation of loss will serve as a preventative measure. Courts may even view allocation of loss
as taking on a slightly punitive function. Although these concerns are often considered to be at the forefront of criminal law, tort law also wants to make sure that wrongdoers do not repeat their antisocial behaviour. Having to pay damages is a strong incentive for everyone, from the private individual to the publicly held company, not to undertake tortious conduct. Even though a tort award only compensates the claimant for the injury suffered, tortfeasors still suffer a loss when ordered to pay damages, and that can have a punitive effect. Furthermore, once the judicial decisions become public, the case will also hopefully prevent other potential defendants from acting wrongfully by showing them they will have to pay damages.

1.8 Motive and intent

Motive and intent play a different role in different types of legal action. Most crime dramas suggest that the defendant’s motive is a key part of criminal law (whether this is actually true or not is something to discuss in your criminal law course). Certainly intent is vitally important in criminal law. On the other hand, the defendant’s mental state—whether it is defined as motive or intent—is virtually irrelevant in contract and property cases, which primarily focus on outcomes alone. Tort law lies somewhere between these two extremes, although it is closer to criminal law than to the other types of law mentioned, since a defendant’s mental state often has some bearing on whether a tort has occurred. In particular, tort law takes a great deal of interest in the intent of an actor, meaning an inquiry into the actions the person intended to take (i.e. to throw a ball, drive a car, make a certain statement). Tort law considers the motive of an actor, meaning the results the person hoped would occur following the act (i.e. to hit a certain person with the thrown ball, to injure a pedestrian while driving a car, to damage another person’s reputation by making a certain statement), to a much lesser extent, since motive relates to a more distant event or effect, whereas intent focuses on the immediate act.

In many cases, motive is irrelevant to a determination of tort liability. For example, a person may eject one trespasser, while allowing another to remain on the property, based on all sorts of improper (and, in other contexts, potentially illegal) rationales, such as gender, race, ethnic or national heritage, religion and sexual orientation, as well as simple personal taste. So long as the ejectment of the trespasser is carried out with no more than reasonable force, however, the landowner will not be liable in tort. Similarly, a person may say the nastiest, most harmful thing in the world about another person, with the end goal of ruining that person’s personal and professional life, but will not be liable in tort if one of the defences to defamation—such as truth—exists. In these cases, the courts may look at intent—meaning whether the defendant undertook the ejectment or the statement voluntarily, recklessly, negligently, or in any other way that is relevant to a tort analysis—but will not look at the motivation behind the act. In such cases, malevolence, vindictiveness, and ill will are all permissible as a matter of law.

In other cases, however, tort law will consider the motive underlying a particular act. For example, in the tort of nuisance, the court can and will look at whether a fence between
two neighbouring properties was built simply out of spite. On the whole, however, tort law is much more concerned with intent, rather than motive, and the inquiry is much more likely to focus on whether the act was done negligently (which would be contrary to what the reasonable person would do in like circumstances) or intentionally than whether it was done maliciously or spitefully.

A very few torts result in strict liability. In those cases, the defendant’s mental state is not at issue at all, since it does not matter how careful or well-intentioned a defendant may have been when the action took place. If the defendant undertook the act (such as putting a particular product into the line of commerce), then the defendant is liable for any and all injuries that result. In such instances, both motive and intent are immaterial.

**TIP** Beginning law students often have trouble when they run into a defendant who has acted cruelly or maliciously and/or a claimant who is particularly sympathetic. Although tort law often reflects popular conceptions about morality, it does so on a global scale. It does not provide for damages simply because one party appears to be more deserving than the other. Focus on intent rather than motive to reach the proper conclusions.

### 1.9 Analysing torts

Previously in this chapter, we mentioned that some commentators believe that the diversity of actions in this area of law means that there is a law of torts, but not a law of tort. Indeed, the wide variation in the types of interests protected by different torts, as well as the range of elements that must be considered to prove an individual tort, can disguise the many similarities between the individual torts. In fact, all torts—both modern and ancient—can be analysed using a simple three-step procedure first advocated by John Henry Wigmore, one of the pre-eminent scholars on the early development of tort law.


