

EXAM

3 hours (100%)

PART A: Problem question (60%)

- Large problem question CAN draw on any of the Torts/courses of action we have studied (NOT defamation/privacy)

PART B: Essay - Choice of 4 (40%)

- Defamation and privacy
- Answer one question out of the four choices

Introduction to the Law of Torts

DEFINE; a collection of different wrongs/ways you can harm someone else

- A branch of private law or the law of obligations
- Creates standards of conduct between persons > when these are not met, those affected have the right to bring an action in their own name for a remedy (usually damages)
- ALL civil obligations that don't arise out of contract
- ALL Torts have a set of criteria

'The breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a representative of society as a whole'

Peter Birks in 'The Concept of a Civil Wrong' (1995)

The Purposes of Tort Law

- Not just compensation. Compensation is often seen as the predominant purpose of tort law. While compensation does often loom large, focusing solely on compensation misses a number of important points.

- Some torts are complete without proof of any actual damage. Such torts include, for example, trespass and defamation.

- Instead of damages, an alternative but important remedy is injunction. This acts to restrain either a threatened tort or the continuation of a current tort. In such a case, the primary purpose is to prevent harm. In some circumstances it is more important to prevent harm than to seek compensatory damages later.

- If a plaintiff does seek a money remedy, there are various measures of damages which might not be strictly compensatory.

- Other purposes. Tort law can have purposes other than compensation, beyond those discussed above, such as vindication, economic efficiency, and deterrence. We shall take each in turn.

Vindication: a tort claim might properly be brought even though the final remedy is merely a declaration vindicating the plaintiff, rather than, for example, any money remedy. In *Ashley v Chief Constable of Sussex Police*, the plaintiffs were allowed to proceed with their claim that the shooting of the victim had been a battery, rather than merely negligent, so as to vindicate their contention that the victim had been unlawfully killed. This was despite the fact that the defendant had admitted negligence and agreed to pay all damages flowing from the incident.

Economic efficiency: those who subscribe to theories of law and economics tend to make two claims. There is a descriptive claim that tort law often draws lines of liability in a way which secures economic efficiency. There is also the prescriptive claim that tort law should use liability to secure economic efficiency. For example, 'the efficient allocation of resources usually requires an activity should bear its own costs. It prevents from being able to impose some of its costs on other people (what economists call "externalities"), the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community, and reduces externalities.'

Deterrence: liability in tort law is said to deter certain types of undesirable behaviour.

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Trespass to the Person

a collection of torts that protect inviolability of the individual

- Tort law highly protective of the body of the person and his liberty - this is reflected in this collection of torts which provide redress against various kinds of interference with these interests
- The torts of battery, assault and false imprisonment are among the most ancient and their core features are fairly well settled
- Protection is available in: battery, assault and false imprisonment under the protection from the **Harassment Act 1997** following infringement of the protected interest without need for proof of harm

Exists in two forms:

1. Assault
2. Battery

Trespass and fault

Letang v Cooper [1965] 1 QB 232

FACTS: D accidentally drove over C's legs whilst she was sunbathing in a car park. C sought damages on the basis of trespass to the person, as a claim in negligence was time-barred (it was more than three years later, so the rules on limitation of actions provided that actions for 'negligence, nuisance, or breach of duty' were barred after three years while other tort actions were barred after six years)

HELD: C could not recover damages on this basis, as D's actions were accidental. CA judges insisted that there was no overlap between trespass and negligence. They thought that if an act was negligent, it would lead to negligence (not trespass) liability.

- THUS, in the wake of this case, it would appear that actions for negligent trespass have effectively disappeared. BUT in academic terms, we still cannot conclusively assert that trespass has no relevance where negligence conduct is relied on - there may still be cases where C perceives there to be an advantage to be gained from framing a claim in trespass rather than in negligence.

POL: Use of force must be intentional, BUT harm need not be intended

The meaning of intentional

- 2 possibilities

1. D intended only to act in the way that he did
 2. D intended both to act in the way that he did and that the resulting contact with C take place
- In most cases, this distinction is of little consequence

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C) False Imprisonment

The infliction of bodily restraint, which is not expressly or impliedly authorised by the law

- An act of D, which directly and intentionally (or possibly negligently) causes C's confinement within an area delimited by D
- Focuses on situations where C's liberty or movement is constrained whether by arrest, detention or other confinement
- Usually when there is a false imprisonment, there will also be an assault or battery, but not for example, where A voluntarily enters a room and then B locks the door, trapping A inside

ELEMENTS

1. Total loss of freedom

- Requires a total restraint of C's movements > it is not enough that D cannot go where he wants provided that he can go somewhere
- If there is a reasonable means of escape, there is no false imprisonment
- Restraint need not be physical > a person who is told not to leave and complies with the instruction suffers a total loss of freedom

**Bird v Jones (1845) 115 ER 668*

POL: it must be total, not partial (as in this case) *restriction of movement*

- MUST be total restraint of the person > preventing a man from crossing a bridge except by making a detour around part of the area of the bridge which has been closed off is not false imprisonment.

