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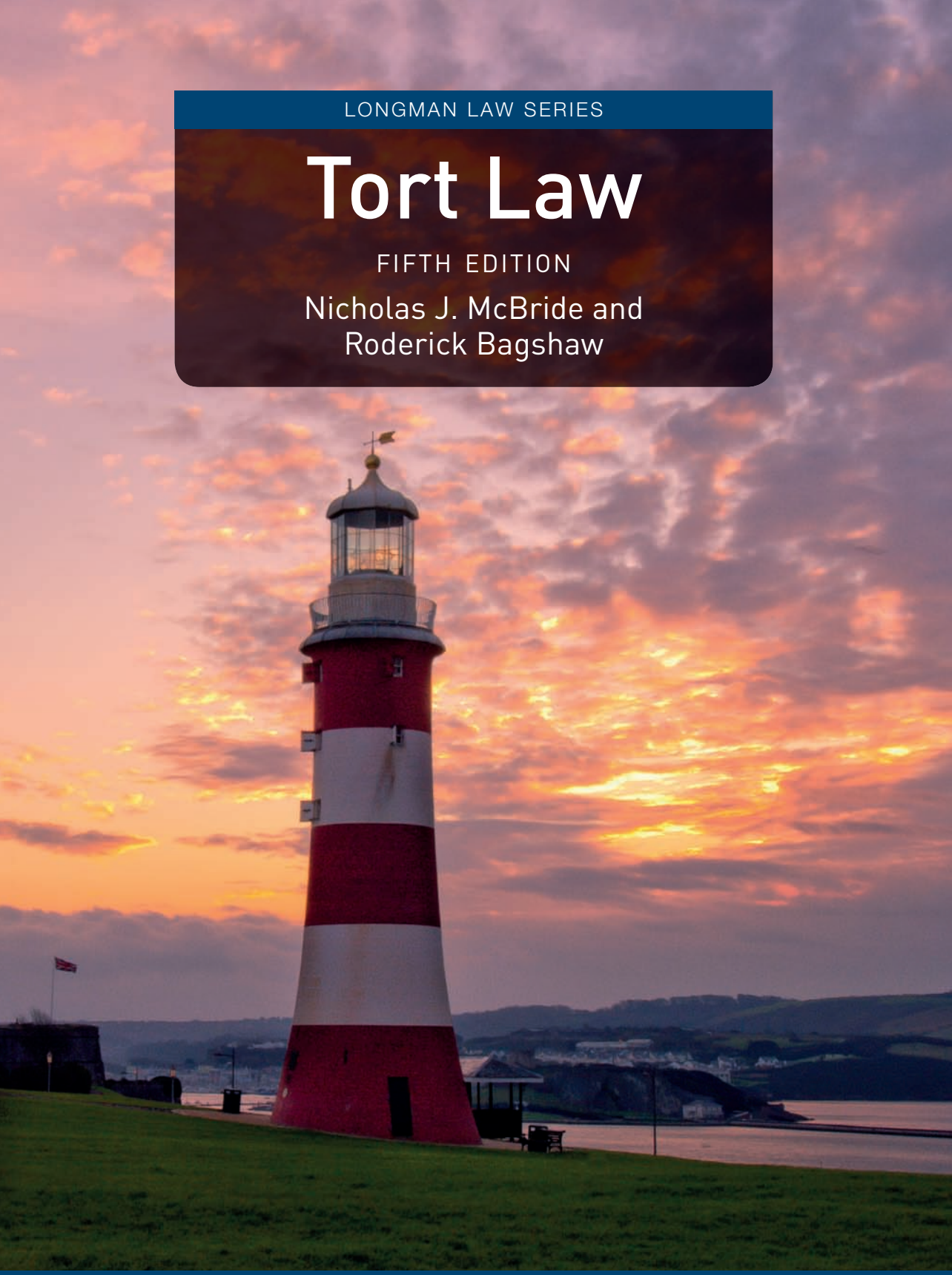
Tort Law

FIFTH EDITION

Nicholas J. McBride and
Roderick Bagshaw



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Tort Law

Fifth Edition

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and

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To
Liz, Corin and Arthur
and
Chris, Ben and Damian

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Acknowledgements

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Nick McBride writes: My developing understanding of tort law continues to benefit from conversations with fellow tort lawyers all over the world, especially Rob Stevens, Jason Varuhas, Sandy Steel, James Goudkamp, Ben Zipursky, Paul Davies, Jason Neyers, Steve Smith and – of course – Rod.

I am extremely grateful for the support I received during my mother's illness and death over the course of 2013 and 2014 from my dearest and closest friend Isabel; the amazing and inspiring Ines and Luca; my brothers, Chris, Ben and Damian; Shamima Dawood; Bridget and Craig Thompson; my colleagues at Pembroke College, especially Trevor Allan, Pat Aske, Mark Wormald, Becky Coombs, Sally Clowes, and Frances Kentish; Paul Davies and Jason Varuhas. Delayed though this edition was, I am sure it could not have been completed when it was without their help.

I would like to take this opportunity to acknowledge the debt I will always owe my mother, Barbara McBride. My mind goes back to an Encaenia Luncheon at All Souls College – which my mother always took great delight in attending – where the then Warden of All Souls asked her, 'How did you manage to produce such a non-conformist?' Like mother, like son: I owed, and owe, everything to her example in courageously and constantly standing up for truth and goodness against those who had little time for those values. We were put on this earth to do amazing things, and she never failed her vocation.

Roderick Bagshaw writes: I am very fortunate to be able, once again, to thank my wife – Liz – and sons – Corin and Arthur – for their generous support and tolerance during the production of this new edition: I am very grateful for all that you do.

Most of my work on this book was again done using libraries and databases at Magdalen College and the University of Oxford, and I remain grateful to my colleagues at Magdalen and in the Law Faculty at Oxford for all the assistance they provide, directly and indirectly, consciously and unknowingly.