If we are ever to have, as Sir Frederick Pollock puts it, not books about specific Torts, but books about Tort in general, some further examination of fundamental ideas is desirable. One might proceed with such a general analysis without regard to the definition of a Tort, or—what is much the same thing—without setting forth one’s view as to the differentiation of Tort-relations from others in the general classification of private law. But, for the sake of clearness, the latter task will here be briefly attempted…

Private law, then, deals with the relations between members of the community regarded as being ultimately enforceable by the political power. Such a single relation may be termed a Nexus; it has a double aspect, for it is a Right at one end, and a Duty or Obligation at the other; every such relation or Nexus necessarily having both these aspects. In classifying them, we may of course rest the division on the nature of either the Rights involved or the...
Duties involved. For the first and broadest division it seems best to take the latter point of view, and to distinguish according as the Duty has inhered in the Obligor (1) without reference to his wish or assent, or (2) in consequence of some volition or intention of his to be clothed with it. The former we may term Irrecusable,—having reference to the immateriality of the attitude of the obligor in respect to consent or refusal; the latter, Recusable,—for the same reason. . . The former includes Torts. . . Dividing further the former sort, we find (a) many imposed universally, i.e. on all other members of the community in favor of myself; and (b) a few imposed on particular classes of persons by reason of special circumstances… The natural terms of distinctions are, for the one Universal Irrecusable Nexus; for the other, Particular Irrecusable Nexus. The subject of Tort, then, deals with the large group of relations here termed Universal Irrecusable Nexus…

The next question is, What is the content of the rights and duties included under this head? . . . The general character, then, of these nexus will be that of relations fundamentally necessary to civilized social intercourse—the minimum number of universal nexus without which the community cannot get along. Furthermore, these Universal Irrecusable Nexus are all negative, not affirmative; i.e., the line is drawn at requiring others not to be the means of harm to me; our law has not yet gone so far, in Universal duties, as to impose any affirmative duty, as between one man and another, to take action to confer a good.

But, . . . we easily see, on examination, certain generic component elements in every relation of the sort we are considering. First, there are the specified sorts of harm which the obligor has a claim to be free from. . . Second, there must be something to connect the obligor with this harm,—that is, we must specify what is the sort of causality-connection, or the like, between the obligor and the harm in question for which he will be held responsible. . . Third, there are numerous cases of circumstances to be specified in which the nexus fails, and is without application,—that is, although harm is done, and although there is no question as to a particular person's responsibility for it . . .

There are, therefore, three distinct classes of limitations . . . The first class deals with the sort of harm to be recognized as the basis of the right; this may be called the Damage element. The second class deals with the circumstances fixing the connection of the obligor with this forbidden harm; this we may call the Responsibility element. The third class deals with the circumstances in which, assuming both the Damage and the Responsibility elements to be present, the nexus still has no validity,—in other words, the considerations which allow the harm to be inflicted with impunity; this may term the Excuse or Justification element. This analysis results in a tripartite division of the Tort-nexus . . .

1. The Damage Element.—The question is here, what sorts of harm is it that the law recognizes as the subject of a claim for its protection? . . .

Under the Damage element, of course, are to be considered physical injuries,—what sort of physical or corporal harm may be the subject of a claim. Mere touching of the person may be, while mere touching of personal property once was not. Physical illness of course is. Whether nervous derangement may be, when not brought about through corporal violence, may be, is still the subject of discussion. Forms of annoyance, such as disagreeable odors, sights, and sounds, are usually said to be the subject of recovery only in connection with the ownership of real property. There must in all such cases be a degree of inconvenience worth taking systematic notice of . . . The social relations must be enumerated with which interference is forbidden, and the words known as Libel and the words

NOTE Wigmore's first category basically describes the principle of strict liability.

NOTE Wigmore here discusses recovery in tort for psychiatric harm—a concept that was not recognized in the United Kingdom until approximately 100 years later.
deemed slanderous per se are to be discussed. The . . . matters as to which we have a ‘right to privacy,’ and several other modes of harm, involve also some statement of the Damage element . . .

II. The Responsibility Element.—[W]e have next to consider those limitations of the nexus which determine the nature of the Responsibility element, by defining what connection must exist between the obligor and the harm done, in order to bring him within the scope of the nexus. . . .