- Nor is it false imprisonment if A is able to escape from his confinement by a nominal trespass on the land of a third party (*Wright v Wilson (1699) 1 Ld Raym 739*)

- There is a breach of *Art.5(1) ECHR*, if a mental patient is 'technically' free to leave a mental hospital, but in reality is constantly monitored and subject to immediate and subject to immediate compulsory detention should he try to leave (*HL v United Kingdom (2005) EHRR 32*)

CONFINED WHERE?

- It is well established that although confinement must be total, it need not be in a prison. One may be confined in a house (*Warner v Riddiford (1858) 4 CBNS 180*), in a prison (*Cobbett v Grey (1849) 4 Exch 729*), in a mine (*Herd v Weardale Steel, Coal and Coke Co Ltd [1915] AC 67*), or even a vehicle (*Burton v Davies [1953] QSR 26*)

- The important point is that the boundaries of the area of confinement must be fixed by D

2. Knowledge:

- There is no requirement that V should be aware of detainment at the time: *Murray v Ministry of Defence [1988] 1 WLR 692 (HL)*

HELD: HL held there was no such requirement, but if a person is unaware he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages (*per Lord Griffiths*)

- Imprisonment is NOT the same as failing to release

**Iqbal v Prison Officers' Association [2010] QB 732*

HELD: prison officers have no obligation to release prisoners from their cell

Herd v Weardale Steel 1913

HELD: no false imprisonment where employers refused to lift a coal miner to the surface. They did no act compelling him to remain there - they merely did not lift him

Special case: prisoners

R v Deputy Governor of Parkhurst Prison, ex parte Hague [1992] 1 AC 58

FACTS: a prisoner challenged the decision that he should be segregated under rule 43

HELD: A prisoner 'is lawfully committed to a prison and while there is subject to the Prison Act 1953 and the Prison Rules 1964. His whole life is regulated by the regime. He has no freedom to do what he wants, when he wants. His liberty to do anything is governed by the prison regime.'

Magna Carta (1297), chapter 29

XXIX Imprisonment, & contrary to Law. Administration of Justice.

NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or Free Customs, or be outlawed, exiled, or any other wise destroyed; nor will We not pass upon him, nor [X] condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will send to him, we will not deny or defer to any man either Justice or Right.

European Convention on Human Rights (1950), Art 5 Right to liberty and Security

Remedies to False Imprisonment

- False imprisonment is a tort, therefore - without proof of damage
- In addition to damages for loss of liberty, the courts may 'compensate' for injury to feelings and loss of reputation (*Hook v Cunard Steamship Co*)
- Apart from exceptional cases, damages are to be awarded only to compensate C for the injury suffered, not to punish D
- Basic damages to compensate C for loss of liberty would generally start at about £500 for the first hour of detention, but thereafter can be calculated on a reducing scale to allow around £3,000 for 24 hours of unlawful imprisonment and a 'progressively reducing scale' for subsequent days

Remedies

- Injunction: mandatory/prohibitive
 - Mandatory = do something
 - Prohibitive = don't do something
- All injunctions come with a penal notice notifying of contempt of court if they are disobeyed > very powerful remedy

Damages

- Courts must give damages where they are entitled
 - General = pain, suffering and loss of amenities
 - Special = out of pocket expenses *eg. if broken leg, must cut off jeans = new jeans*
 - Aggravated = emotional damages *eg. humiliation*
 - Exemplary = only available against breaches of the govt. > *aims to punish the civil officer that has done wrong*

Aggravated Damages

- An additional compensatory amount by way of aggravated damages was at one time available for the humiliation, distress and indignation that are likely to arise upon the commission of an intentional tort against the person. There is good authority that such an award may be made where C has been humiliated during their false imprisonment by the police (*Richardson v Howie [2005] PIQR Q3*)
- BUT in relation to assault and battery, where distress, anger, indignation and hurt feelings are likely to be present in most cases, it is now thought that the appellation 'aggravated damages' is inappropriate - these forms of injury are, in the context of these torts, merely part and parcel of what D is expected to compensate under the head of general damages.
- THUS, aggravated damages should now only be awarded in a 'wholly exceptional case' of assault and battery

Additional Defences

In addition to general defences...