Moreover, as in previous editions, it would be seriously remiss for me to fail to acknowledge the extent to which this book depends on Nick's willingness to go far beyond the conventional role of a co-author. Both of our names appear on the cover, but readers should not infer from that that we share the burdens equally: Nick takes on a far greater share of the writing and of all the other tasks involved in ensuring that this book meets its goals.

Preface to the fifth edition

Updating the fifth edition of this textbook did not require any radical changes to the structure of this book (detailed in the Preface to the fourth edition, and reprinted overleaf) but a number of chapters had to be extensively rewritten to take account of recent developments in the law.

Except in the field of vicarious liability, an area of liability which grows ever larger and more and more out of control, the general trend over the last three years or so has been in favour of making it harder for claimants to sue defendants in tort: the UK Supreme Court's recent decision in *Michael* v *Chief Constable of South Wales Police* (2015) – the third most important decision on the law of negligence ever handed down by the UK's highest court, after *Donoghue* v *Stevenson* (1932)and *Hedley Byrne & Co Ltd* v *Heller & Partners* (1964) – has put the kibosh on suggestions that public bodies should generally be liable for failures to save people from harm where there would be no policy objection to such liability arising; the Court of Appeal's decision in *Stannard* v *Gore* (2012) makes it even harder than it was before for a claimant to sue a defendant under the rule in *Rylands* v *Fletcher*; and the UK Supreme Court's restatement of the law on private nuisance in *Lawrence* v *Fen Tigers Ltd* (2014) has the potential to make it harder for the victim of a private nuisance to obtain an injunction bringing the nuisance to an end. Parliament has also been busy trying (sometimes ineffectively, sometimes effectively) to roll back the boundaries of tort law: the risibly titled Social Action, Responsibility and Heroism Act 2015 seeks to give those who seek to do good extra protection from being sued in negligence; the Defamation Act 2013 attempts to make it harder for claimants to sue defendants in defamation though it goes nowhere near as far as its proponents would claim in changing the law; s 69 of the Enterprise and Regulatory Reform Act 2013 does make it much harder for employees to sue their employers for compensation for injuries they have suffered at work; and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes it harder for the worst off in society to get legal assistance to sue those who violate their rights.[1]

It is hard to imagine that the next three years will bring as many changes to tort law as the last three years have – it is hard to see tort law being cut back even further and impossible to see the courts or Parliament embarking on any great leaps forward in terms of extending tort liability further than it currently goes. (Any new developments will, of course, be covered in the Tort Law section of www.mcbridesguides.com.) So it may be that we tort lawyers are in for an extended 'great moderation' (a term used by economists to describe the 20 year period of relative economic stability between 1985 and 2007) so far as tort law doctrine is concerned. But it is to be hoped that this period of relative quietude will not be matched by the tort academics, who still have much to do in terms of developing a defensible understanding of what tort law *should* be doing, as opposed to what it *is* doing. Arthur Herman's magisterial survey of the history of Platonism and Aristotelianism

[1] See Wilmot-Smith 2014 (available on the *London Review of Books* website) for an excellent account of the current situation so far as access to civil justice is concerned, and McBride 2014b for a discussion of how bad things could get, and what to do if they do get that bad.

over the course of Western civilisation – *The Cave and the Light* (Random House, 2014) – ends by warning that too much Aristotelianism (by which he means the activity of classifying, defining, explaining and describing ideas and things) can result in intellectual stagnation. Aristotelianism – while valuable – needs to be tempered with Platonism – the willingness to think of how things *might* be, to break out of established categories of thought, to consider that what we do at the moment might be *wrong*. It seems to us that tort law scholarship – a huge bibliography of which, unmatched in any other tort textbook, is available at the back of this book – is suffering from too much Aristotelianism at the moment and is beginning to stagnate as a result. A turn to Platonism is the corrective, and we hope to see some of that in the next few years from our tort academics.

Preface to the fourth edition

It is a striking feature of most textbooks that they tend not to change that much from edition to edition, in terms of their basic structure. We have bucked this trend by completely rewriting and restructuring our textbook for its fourth edition. In the previous three editions, we adopted what seemed to us the most rational way of setting out the law of tort – that is, by in one part of the book setting out the torts recognised by English law and in a subsequent part setting out what remedies would be available when someone committed a tort. The final part of the book dealt with a number of liability rules that are customarily dealt with in tort law textbooks because they make a defendant liable to pay *compensation* to a claimant, but which are difficult to rationalise as actually being part of the law of tort because the defendant does not have to have done anything *wrong* to incur a liability to pay compensation under these rules.

We continue to think that this is the most rational way of setting out tort law as a body of legal rules and principles: it has the twin virtues of enabling those rules and principles to be presented in a way that is very clear and involves no repetitions. However, we acknowledge that the most *rational* way of setting out the law of tort may not be the most *convenient* for tort law teachers or students. Separating out the issue of when someone will commit a tort from the issue of what remedies will be available when someone commits a tort meant that readers had to look in two different parts of the book to find out everything they needed to know about (say) the law of negligence – one part to find out when someone will commit the tort of negligence, and one part to find out what remedies will be available when that tort is committed. Moreover, readers wanting to compare the remedies available to a claimant in (a) negligence, and (b) under the Consumer Protection Act 1987 when the claimant's car was wrecked by a dangerously defective tyre might have found it disconcerting to have our discussion of those issues separated by 700-odd pages.