The doctrine of ‘acting at peril,’ the phrasing and application of the tests of ‘proximate cause,’ ‘reasonable and probable consequences,’—these, with their attendant refinements and exceptions, form the substance of the general topic. But the important circumstance to call attention to is that this topic has an application in the domain of each one of the common so-called Torts . . . Speaking roughly, a man may be made responsible for a given harm by initiatory action of one of three sorts: by acting (1) designedly, with reference to the harm; (2) negligently, with reference to it; (3) at peril, in putting his hand to some nearly related deed or some unlawful act . . .

The question is constantly likely to arise whether the consequences of certain conduct were such as a person of ordinary prudence ought to have foreseen . . .

III. The Excuse or Justification Element.—Assuming that the various sorts of harm have been specified, and that the conditions and tests of Responsibility for them have been determined, the general limitations under which the nexus exists still call for treatment. Perhaps the simplest illustration, if any is needed, is the excuse of Self-defence . . .

One or two general implications of the recognition of this tripartite division of Tort may now be pointed out . . .

A more important consequence of the recognition of the tripartite division is the helpful results to be reached by studying the different solutions of the same problems and the applications of the same principles in different torts. Clearer understanding of a general principle and its differing aspects in application, keener appreciation of its worth or perhaps of its incongruities, greater readiness for new developments already pressing upon us,—these are the benefits of such a recognition.

As you can see, Wigmore not only described a useful means of viewing a variety of existing actions through a single lens, he also foresaw the direction in which the law of tort would generally develop. The beauty of the Wigmore analytical model is that it reinforces the similarities between different torts and gives a simple method of organizing the constituent elements of each tort, particularly for students who are responsible for learning and memorizing a vast amount of information. However, there are other ways of breaking down this area of law, particularly as a conceptual matter. For example, Sir Frederick Pollock, who wrote one of the earliest textbooks on the subject, classified tort into personal wrongs; wrongs to property and possession; and wrongs to persons, estates and property generally. While this approach is still workable, the evolution of tort law, particularly in the areas of negligence and strict liability, means that there are times when a particular tort—such as negligence—will cross over into more than one category.
Chapter 1

Introduction to tort

1.10 Structure of the current text

The current text is organized in a way that is intended both to help readers see how various torts interrelate and to track how most lecturers proceed through the course. That having been said, there is a great deal of variation in how instructors teach their courses. Some lecturers begin with negligence, since it often takes up the most time and includes a number of important elements, such as causation, that will be repeated throughout the course. Other people prefer to begin with the intentional torts, since their familiarity provides an easy entry into the study of law. Still others may start with another tort.

Most instructors appear to begin with negligence, so this text will do the same. The structure of the book is as follows:

- Negligence;
- Breach of statutory duty;
- Torts involving land;
- Damages and other remedies;
- Special kinds of harm;
- Product liability;
- Liability for the torts of others; and
- Torts against the person.

The final chapter will include tips on revising for your examination.

1.10.1 Negligence

Negligence is a tort of relatively recent origin, owing its genesis to the economic, social, and moral realities of the Industrial Revolution. It has become something of a catch-all tort, encompassing harms to an individual (including both personal injury and death); to real property (meaning land); to personal property (such as cars, clothes, jewellery, or furniture—basically anything that can be owned, other than real property); and even to intangible interests such as economic interests. Because the harms are so diverse, so, too, are the causes, which can range from a reckless driver to street vandals to the escape of water from one property to another. Although the breadth and scope of actions in negligence can lead to the tort seeming nebulous at first, its boundaries quickly become discernable as the basic elements of the tort become more familiar. This section includes four separate chapters, each dealing with one of the basic elements of negligence. The first chapter, duty, describes what has become known as the ‘neighbour principle’, which identifies the realm of persons to whom a duty of care is owed. The first chapter in this section also discusses some of the different types of harm that can arise in negligence cases.
The second chapter in this section involves breach of the duty of care. This discussion revolves around the amount and type of care that must be taken in any particular situation (often called the standard of care). Special circumstances exist with respect to professionals and employers, who are often held to a different standard of behaviour. This chapter also describes some of the procedural problems that are associated with proving negligence, as well as legal doctrines such as res ipsa loquitur (Latin for ‘the thing speaks for itself’) that can be used to overcome these problems.