- Reasonable condition for release: *If D's detention of C is dependent on the performance of a reasonable condition eg. payment of a toll but C refuses to comply, his continued detention will be considered voluntary*
- Lawful arrest: *An arrest made properly according to the requirements of the Police and Criminal Evidence Act 1984 (as amended) will not amount to false imprisonment nor will a detention made in furtherance of the common law right to make a citizen's arrest*
- Medical detention: *Circumstances where a person requires protection from their own behaviour and thus detention may be authorised by the provisions of the Mental Health Act 1983. Also individuals suffering from particular contagious diseases may be detained against their will according to the Public Health (Control of Disease) Act 1988*

Private Nuisance

- 2 types: Nuisance may be private (affecting an individual or property) OR public (impacting a wider group of people)
- Private nuisance protects 3 types of interest:
 1. Rights in the use of land
 2. Rights in the enjoyment of land
 3. Rights in land itself so as to protect against physical damage of the land
- Nuisance = one of the key ways in which individuals can secure a peaceful existence free from external interference

DEFINE; 'The very essence of private nuisance...is the unreasonable use of man of his land to the detriment of his neighbor' *Miller v Jackson* [1977] QB 966 (CA)

- This definition makes it clear that private nuisance focuses around interference with land or property that stems from neighbouring land or property
 - This emphasises that the two central characteristics of private nuisance are:
 1. Protection of land or property AND
 2. Protection from unreasonable interference

Forms of Nuisance

- Can take several forms:
 - One residential property to another: *No requirement that they adjoin, provided they are close enough to be effected by the nuisance*
 - No requirement that they are different buildings, provided there is a separation of exclusive possession *eg. flats*
 - Nuisance must come from land rather than buildings, so it is possible for natural features *eg. trees* to amount to nuisance
 - Also covers activities that take place on land (nuisance may emanate from the house and affect the activity as well as the other way around)
 - Nuisance may emanate from commercial or industrial properties but these may also be the subject of nuisance > not only residential rights that are protected *eg. if the subsidence of the residential property affects the commercial property, this may be actionable nuisance*
 - Nuisance may involve land with no residential premises *eg. the noise from a stadium may be a nuisance in relation to a park, whilst trees from the park could encroach on the stadium*

Title to Sue

- Private nuisance concerned to protect interests in and enjoyment of land. SO, fundamental that a person could only enjoy the protection of this tort if he had right to exclusive possession of the land *eg the owner or leaseholder*.
- Someone with an interest in the *land affected*
- USUALLY the person entitled to exclusive possession > not necessarily the owner but the person with exclusive control over the land OR the reversioner (if damage to reversionary interest) *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145
- BUT this placed limitations on the availability of an action in private nuisance, as visitors, lodgers and family members were not entitled to claim ...SO, the principle was challenged in the courts

Malone v Laskey [1907] 2 KB 141

FACTS: C was the wife of the leaseholder so was not entitled to exclusive possession in her own right. She was injured when the vibrations from a neighbouring property caused a toilet cistern to fall on her head.

HELD: Claim rejected as she lacked a proprietary interest in the land

POL: C MAY be able to bring an action in nuisance without a proprietary interest in exclusive circumstances

Khorasandijan v Bush [1993] QB 727

FACTS: The daughter of the property owner was harassed by D. Her action in private nuisance succeeded despite the lack of proprietary interests in the property, probably because there was no clear need for an injunction to protect her and no other basis upon which it could be issued (the case occurred prior to the PFHA 1997)

POL: C MAY be able to bring an action in nuisance without a proprietary interest in exclusive circumstances

* *Hunter v Canary Wharf Ltd* [1997] AC 655

FACTS: residents in the area of the Canary Wharf development experienced interference with TV signals. Some were homeowners whereas others were family members, lodgers and other without a proprietary interest in the property affected

HELD: CA had ruled that occupation of a home was sufficient basis for a claim but this was reversed by the HOL who reinstated the requirement of proprietary interest stated in *Malone v Laskey* (with the amendment that wife's beneficial interest in the family home conferred a proprietary right upon her)

- **This decision restricted private nuisance as a tort to concerns with property rights and not one which protected against nuisance caused to individuals independently as it can only be brought by a person with rights to exclusive possession of the property such as an owner or tenant (or non-resident landlord if the nuisance is likely to cause permanent damage to his property)**

Who can be sued?

- The person who occupies or controls the land from which the nuisance emanates...if they are responsible for the nuisance...