So, for this edition, we have opted for a much more conventional way of presenting tort law. So, for example, after we conclude our discussion of the law of negligence, we do not move on to another tort (as we did in previous editions), but instead talk about the law on causation and actionability. Convenience demands that we do so, as these areas of law are crucial to the outcome of any negligence case. But what is convenient also carries with it some dangers, as these areas of law are relevant to all tort cases where a claimant is suing for compensatory damages (as he or she almost always is) and discussing these areas of law before other torts may tend to obscure that fact. Again, for reasons of practical convenience, we talk about the Consumer Protection Act 1987 in chapter 12 of this book, as opposed to chapter 43 in the previous edition. And again, some dangers are involved in doing this. When we come to the 'remedial' chapters in this edition (chapters 27–35), and make statements starting 'When a defendant commits a tort in relation to a claimant . . .', the reader may well wonder, 'Does that include a situation where the defendant is liable to the claimant under the Consumer Protection Act 1987?' The short and obvious answer is, 'No – it does not' – but the potential for confusion is created by dealing with the 1987 Act *before* talking about the remedies available when a tort has been committed, rather than *after* (as in previous editions). However, we are alert – in a way that writers who go along

as a matter of course with conventional presentations of the law of tort might not be – to the dangers of confusion created by setting out tort law in a convenient way, and have sought to warn the reader of those dangers all along the way.

Radically rewriting and restructuring this textbook has also freed us up to make some further innovations in this edition. Two in particular should be noted:

(1) *Theory*. In this edition, we discuss various academic views about the basis of tort law or various features of the law of tort in far more depth than we have in previous editions. We have three reasons for doing this.

First, we do so for the sake of students who read this book for the purpose of learning about tort law. We firmly believe that tort law is easier for students to come to grips with and remember if they have some understanding of the principles underlying the cases and provisions making up the body of tort law. To draw an analogy, chess masters and grandmasters have the ability to remember thousands and thousands of different positions on a chessboard. But if you lay out some pieces on a chessboard randomly, not even the most distinguished chess player will be able to remember how the pieces were arranged. The reason is that we are only capable of remembering things that form some sort of order or pattern; our memories cannot cope with randomness. Students who can discern some sort of order underpinning the rules and doctrines that make up tort law will find those rules and doctrines far easier to remember than students for whom those rules and doctrines are only noise.

Secondly, we do so for the sake of the future of tort law, which can only function effectively and fairly if those who administer it know what they are doing and why. There is a saying from the Bible that 'Where there is no vision, the people perish.'[2] The same is true of the law. Where there is no lively understanding – albeit, perhaps, unspoken – among the judges as to *why* the law says what it does, they will not know how to develop the law in a consistent and principled way in deciding novel cases; moreover, they will have no reason to stick to the letter of the law in cases where their sympathies are on the side of the party whose case has no legal merits. The courts will become a casino where the outcome of your case will be largely a matter of chance. There are some signs that the absence of any understanding among the judges as to what tort law is for is already resulting in tort cases no longer being decided in any kind of principled way. It is quite remarkable how many recent Court of Appeal decisions in the field of tort law have been badly reasoned or decided. A particular nadir was reached in the case of *Shell UK Ltd* v *Total UK Ltd* (2010) where counsel's argument for the defendants in that case was dismissed on the ground that it would be 'legalistic' to deny the claimants' claim.[3] What are the courts for, if not to be 'legalistic'?

Thirdly, we do so for the sake of academics whose painstaking researches into, and arguments about, tort law are in danger of being lost unless they are assimilated into a work such as this one. Worldwide pressure on academics to produce more and more 'research outputs' in order to ensure continued state funding to their institutions has resulted in a huge profusion of articles and books on all areas of law, including tort law. But it is difficult for anyone to be heard properly when everyone is speaking at once – and there is a real danger at the moment that the profusion of research into tort law is actually making it more difficult, rather than making it easier, for real progress to be made in understanding tort law. We do not really need any more law journals, carrying more and

[2] Proverbs 29:18 (KJV).
[3] [2011] QB 86, at [132].

more articles about aspects of the law. What we are desperately in need of are meta-journals: journals that report and reflect on what is in the law journals, so as to bring the flood of research pouring out of the universities under control, disperse it into the tributaries of various legal specialisms, and thereby enrich their development. In the absence of such meta-journals, it falls on textbook writers – paradoxically, the most despised breed of writer under the current systems for evaluating a university's or faculty's worth – to do the necessary work of assimilating and communicating to others the current state of legal research.

(2) *Problems*. The reader will find at various points throughout this edition, a number of difficult tort law-related problem scenarios. A full index of these problems may be found at the back of this book.

We have done so, in part, for educational reasons. The problem questions are fun, and interesting, and help the reader see how tort law can be fun, and interesting. This is particularly important when a lot of the tort law problem questions a typical student reader might be confronted with in the course of his or her studies reduce down to 'Can you remember the case or cases that are relevant to this situation?' We hope the problem scenarios scattered throughout this book show that tort law can be a *lot* more interesting than *that*.

But we have also done so in order to make a general point about tort law. The mathematical and scientific revolutions of the 17th century led many thinkers to believe that human institutions such as law could be given a mathematical/scientific basis.[4] As Roger Berkowitz explains in his book *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham, 2010):

> The grand insight of seventeenth-century natural scientists was not simply to rediscover Euclid and ancient mathematical reasoning; rather it was to extend the mathematical method from logical beings to actual beings in the world.[5]

So the mathematician Gottfried Wilhelm Leibniz (who – simultaneously with Isaac Newton – invented calculus)

> expresse[d] his ambition to discover a method for the determination of fundamental principles that would decide all legal cases, even the most difficult and perplexing ones, with certainty.[6]

Leibniz thought he had found this method in 'this single principle: the fact that justice is the charity of the wise.'[7] This single principle, he thought, lay at the base of the law and would yield up rules and sub-principles that could determine – with mathematical certainty – any legal case.