The third chapter in this section deals with causation, a concern that exists in virtually any tort. Because tort law is based on a concept of fault, it is vitally necessary that the court be satisfied that the defendant is the person who is responsible for the action that led to the harm. However, causation in negligence—and indeed in other torts—exists in two forms—the ‘but for’ test and remoteness. The ‘but for’ test notes that, but for this defendant’s action, the claimant would not have suffered injury. However, relying solely on the ‘but for’ test can lead to ludicrous results. For example, imagine that Ahmed is about to drive to the local market to do his weekly shopping—something that he does at the same time every week. This week, he is delayed for ten minutes because his next door neighbour, Sheila, comes over to discuss repairs on their common fence. When Ahmed finally drives to the market to do his shopping, he gets into a car accident, injuring another person. Under the ‘but for’ test, Sheila could be said to be liable for the accident victim, since she was a factual cause of the accident, since Ahmed would not have been on the road at that time ‘but for’ her delaying him. However, it seems wrong to hold Sheila responsible for the accident—she had no way of controlling Ahmed’s actions or of foreseeing that he would be in a position to injure someone on the roadway in the near future. In fact, Sheila’s liability is limited by the rules relating to the principle of remoteness. This chapter discusses these and related topics in more detail.

The final chapter in the first section covers defences. While the discussion devotes itself to the various ways in which a defendant can limit or escape liability in negligence, many of the subjects covered here apply equally to other torts. Contributory negligence, for example, can reduce a defendant’s liability not only in negligence cases but also in other torts where the claimant’s own wrongdoing has contributed to the harm suffered. For instance, say Patricia was injured when Gordon hit her with his car. Gordon was acting negligently because he was simultaneously talking on his cell phone and trying to read a map while driving. Normally, Gordon would be entirely liable for the injury he caused. However, if Patricia was also acting negligently—say, by failing to look in the proper direction when stepping into the street—then the amount that Gordon has to pay will be reduced by a sum proportional to the extent to which Patricia was at fault (i.e. was negligent). The same principle holds true if Patricia is injured whilst walking across a wooden bridge that the property owner knew was in disrepair—if she was acting negligently, as by jumping up and down on it or driving over it in a car when it was obviously meant to be nothing more than a footbridge, then the property owner’s liability may be reduced. These and other defences are covered in detail in this chapter.
1.10.2 Breach of statutory duty

Negligence is almost entirely a common law tort, meaning that the elements of the cause of action and the defences to it are found in judicial opinions, as opposed to legislation. The emphasis on cases in tort courses can lead students to downplay the importance of statutory law. Therefore, the second section in this text brings statutory interpretation immediately to the fore by discussing breach of statutory duty. As discussed in this chapter, certain duties arise not as a result of a determination of what the hypothetical ‘reasonable person’ would do in any given circumstance, but as a result of a determination by Parliament that certain standards of behaviour must be met. These are known as statutory duties, since they are imposed by statute rather than by common law. When these duties are not met, an individual may bring a civil action for damages relating to the breach of the statutory duty. What is unusual about the tort of breach of statutory duty is that most of the statutes involved do not expressly impose civil liability in tort. Therefore, this chapter not only introduces some of the legislation that is commonly used as basis for tort liability, but also discusses how to go about interpreting statutory language and gleaning Parliamentary intent from potentially vague legislation. The chapter concludes with information on the defences that are available to this particular tort.

1.10.3 Torts involving land

When analysing problems in tort, it is important to learn how different causes of action interrelate and overlap. While there are times when a claimant will only have one cause of action, it is equally likely that a claimant will be able to proceed with several different claims arising out of a single series of events. It is to the claimant’s benefit to consider bringing as many different claims as possible, since there is no guarantee of recovery with any single head of liability and different torts carry different types of awards and remedies. This section considers four different types of land-based liability which should typically be considered together, since they overlap significantly. Furthermore, when analysing an injury that arises out of the use, ownership, or occupation of land, a claimant should also consider whether negligence exists, since negligence addresses injuries to persons and property arising through any means.

The first chapter in this section addresses occupiers’ liability, a statutory-based tort that outlines liability that can result from the occupation of premises. The chapter looks at the Occupiers’ Liability Act 1957 and the Occupiers’ Liability Act 1984 in great detail, as well as the cases that construe those statutes. The discussion also includes liability of non-occupiers and defences that arise under the statutory and common law.