Forms of nuisance

- Occupier who creates the nuisance *eg. plays the trombone, burns the bonfire*
- Occupier who authorizes the nuisance *eg. invites friends around to play trombone, or has regular parties which make a lot of noise*
- A state of affairs *eg. tree overhanging into garden dropping leaves*
- A sudden and unexpected one off? *Midwood & Co v Manchester Corp* [1905]
- FACTS: gas pipes exploded causing damages to neighboring land > sued for nuisance BUT should have sued for negligence (this wasn't available then)
- Occupier who knows, or ought to know, of the nuisance; and can reasonably stop it:
 - Including acts by trespassers > something affecting another's land that was caused by trespass to your land
- Sedleigh-Dunfield v O'Callaghan* [1940]
- FACTS: drain floods, flooded into neighbouring land, sued for nuisance, caused by a state of affairs > drain being blocked > tried to claim they didn't block the drain, someone else did
- HELD: even though this obstruction was put there by someone else, you are liable - you should have noticed

ELEMENTS

1. Unreasonable use of land

- An actionable nuisance requires that the use of the land which is the source of the nuisance, is unreasonable - Foreseeability = an element of unreasonableness SO that interference with the C's quiet enjoyment of land that is a foreseeable result of D's use of his/her own land will be unreasonable

Walter v Selfe [1851]

POL: interference must be more than merely fanciful > must have a reasonable margin of tolerance for your neighbor > BUT if people are going beyond this, that is something that can be complained about

- BUT what goes beyond reasonable bounds?

Andreae v Selfridge & Co [1938]

FACTS: building work (always disruptive but this cannot be complained about BUT this does not mean anything - as a builder you must act within reasonable bounds)

HELD: went beyond reasonable bounds so it could be complained about

- What does not go beyond reasonable bounds?

Baxter v Camden LBC [2001]

HELD: cannot complain about noise above in flat where woman was walking around in high heels > technically complaining about the sound proofing - SO.. is the landlord in breach of something in the contract due to this?

What is unreasonable?

- The courts have considered a number of factors in deciding whether a particular use of land is unreasonable

NEGLIGENCE

Introduction to Negligence

- Negligence has grown to become the largest area of tort law
- In everyday terms, negligence means failure to pay attention to what ought to be done or take the required level of care. Its everyday usage implies a state of mind (carelessness), whereas the tort of negligence is concerned with the link between D's behaviour and the risk that ought to have been foreseen.

DEFINE; Negligence as a tort, is a breach of a legal duty to take care which results in damage to the claimant (Rogers, Winfield and Jolowitz on Tort 18th edn, 2010)

Formation of the principle

- Historically, there was no separate tort of negligence to impose liability. Around 1825 was the first emergence of negligence as a tort.
- There existed merely a list of situations where the victims of careless conduct might recover damages. Thereafter, actions on the case for negligence became common. It is now the most common and most important tort.
- It must be noted however, that negligently inflicted harm does not always sound in negligence alone; negligent conduct relating to the use of land may well give rise to nuisance liability for example
- The tort of negligence requires more than 'heedless or careless conduct'. The injured party must establish that D owed him a duty to take reasonable care to protect him from the kind of harm suffered, that he was in breach of that duty and that it was D's breach of duty that caused the duty.
- Duty, breach and causation must all be established in every successful claim in negligence

Donoghue v Stevenson [1932] * a key case in the development in the law

Q: Whether the manufacturer was under 'any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health' Lord Atkin @ 578

HELD: 'the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:- So held, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.'

KEY: imposed a duty on manufacturers in respect of the production of certain types of goods i.e those which could not be inspected before consumption or use

CASE SUMMARY:

2 elements

1. Reasonable foreseeability
2. Proximity (the neighbour principle)
 - This case established the neighbour principle - this was initially used to determine whether a DOC existed
 - ...**You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour...** Lord Atkin at 581

- The basic concept of the **neighbour principle** established in *Donoghue v Stevenson* was reformulated in:

Caparo Industries PLC v Dickman [1990] 2 AC 605

- Lord Bridge's opinion in this case has come to be regarded as modern approach to establishing a DOC

1. Was the **harm reasonably foreseeable** by the defendant at the time of his/her act?
2. Is there **proximity** between the parties?
3. Is it **fair, just and reasonable** to decide that there is a duty of care?