It may be that history is now repeating itself. While this edition was being written, the BBC screened a three part Adam Curtis documentary series called *All Watched Over By Machines Of Loving Grace*. The essential thesis of Curtis' documentary was that the computer revolution has had a fundamental effect on the way we think of ourselves and the world. We tend to think of ourselves, and the world we live in, as programmed to achieve certain outcomes, in a stable and determinate way. Just like a computer. It might be that this mental conditioning explains why so many academics are happy to endorse accounts

[4] Our thanks to Sandy Steel for first suggesting to us this historical parallel.
[5] Berkowitz 2010, 18–19.
[6] Berkowitz 2010, 29.
[7] Berkowitz 2010, 64, quoting from a letter written by Leibniz in May 1677.

of tort law that see it as giving effect to one 'single principle' – such as 'Maximise wealth!' or 'Preserve the equal freedom of every agent to determine what purposes he will pursue!' or 'Do what is most beneficial for society!' – that will (it is thought) determine *for certain* what the outcome of *any* tort case should be.

The problem scenarios scattered throughout this book are intended as a corrective to this – in our view – overly simplistic view of tort law. Even if tort law gives effect to one 'single principle' – something which is very doubtful – such a principle will never be able to determine for certain what decision a court should make in the sort of difficult scenarios that are set out in this book.[8] How those sorts of cases are to be resolved requires judgment and wisdom; and we hope some of that will come through in reading this book.

[8] A topic pursued further in Bagshaw 2011b.

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Health and Social Care Act 2008: s.145 *78*

Health and Social Care (Community Health and Standards) Act 2003: s.150 *879*; s.153 *879*
Highways Act 1980: s.41 *380, 654*; s.58 *654–655*
Human Rights Act 1998 *3, 8, 21, 23, 37, 73, 74, 96, 115, 197, 224, 227, 228, 252–253, 471, 576, 577, 607, 645, 739, 758, 840, 841*; s.3 *86*; s.6 *73, 74, 75, 79, 80, 81, 85, 473, 610, 631*; s.7 *82, 228*; s.8 *22, 75, 80, 82, 84, 85*; s.9 *86*; s.12 *638, 855–856, 858, 859*

Infrastructure Act 2015: s.39 *428*

Latent Damage Act 1986: s.3 *879*
Law Reform (Contributory Negligence) Act 1945 *22, 406*; s.1 *792*; s.4 *792*
Law Reform (Married Women and Joint Tortfeasors) Act 1935: s.3 *890*
Law Reform (Miscellaneous Provisions) Act 1934: s.1 *560, 744, 767, 821, 822, 844*
Law Reform (Miscellaneous Provisions) Act 1970: s.4 *7*; s.5 *7*
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Mental Health Act 2007: s.50 *53*
Misrepresentation Act 1967: s.3 *747*

National Parks and Access to the Countryside Act 1949 *375, 380*
Nuclear Installations Act 1965: s.7 *502*; s.12 *502*; s.13 *502*

Occupiers' Liability Act 1957 *246, 248, 249, 277, 343, 370, 372, 373, 375, 380, 381, 382, 383, 384, 385, 387, 388, 389, 645*; s.1 *100, 249, 373, 375, 376, 380*; s.2 *273, 372, 375, 377, 378, 381, 383, 389*
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Slander of Women Act 1891: s.1 *563*
Social Action, Responsibility and Heroism Act 2015: s. 2 *268*; s. 3 *263*; s. 4 *261*
Social Security (Recovery of Benefits) Act 1997 *879*

Theatres Act 1968: s.4 *562*; s.7 *562*
Torts (Interference with Goods) Act 1977: s.1 *511*; s.2 *249, 515*; s.3 *524*; s.5 *523*; s.6 *524*; s.11 *514, 793*
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First Protocol to the European Convention on Human Rights: Art 1 *71, 87*; Art 2 *71*; Art 3 *71, 72*

1 The basics

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Aims and objectives

Reading this chapter should enable you to:

(1) Understand what a civil wrong is, and that a tort is a form of civil wrong.
(2) Begin to understand what forms of behaviour will amount to torts.
(3) Understand what remedies will be available when a tort has been committed.
(4) Come to grips with various different views of what tort law is 'about'.
(5) Distinguish tort law from other areas of law, such as criminal law or property law.
(6) Understand what role insurance plays in tort claims and the way tort cases are decided.

1.1 THE FUNCTION OF TORT LAW

Tort law is one of the most fundamental legal subjects that you can study. This is because the function of tort law is to determine what legal rights[1] we have against other people, free of charge and without our having to make special arrangements for them, and what remedies will be available when those rights are violated.

In *Donoghue* v *Stevenson* (1932), Mrs Donoghue and a friend of hers went to a café in Paisley, Scotland. Donoghue's friend ordered an ice cream 'float' for Donoghue. Francis Minchella, the café owner, served Donoghue with a tumbler of ice cream and an opaque bottle of ginger beer. Minchella poured some of the beer over the ice cream to create the 'float' and left the bottle – now half full – on Donoghue's table. After Donoghue had eaten some of the 'float', she topped it up by pouring onto it some more ginger beer. As she did so, the decomposing remains of a snail slid out of the ginger beer bottle. Donoghue was taken ill. She brought a claim in tort against David Stevenson, the manufacturer of the

[1] From now on, whenever we use the word 'right', we mean by that a legal right, not a moral right.

ginger beer. She argued that Stevenson had been careless in allowing a snail to get into the bottle, and as a result he should be held liable in tort to compensate her for the illness she had suffered after drinking the bottle's contents (dead snail remains and all).

In bringing her claim against Stevenson, Donoghue faced an uphill battle. The available authorities that applied to her case indicated that:

(1) If Donoghue wanted to sue Stevenson in tort, she had first of all to show that she had a right against Stevenson that he take care that the ginger beer in her bottle was safe to drink. If she could not show this, then even if Stevenson had been careless in allowing a snail to get into the ginger beer bottle, he would have done no wrong – committed no tort – to Donoghue in being careless.