The second chapter in this section discusses the law of nuisance, both public and private, while the third chapter covers liability under Rylands v Fletcher, a tort that is very similar to nuisance. Both causes of action relate to injuries that arise on one landowner’s property as a result of another landowner’s use, occupation, or ownership of property. Some of these injuries can be intangible in nature, such as when an offensive odour wafts from one place to another or a particularly loud noise can be heard by others. While these
sorts of harms can be difficult to quantify, they are real and recoverable under tort law. Other types of injuries are much easier to understand as compensable harms since they involve destruction of property, either real (such as land contaminated by chemicals) or personal (such as a damaged vehicle that was sitting on the property). What is unusual about these torts is their links to the land—typically, both the defendant and the claimant must have some ties to the property in question. While this is also true with occupiers’ liability, at least on the defendant’s side (the claimant in those cases also has a tie to the land, but it is much more fleeting, since the claimant can be nothing more than a visitor or even a trespasser to the premises), both nuisance and liability under *Rylands v Fletcher* are the quintessential land-based torts.

The fourth and final chapter in this section covers the most commonly known land-based tort, trespass to land. In many ways, this chapter is the odd one out in this section, because the liability here is on the part of the person who does not own the land, which is the reverse of the other three torts. With trespass to land, the claimant is the landowner; in occupiers’ liability, nuisance, and *Rylands v Fletcher* cases, the defendant is always a landowner. However, since in two of the other torts in this section—nuisance and *Rylands v Fletcher*—the claimant will also be a landowner (those two torts are always between two landowners or occupiers), it makes sense to consider trespass to land here. Many—though by no means all—of the actions that will lead to a claim in nuisance or in *Rylands v Fletcher* will also support a claim in trespass to land. Therefore, many injured parties will bring three separate causes of action for injuries to their land. It should be noted, however, that many textbook writers and lecturers include trespass to land with torts such as assault, battery, and false imprisonment, which are also known as trespass to the person. Together, trespass to land and trespass to the person constitute the intentional torts, since liability will not be imposed unless the defendant acted intentionally (as opposed to negligently). Therefore, it makes sense to cover the various sorts of trespass together, since there are theoretical and analytical similarities.

### 1.10.4 Damages and other remedies

In some cases (most notably, negligence), a claimant must prove the existence of damage as a required part of the tort. In other cases, damage is presumed as soon as the claimant proves the other required elements of the tort. However, most claimants will want to enter evidence of the type and extent of injury suffered, even when damage is presumed, since it will likely increase the amount of money they can recover.

This chapter discusses the various types of damages awards that a court can issue, depending on the type and scope of injury suffered. These awards can range from a single pound sterling—occasionally issued when the court recognizes that a tort has occurred but wants to signal its displeasure that a case was brought for such a trivial injury—to millions of pounds. In addition to listing the various categories of damages, this chapter discusses how damages are calculated in cases involving personal injury and death. While examiners seldom expect to see actual figures given in response to a question from an examiner, students will often be asked to show the type of calculations that a court must make when determining a damages award for personal injury or
death. The analysis combines both case law and statutes, and can be somewhat detail-oriented, although there is little that is conceptually difficult about the analysis.

This chapter also covers non-monetary remedies such as injunctions. An injunction is not available in all cases, but can at times be more useful to a claimant than money damages. Injunctions forbid a defendant from undertaking a certain act going forward in the future, although in rare cases the court will order a defendant to take certain affirmative actions to cure an ongoing tortious circumstance. Thus, for example, one injunction may prohibit a factory from emitting noxious fumes that spread across the adjoining neighbourhood, while another injunction (the rarer type, which requires a particular action to be taken) might require a defendant to build a fence between two properties.

NOTE An injunction takes the form of a court order, which is nothing more than a piece of paper outlining what a party is to do or not do. Although this does not seem to be a very useful remedy, a party who fails to comply with the terms of an injunction may be brought into court by whoever was supposed to benefit from the order. The non-compliant party will be asked to show cause why the terms of the injunction were violated. Failing a very good reason, the non-compliant party will be held in contempt of court and will be required to pay a fine into the court and, in some cases, to the party who was injured as a result of the failure to comply with the terms of the injunction.

1.10.5 Special kinds of harm

Although it makes sense, in many ways, to begin a tort course with a discussion on negligence, there are numerous special cases that can confuse those who are new to the subject. The two most commonly studied special cases in negligence involve psychiatric damage and economic loss, which are covered in two separate chapters in this section. Psychiatric damage, as discussed in the first chapter in this section, is more than hurt feelings, although some torts do allow recovery for pain and emotional suffering associated with personal injuries. Psychiatric damage, as the term is used here, relates to mental trauma that arises as a result of a tortious event even when the claimant has not suffered any physical harm. For example, a person who, while standing in the front yard, witnessed the death of a loved one after a car ran up on the pavement may recover for shock and trauma, even if the claimant was in another part of the front yard and was not injured when the accident occurred. For many years, tort law did not award damages for this type of injury, since courts were concerned about matters of evidence (how does one prove mental trauma?) as well as matters of public policy (if we allow recovery in these types of cases, will the number of claims increase so radically that they flood the courts?). As a result, the rules about who can recover and when are somewhat complex and severely limit the number of situations in which damages are allowed.

Economic loss—also known as ‘pure economic loss’ to distinguish it from economic loss associated with other types of damage—is another area where courts have hesitated to allow recovery. In this case, the major concern was that the losses involved were too speculative. Pure economic loss can be difficult to quantify, since it’s hard in many cases
to know what kind of profits a business will make in the future. Furthermore, it might be difficult to say for certain that the defendant should be liable for such losses since, even if future profits could be quantified, there is nothing to say that some other catastrophic event wouldn’t arise. Finally, courts are hesitant to hold defendants responsible for losses that they could not possibly foresee or guard against. As time passed, however, courts began to identify ways to restrict recovery in inappropriate cases but allow it in a tightly circumscribed set of circumstances. The second chapter in this section also discusses the development of the law on recovery for economic loss.

The third chapter in this section covers the law of defamation and the emerging law of privacy. Defamation is one of the torts protecting intangible interests, in this case the reputation of the claimant. Like it or not, people are social creatures who value the opinions of friends, family members, and business associates. Circulating falsehoods about someone’s personal or professional characteristics can cause both emotional suffering and financial loss. For example, a wife might leave her husband if she is told that he has a mistress. A businesswoman might lose her job if her supervisor is told that she takes drugs and embezzled money from her last place of employment. A father might have his children put into state care if social services is told that he beats or neglects them. Lies and half-truths that injure a person’s reputation can have severe consequences, and that is the interest that defamation protects. This chapter discusses the elements required to establish defamation as well as the special defences and remedies associated with this tort.

The chapter includes a short subsection on the developing law of privacy, which is related to defamation in that it also protects certain intangible values associated with an individual. However, the law of privacy does not protect against falsehoods, as defamation does; instead, it protects those parts of a person’s life that can and should remain outside the public sphere. Thus, two movie stars can bring a suit to prohibit publication of certain photographs of their private wedding, even though the photographs are true and accurate depictions of the events, simply because the publication of the photographs would infringe on their private lives.

1.10.6 Product liability

The next chapter returns to an area of law that is largely controlled by statute: product liability, which involves injuries to persons and property that arise as a result of an item that has been produced for public consumption. Because personal safety is a major public policy concern, Parliament has a strong interest in protecting consumers from unsafe products and ensuring that the risk of harm falls on the appropriate party. As a result, Parliament has enacted legislation that addresses who will be liable for any losses associated with unsafe products. In fact, this is one of the areas where Parliament has used tort law as a means of moulding the behaviour of big business. Because consumer protection is so important, Parliament has made product liability a strict liability tort, meaning that it does not matter how careful the manufacturer was in researching, designing, and producing the item—if an injury occurs, then the manufacturer will be held liable for all losses suffered. This mechanism provides industry with a large incentive for ensuring
that all products that reach the market are safe for use, since a rash of injuries would not only harm a company’s reputation, it could result in a series of large damages awards that could bankrupt the company. This chapter discusses the relevant legislation, as well as the key cases construing that legislation, and provides a background on the development of strict liability in tort.

1.10.7 Liability for the torts of others

Although many people think of tort law as involving two private individuals—as is true in property disputes between neighbours, for example, or in cases involving auto accidents or other instances of negligence—tort law also governs relationships involving businesses. One way that a company or corporation might become involved in tort litigation is through the sale of its products, as discussed in the chapter on product liability. A commercial enterprise might also become subject to a claim in tort as a result of the actions of its employees or other hired help. This chapter addresses liability for the torts of others, including both employees and independent contractors. The discussion devotes considerable attention to the question of whether a person is an employee working for the company or an independent contractor working for him or herself, since liability often hinges on that distinction, as well as the question of whether an employee was working within the course of his or her duties at the time the injury arose.