(2) Donoghue could only have had a right against Stevenson that he take care that the ginger beer in the bottle was safe to drink if she and he had entered into a contract – a legally binding agreement – under which Stevenson undertook to take such care in manufacturing the bottle of ginger beer.[2] Obviously, this requirement was not satisfied in this case. Donoghue and Stevenson were complete strangers. Donoghue did not even have a contract with Minchella, the café owner who had served her the ginger beer, as the ginger beer had been bought from Minchella by her friend, and not her.

When the case came to the House of Lords, the Law Lords decided – by a 3:2 majority – that (2) was incorrect. It decided that even though Donoghue and Stevenson were complete strangers, Donoghue still had a right that Stevenson take care that the ginger beer in her bottle was safe to drink. *Donoghue* v *Stevenson* established that a consumer would *not* have to enter into a contract with a manufacturer if she wanted to have a right that the manufacturer take care that his goods were safe for the consumer to use. Instead a consumer would have such a right automatically.

What the House of Lords did in *Donoghue* v *Stevenson* was exactly what tort law does generally. Tort law tells us what rights we have against other people automatically – free of charge and without us having to make any special arrangements for them – and what remedies will be available when those rights are violated. To save words, let's call these rights that tort law gives us, *basic rights*. So the function of tort law is to determine what basic rights we have against other people, and what remedies will be available when those rights are violated.[3] The major task of a tort textbook is to set out what these basic rights are, and what remedies will be available when they are violated.

1.2 RIGHTS AND DUTIES

Because lawyers use the word 'right' in different ways, saying – as we do – that tort law determines what basic rights we enjoy against other people can create confusion. Lawyers use the word 'right' in at least three different ways:

(1) To describe what A has when A has a power to perform some kind of legal act, such as suing someone for damages, or terminating a contract. So if A has the power to sue B for damages, lawyers say that A has a 'right' to sue B for damages. Similarly, if A has the power to terminate a contract that A has with B because B has failed to perform her side of the contract in some serious way, then we say that A has a 'right' to terminate his contract with B.

[2] *Winterbottom* v *Wright* (1842) 2 M & W 109, 152 ER 402.
[3] For an excellent presentation of this view of tort law, see Tettenborn 2000a.

(2) To describe what A has when the law imposes a legal duty on B to do *x*, and the law imposes that duty on B for A's benefit. In such a situation, lawyers will say that A has a 'right' against B that B do *x*. This right is correlative to the duty that (lawyers say) B *owes* A to do *x*. Neither the right nor the duty is prior to the other. The right does not arise out of the duty. The duty does not arise out of the right. The duty and the right are two sides of the same coin.

So, for example, we said above that the issue in *Donoghue* v *Stevenson* was whether Donoghue had a right against Stevenson that he take care that the ginger beer in her bottle was safe to drink. But an exactly identical way of expressing this point is to say that the issue in *Donoghue* v *Stevenson* was whether Stevenson owed Donoghue a duty to take care that the ginger beer in her bottle was safe to drink. And that was the way the case was argued in the House of Lords – in terms of duties, not rights. But it makes no difference whether you discuss that case in terms of Stevenson owing a duty of care to Donoghue, or in terms of Donoghue having a right against Stevenson that he take care. It comes to the same thing.

(3) To describe what A has when the law takes steps to protect some freedom or interest of A's from being interfered with by other people. So, for example, it is correct to say that you have a 'right' to freedom of speech. This is because the law takes special steps to protect your freedom of speech – in two ways.

First, the Human Rights Act 1998 makes it unlawful for a public body to interfere with your freedom of speech if doing so serves no legitimate purpose,[4] or if doing so does serve a legitimate purpose but would have a disproportionate effect on your freedom of speech.

Secondly, the law grants you immunities, or exemptions, from certain legal rules that would otherwise have the effect of allowing other people to unacceptably interfere with your freedom of speech. For example, it is normally the case that if you defame someone else – say something bad about them – then the person you have defamed will be entitled to sue you for damages. But applying that rule across the board would have the effect of unacceptably interfering with your freedom of speech – for example, when what you have to say about someone else is damaging but true, or when you occupy some position that makes it important that you be able to say what you think about someone else without fear of being sued. In order to prevent people's freedom of expression being unacceptably interfered with in this way, the law grants us certain immunities, or exemptions, from the law on defamation.

So if you say something bad about A, but what you say about A is substantially true, then you will almost always have a defence to being sued by A for defamation. Again, if a journalist in good faith publishes an article that makes damaging allegations about B, then the journalist will have a defence to being sued by B for defamation if the article was on a matter of public interest, and the journalist acted responsibly in publishing the article. And again, a Member of Parliament who makes damaging allegations against C on the floor in Parliament cannot be sued at all by C – and this is so even if the MP in question knew that what he was saying about C was untrue when he said it.

[4] Article 10(2) of the European Convention on Human Rights provides that it may be legitimate to limit freedom of speech 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

When we say that the function of tort law is to determine what basic rights we have against other people, and what remedies are available when those rights are violated, we are using the word 'right' in the *second* sense above. This is a very important point, because people often mix up the second and third types of rights and say things like – 'In *Donoghue* v *Stevenson*, Donoghue was entitled to sue Stevenson because he violated her right *to* bodily integrity'. No – Donoghue was entitled to sue Stevenson because she had a right *that* he take care that the ginger beer in her bottle was safe to drink, and he (we can suppose) violated that right.[5]

Remedies in tort law are based on the violation of a 'right *that* . . .', not a 'right *to* . . .'. Tort law does not do what it does because we have various 'rights to . . .' (bodily integrity, freedom of speech, reputation, property, trade, vote, freedom from discrimination, and so on).[6] On the contrary: our 'rights to . . .' (bodily integrity, freedom of speech, reputation, property, trade, vote, freedom from discrimination, and so on) exist because tort law does what it does in giving us particular rights against other people that they not act in particular ways. It is because we have *those* rights that we can say we have rights to bodily integrity, freedom of speech, reputation, and so on.[7]