1.10.8 Torts against the person

Following the discussion of intentional torts is a conclusory chapter that includes guidance on how to revise for a tort examination, including step-by-step revision techniques and sample revision plans. Although this chapter comes at the end of the text, you might want to glance at it now or at some other point well before your revision period, since it includes a number of suggestions that will help you understand and organize your materials as you go through your course. Furthermore, with all the things that must be done at the end of a course, it is easy to skip the last bit of reading. If you make a good start now, you can simply skim it later.

The substantive portion of the text will conclude with a chapter on torts against the person—assault, battery, and false imprisonment. Some lecturers choose to use these torts—which were amongst the first civil actions to be recognized as providing individual recovery for injuries suffered at the hands of another—as an introduction to the law of tort, whereas others choose to omit them altogether. Certainly the three torts are analytically different from other causes of action discussed in this book (with the exception of trespass to land), since they all require the tortfeasor to act with intent, rather than with some lesser mental state. This chapter will outline the necessary elements of each of the three torts and discuss the defences unique to these actions.
1.10.9 Revising for a tort exam

A few final points; first, you may notice that older cases include the term ‘plaintiff’ to refer to the person who filed the claim in court. This is typically the injured person. Recent reforms in the civil procedure rules have changed the term ‘plaintiff’ to ‘claimant’ to help de-mystify law. Be aware that the older terms will be used for older cases, whereas the new term will be used from the time of the change in the courts. The term ‘defendant’—meaning the person against whom the case is brought—has stayed the same.

Second, the text is scattered with ‘tip boxes’ which show in the margins. These boxes include vocabulary, cross-references, and additional ideas for consideration, as well as the occasional exam tip. Sometimes the information in the tip boxes is not found in the main text, so you should be sure to read these tip boxes in addition to the body of the text.

Third, this series has taken the study of law into the twenty-first century by providing a wealth of additional information on the Oxford University Press website. If you go to www.oxfordtextbooks.co.uk/orc/strong_complete/, you will find additional revision suggestions and material, as well as a question bank that you can use to test yourself on the subjects contained in this book.

Fourth, a number of the case extracts use the new neutral citation system, introduced in 2001. In these extracts, the paragraph numbers from the neutral citation system have been omitted for easier reading. Should you go into legal practice professionally, you should be sure to use the paragraph numbers as indicated by the relevant practice directions. Furthermore, this text has adopted the convention of using the full case name and citation in the vast majority of references to cases. This way, you don’t have to search for a full citation if your instructor only assigns parts of chapters or if you do your reading in short spurts and can’t remember where the first case reference shows. By using this method, this text also underscores the importance of explicitly relying on legal authority in all of your work. However, you should be aware that your instructor may allow you to ‘short cite’ cases in your papers and examinations, and you should follow whatever conventions your examiner recommends.

You are now ready to begin reading about the first tort on your course. Enjoy your foray into what many people think is one of the most interesting areas of legal study!

For more revision tips, including self-test questions and suggestions for further reading, see the Online Resource Centre at www.oxfordtextbooks.co.uk/orc/strong_complete/.
The most accurate and helpful revision is done while you are going through the course. There will not be time to do a proper job of revision if you wait until the conclusion of your lectures. Consider the following tips to help you organize your thoughts and your materials as you begin your course.

- Start a vocabulary list with all the terms—procedural and substantive—that you don’t know and keep adding to it throughout your course. Using the right terms is half the battle on an examination, and knowing the terms in advance will make your weekly reading much easier.

- Browse through chapter 18 on revising for a tort examination now and identify which revision techniques work best for you. Although student lawyers must learn new analytical and revision techniques if they are to learn how to (a) remember and (b) manipulate the masses of information they will be given, there is no need to abandon all the revision techniques that have worked for you in the past. Be wise in what habits you prune, while also being open to new ideas.

- Your understanding of written material is best right after you have read it. Begin to organize the cases and statutes the minute you finish your reading. While you may want to do additional cross-referencing later, law does not build up on prior learning the same way that other courses do. You will be learning something new and different all the time. Don’t make the mistake of thinking you should wait to do your organization later, when you understand the material better—make your start now.