In *Allen* v *Flood* (1898) Allen represented ironworkers who were employed by the Glengall Iron Company to repair a ship. The ironworkers were employed on a 'day to day' basis. In other words, if they were working on the ship one day, the Glengall Iron Company had no contractual duty to employ them to work on the ship the next day. But equally, they had no contractual duty to turn up to work on the ship the next day. So each day, the ironworkers would present themselves at the yard for work, and see if they would be taken on for that day. Flood and Taylor were also employed on a 'day to day' basis by the Glengall Iron Company to work on the ship, repairing its woodwork. The ironworkers objected to working alongside Flood and Taylor because Flood and Taylor had previously done some ironwork on another ship, and the ironworkers regarded such work as exclusively theirs to do. So Allen told the Glengall Iron Company that if the company carried on employing Flood and Taylor, the ironworkers would no longer work on their ship. The result was that the next day, Flood and Taylor were told they were no longer needed to work on the ship.

Flood and Taylor sued Allen. They won at first instance, and in the Court of Appeal. When the case reached the House of Lords, nine Law Lords heard the case. Such was the importance of the case, the nine Law Lords asked eight judges to sit in on the hearings and advise them as to what decision they should give in the case. Of those eight judges, six (Hawkins, Cave, North, Wills, Grantham and Lawrance JJ) said that Flood and Taylor were entitled to sue Allen, and only two (Mathew and Wright JJ) said they were not. However, the nine Law Lords decided by six (Lords Watson, Herschell, Macnaghten, James, Shand and Davey) to three (Lord Halsbury LC, and Lords Ashbourne and Morris) that Flood and Taylor had no claim in this case. All in all, 21 judges heard arguments in *Allen* v *Flood* (including one judge at first instance, and three in the Court of Appeal) – 13 found for Flood and Taylor, and only eight for Allen.

Allen v *Flood* illustrates just how important it is to bear in mind that you can only sue someone in tort for doing *x* if you can show that you had a right against them *that* they not

[5] In fact, the issue of whether Stevenson failed to take care that Donoghue's ginger beer was safe to drink was never tried. The only issue the House of Lords had to decide was whether Stevenson owed Donoghue a duty of care. The case was then sent back down to a lower court to resolve the issue of whether Stevenson breached that duty of care. But the case was settled – Stevenson paid Donoghue damages out of court – before that issue came to court.

[6] Again, it should be remembered (see fn 1, above) that we are talking of legal rights here, not moral rights.

[7] See McBride 2011 for a much more detailed exposition of this basic point.

do *x*. This point was overlooked by the 13 judges who ruled for the claimants in *Allen* v *Flood*. Those judges all took the view that Flood and Taylor should be allowed to sue Allen because they had a 'right to trade' that had been unjustifiably interfered with by Allen. But whether or not Flood and Taylor had a 'right to trade' was irrelevant. The real issue was whether Flood and Taylor had a right against Allen *that* he not persuade the Glengall Iron Company not to re-employ them the next day by threatening that if the company did so, the ironworkers represented by Allen would no longer work on the company's ship. The House of Lords decided that Flood and Taylor had no such right against Allen.

The only (relevant) rights that Flood and Taylor did have against Allen were: (1) a right that Allen not persuade the Glengall Iron Company to breach any contract it had with Flood and Taylor, and (2) a right that Allen not intentionally cause Flood and Taylor loss using means that were independently unlawful. Flood and Taylor could not sue Allen because neither of those rights had been violated in this case. Right (1) was not violated because the Glengall Iron Company was under no contractual obligation to employ Flood and Taylor the next day. Right (2) was not violated because the means by which Allen caused Flood and Taylor loss in this case was to threaten that the ironworkers that he represented would not turn up to work the next day. As the ironworkers were under no contractual duty to turn up for work the next day, it was not independently unlawful for Allen to make this threat.

1.3 THE RANGE OF TORTS

In principle, there are as many different torts as there are different basic rights that tort law gives us against other people.[8] In practice, this is not true as there is one tort, *negligence*, that encompasses the violation of a large number of different rights that we have against other people that they take care not to harm us in some way, or take care to help us in some way. The range of torts recognised under English law can be divided up into a number of different groups:

(1) *Torts of trespass to the person*. These include battery (unlawfully touching another), assault (unlawfully making someone think that they are about to be touched), and false imprisonment (unlawfully confining someone's movements to a particular area).

(2) *Negligence*. This tort covers any situation where a defendant has breached a duty of care owed to a claimant. There are a large number of different duties of care recognised under the law, and a large number of different situations in which one person will owe another a duty of care. Periodic attempts have been made to come up with a master formula that will tell us in any given situation whether or not one person will owe another a duty of care, and, if so, what sort of duty. The most famous was Lord Atkin's in *Donoghue* v *Stevenson*, where he argued that

> in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances' and went on to suggest that the particular cases to be found in the books (that is, the law reports) were based on the general proposition that 'You must take reasonable care to avoid acts or omissions which would be likely to injure your neighbour', where 'your neighbour' is someone who is 'so closely and

[8] Rudden 1991–1992 provides us with a list of over 70 torts which have been recognised at one time or another in the common law jurisdictions. But it is doubtful whether some of the listed 'torts' are actually torts – for example, 'homicide' or 'products liability'.

> 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.[9]

In truth, all such attempts to come up with such a master formula have failed. Either the formula has been wrong (as Lord Atkin's was, in eliding the fundamental distinction in English tort law between acts and omissions) or the formula has amounted to nothing more than saying 'A will owe B a duty of care if it would be "fair, just and reasonable" for him to do so' – which may be true, but is hardly informative.

(3) *Torts to land*. This group of torts includes the tort of trespass to land (unlawfully going on to someone else's land) and the tort of private nuisance (unlawfully interfering with the amenity value of land in someone else's possession), as well as any forms of the tort of negligence that involve breaching a duty to take care not to do something that is liable to damage someone else's land or a duty to take care to do something to protect someone else's land from being damaged.

(4) *Torts to goods*. Again, the tort of negligence is relevant here, or at least any forms of the tort that involve breaching a duty to take care not to do something that is liable to damage someone else's goods, or a duty to take care to do something to protect someone else's goods from being damaged. The latter kind of duty will be owed in a bailment situation – where A is entrusted with the job of looking after B's goods. Other torts that belong to this group are trespass to goods (unlawfully touching another's goods) and conversion (treating another's goods as though they are your own to dispose of). A further tort, detinue (which involved refusing to hand over goods to the person entitled to them), was abolished in 1977, and this type of wrong is now treated as a form of conversion.

(5) *Personality torts*. These torts involve acting in ways that impinge on someone's ability to function as a person, or to interact with other people. They include defamation, harassment and the new tort of invasion of privacy (or, more accurately, unlawful disclosure of private information to a third party).

(6) *The economic torts*. The torts that belong to this group are so-called because they all involve inflicting some kind of economic harm on someone else. These torts include the tort of inducing a breach of contract, the intentional infliction of economic loss using unlawful means to do so, conspiracy (in both its 'lawful means' form – combining together with one or more people to cause someone loss for no good reason – and its 'unlawful means' form – combining together with one or more people to cause someone loss, using unlawful means to do so), deceit (intentionally or recklessly lying to someone so as to get them to act in a particular way), passing off (trading on the goodwill attached to someone's name or business, or trading in a way that might endanger the goodwill attached to someone's name or business), and malicious falsehood (deliberately telling a third party lies about someone with the object of causing that someone loss). In theory, this group also involves any form of the tort of negligence that involves a breach of a duty to take care not to harm, or to safeguard, someone else's economic welfare.

(7) *Abuse of power torts*. This group includes misfeasance in public office (which either involves a public official unlawfully and intentionally causing someone loss, or involves a public official knowingly doing something unlawful that he knew would cause someone loss) and malicious prosecution (which involves A instituting criminal proceedings against an innocent person for no legitimate reason).

[9] [1932] AC 562, at 580.

(8) *Statutory torts*. We will discuss these in more detail shortly,[10] but for the time being: A will commit a statutory tort if: (1) he breaches a duty that Parliament has imposed on him for the benefit of B; and (2) Parliament intended that a breach of that duty should be actionable in tort – that is, Parliament intended that the same remedies that are available against someone who commits one of the torts set out above should also be available against A.

The range of torts recognised under English law expands and contracts over time, to reflect changing social notions as to what basic rights we should have against other people. We have already seen how in *Donoghue* v *Stevenson*, the House of Lords was confronted with the question: Should a consumer automatically have a right against the manufacturer of a product she is using that the manufacturer take care that that product is safe to use? Previous decisions had indicated that a consumer should not: that if a consumer wanted such a right, she would have to go to the manufacturer and bargain for it. Such decisions reflected a desire not to impose too many burdens on businesses and expose them to the risk of a multiplicity of lawsuits:

> The only safe rule is to confine the right to recover [for harm caused by a defective product] to those who enter into [a] contract [with the manufacturer]; if we go one step beyond that, there is no reason why we should not go fifty.[11]

But by the time *Donoghue* v *Stevenson* was decided, the pendulum had swung, and the majority in the House of Lords was more concerned to enhance the degree of protection enjoyed by consumers than it was to protect businesses from too many lawsuits.

Donoghue v *Stevenson* was an example of changes in society triggering an expansion in the basic rights we enjoy against each other; but social change can also result in a contraction in our basic rights. For example, it used to be the case that if a man was married, he would normally have a right against other men that they not sleep with his wife,[12] that they not encourage his wife to leave him, and that if his wife did leave him, that they not give her a place to stay.[13] As McCardie J frankly admitted in *Butterworth* v *Butterworth and Englefield* (1920), the reason for this was that a 'wife was in substance regarded by the common law as the property of her husband'[14] – so interfering with a man's wife was regarded as being akin to interfering with his property. Now that society has rejected the idea that a man's wife is his property, the idea that a married man will have a right against other men that they not interfere with his marriage has also been rejected. So it is not a tort anymore to interfere with someone else's marriage.[15]

However, the pendulum might swing again, particularly under the influence of Article 8 of the European Convention on Human Rights, which provides that 'Everyone has the

[10] See § 1.10, below.
[11] *Winterbottom* v *Wright* (1842) 2 M & W 109, at 115 (per Alderson B).
[12] Matrimonial Causes Act 1857, s 33.
[13] *Winsmore* v *Greenbank* (1745) Willes 577, 125 ER 1330.
[14] [1920] P 126, 130.
[15] Section 4 of the Law Reform (Miscellaneous Provisions) Act 1970 provides that 'no person shall be entitled to . . . claim . . . damages from any other person on the ground of adultery with the wife of the first-mentioned person'. Section 5 of the 1970 Act provides that '[no] person shall be liable in tort . . . (a) to any other person on the ground only of his having induced the wife . . . of that other person to leave or remain apart from [that person]; . . . (c) to any other person for harbouring the wife . . . of [that person] . . .' Section 2 of the Administration of Justice Act 1982 provides that '[no] person shall be liable in tort . . . to a husband on the ground only if having deprived him of the services or society of his wife'. The last remaining traces of the idea that a man's wife is his property were removed from the law by the House of Lords in *R* v *R* [1992] 1 AC 599, ruling that a man is not allowed to have sexual intercourse with his wife without her consent.

right to respect for his private and family life, his home and his correspondence.' It could be argued that it is unrealistic to look at a family as an atomistic collection of individuals that have nothing to do with each other. Every member of a family's welfare is bound up with the fate of the family as a whole – so anything that happens to disrupt or harm the family as a whole has a serious effect on the welfare of each member of that family. Given this, it could be argued that the law should recognise that parents have a right that other people not harm their children; and children have a right that other people not harm, or break up, their parents.

So far, attempts to argue for the existence of parental rights that social workers take care not to take the parents' children out of the family home for no good reason,[16] or that social workers not unjustifiably interfere with parents' relationships with their children by placing them with foster parents or having them adopted[17] – have fallen on stony ground because of a desire on the part of the courts to let social workers get on with their jobs, and focus on what they think is the right thing to do for the children whose safety should be their first concern, free from the fear that their decisions may result in their being sued by the children's parents. However, it is easy to imagine that such parental rights will be recognised in future, as society comes to take a different view of where the balance[18] should be struck between the need to protect good families from being broken up, and the need to allow social workers to do their jobs properly.[19]

1.4 TORTS AND WRONGS

A tort is often said to be a form of *civil wrong*.[20] What do we think?

A wrong involves the breach of a legal duty.[21] Whenever someone does something he is not allowed to do under the law, we can say that he had a duty not to do what he did, and we can also say that he has committed a (legal) wrong. All wrongs can be divided up into *private* wrongs and *public* wrongs.

A private wrong involves the breach of a legal duty that has been imposed on someone for the benefit of a specific individual. So, for example, if you take any two given individuals, A and B, A will have a legal duty not to beat B up. That duty is imposed on A for B's benefit. It is not imposed on A for anyone else's benefit – such as B's wife or children. No doubt they have an interest in B's not being beaten up. But their interest in B's not being beaten up is not the reason why A has a duty not to beat B up. A's duty not to beat B up is imposed on him because B has an interest in not being beaten up. Because A's duty not to

[16] See *D* v *East Berkshire Community Health NHS Trust* [2005] 2 AC 373; *Lawrence* v *Pembrokeshire County Council* [2007] 1 WLR 2991.

[17] See *F* v *Wirral MBC* [1991] Fam 69.

[18] On the value judgments involved in engaging in this kind of balancing process, see McBride 2013.

[19] The European Court of Human Rights has already ruled in *MAK* v *United Kingdom* (2010) 51 EHRR 14 that a public authority will violate a parent's Article 8 rights if it unreasonably reaches the incorrect conclusion that the parent's child is at risk of abuse (physical or sexual) in the family home and as a result takes the child into care. This may prod the UK courts into recognising that parents have rights under the common law not to have their children taken away from them unreasonably. But there is no need for the courts to do this to bring UK law into compliance with the European Convention on Human Rights as the existence of the Human Rights Act 1998 now means there is an adequate remedy when a parent's Article 8 rights are violated in the way they were in *MAK*. For criticism of the *MAK* decision – and, in particular, its failure to pay attention to the concern that in cases of suspected abuse, doctors and the social services need to be shielded from the risk of litigation by parents who have had their children taken away from them, if there is to be a proper investigation of the allegations of abuse – see Greasley 2010.

[20] See Birks 1995.

[21] From now on, whenever we use the word 'duty' we mean by that a legal duty, not a moral duty.

beat B up is imposed on A for the benefit of B, we can say that A will commit a private wrong *in relation to B* if A beats B up. We saw in the previous section, if the law imposes a duty on A to do *x* for the benefit of B, we can say that A *owes* B a duty to do *x*, and – what comes to exactly the same thing – we can also say that B has a right against A that A do *x*. So we can say that a private wrong involves the breach of a legal duty owed to someone else, or – what comes to exactly the same thing – that someone who commits a private wrong violates a right that someone else had against him.

It is quite different with public wrongs. A public wrong involves the breach of a legal duty that has been imposed on someone not for the benefit of a specific individual, but for the benefit of society as a whole. So, for example, you are under a duty not to damage or destroy the breeding site or resting place of a wild animal that belongs to a 'European protected species'. This is because regulation 41(d) of the Conservation of Habitats and Species Regulations 2010 makes it a criminal offence to do such a thing. That duty is not imposed on you for the benefit of a particular individual. So you cannot be said to owe that duty to a particular individual; nor can it be said that any particular individual has a right that you not damage or destroy a protected animal's breeding site or resting place. Rather, your duty not to do such a thing is imposed on you for the benefit of society as a whole. So if you do damage or destroy a protected animal's breeding site or resting place, you will commit a public wrong, not a private wrong.

With that all said, let us now turn to civil wrongs. There are two popular ways of defining what a civil wrong is:

(1) A private wrong. That is, a breach of a duty owed to another, or – to put it another, exactly equivalent way – the violation of a right that one person had against another.[22]

On this definition, we would agree that a tort is a form of civil wrong. Clearly, everything we have said so far indicates that we take the view that someone who commits a tort commits a private wrong.

(2) Any kind of wrong – private or public – that is capable of giving rise to a right to bring an action (known as a 'civil action') against the person who committed that wrong for damages.[23]

On this definition, we would again agree that a tort is a form of civil wrong. Someone who commits a tort commits a wrong, and one of the remedies that *may* be made available against them is an order to pay damages to someone else. But strong emphasis needs to be placed on the word 'may'. If someone commits a tort, it is not necessarily the case that they will *always* have to pay damages to someone else. Consider the **Two Burglars Problem**:

> *Greedy* and *Nasty* break into *Owner*'s house and attempt to open *Owner*'s safe with some explosives that they have brought with them. *Greedy* carelessly drops the explosives, with the result that they go off, and *Nasty* is injured.

In this sort of case, it seems to us obvious that *Greedy* has committed a tort to *Nasty*: the tort of negligence. *Greedy* owed *Nasty* a duty to take care not to drop the explosives for the same reason that the defendant in *Donoghue* v *Stevenson* owed the claimant a duty to take care to see that her ginger beer was safe to drink – because it was reasonably foreseeable that if care was not taken, someone would get injured. But the available authorities indicate

[22] See Birks 1995, at 33.
[23] See Birks 1995, at 40.