- This case effectively redefined the neighbour principle > adds the requirement that there must be a relationship of sufficient proximity and that the imposition of a DOC must be fair, just and reasonable

ELEMENTS

1. The claimant was owed a duty of care

- Fundamental to a claim in negligence
- Should D be held responsible?
- Used as tool to limit liability by defendants

2. There was a breach of that duty of care

- Sets standards
- Established a DOC but there will be no liability if D meets the standards the law requires of them

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

- Important because there is only liability where there is damage and damage must be recognised by the law
- D's breach must factually be the cause

IN CONTRAST to trespass, which is actionable per se

Damage:

- Physical harm to person/property
- Psychiatric harm
- Certain types of economic loss: consequential economic loss
- Pure economic loss generally not recoverable but *Hedley Byrne v Heller*

4. The damage suffered was not too remote

- Foreseeability of a certain type of harm
- If it is too remote and it was impossible for D to have seen it, there will be no LEGAL causation and therefore no liability (the damage is too remote)

identified the body of their relative, although none saw the body in the immediate aftermath of the disaster. Nine of the plaintiffs had succeeded at first instance, but had the judgements reversed by the Court of Appeal.

HELD: On appeal by the plaintiffs to the House of Lords, none was allowed.

None of the plaintiffs were able to establish that their psychiatric illness was foreseeable within the parameters set by *McLoughlin v O'Brian*: they were either not closely enough related; or they did not witness the 'immediate aftermath' - i.e. see the body of their relative within the two hour window allowed in *McLoughlin v O'Brian*.

- In the case of the defendants who were at the match and lost relatives, it was held that there was no evidence of a close tie of love and affection.

- In the case of those who had seen events folding on TV, it was noted that there were no scenes of people dying; and the coverage lacked the immediacy required to make psychiatric illness foreseeable. None of the relatives arrived within two hours.

Special claimants and defendants

Bystanders

- In *Alcock*, some members of the House did, obiter, suggest that it was not out of the question that a bystander might have a claim, in the event of a particularly horrific accident; and that watching an incident on live television might also, in some circumstances, found a claim by a relative.

- BUT this was unsuccessful in:

McFarlane v EE Caledonia Ltd [1994] 2 All ER 1

FACTS: Oil leak in the sea, 164 people killed > a painter, sleeping on a ship at the time of the accident, the ship he was on became the rescue ship picking up survivors Mr McFarlane did not take part in the rescue process

HELD: brought 3 claims, rescuer (failed), secondary victim - saw people he knew killed (failed due to no close tie), primary victim (failed as he did not have a reasonable fear of his own safety > saw burning people through themselves into the sea, saw a boat consumed by a fireball > extremely traumatic for Mr McFarlane, not foreseeable that a bystander of ordinary fortitude would suffer psychiatric injury.

Attia v British Gas [1988] Q.B. 304

FACTS: coming home, having a boiler fitted by British gas, as she got home, saw her house in flames

HELD: able to claim for posttraumatic stress

North Glamorgan NHS Trust v Walters [2002] EWCA Civ 1792

FACTS: a child due to medical negligence (misdiagnosed) suffered brain damage from an epileptic fit > mother saw child die, suffered psychiatric injury

ISSUE: *was there a single shocking event?* > The court said nothing in the case law said a single shocking event had to be instantaneous > nothing to suggest it was limited in time - the single 36 hour experience was shocking

HELD: claim successful

Unwilling participants

- Another type of secondary victim: people not scared for their own safety BUT traumatised by someone else's danger > where someone feels reasonable for killing or seriously injuring someone else > where C believes he has caused another's death or injury

- This further category of primary victims was established in *Dooley v Cammell Laird and Co Ltd* [1951] 1 Lloyd's Rep 271 and *Wigg v British Railways Board* (1986) 136 NLJ 446 (QBD)

- This would only succeed if the claimant was actually present when the death or injury occurred

- BUT this was removed in *White v Chief Constable of South Yorkshire Police* where it was held that only persons in actual danger of physical harm can be classified as primary victims

Monk v PC Harrington [2008] EWHC 1879 (QB)

HELD: the belief that the claimant had caused the accident had to be reasonable.

Unborn children

- The existence of a DOC requires reasonable foresight of harm - HOWEVER, in the case of unborn children the D might not realise that the female claimant is pregnant, although it is quite possible that a person's negligence might harm an unborn child

Burton v Islington Health Authority [1993] QB 204

HELD: a DOC is owed to an unborn child which becomes actionable on birth

SO... a child can sue in negligence for events occurring during its time in its mother's womb. This common law position is only applicable to children born prior to 22 July 1976, when the Congenital Disabilities (Civil Liability) Act 1976 came into force.

- This act gives a right of action to a child who is born alive and disabled in respect of the disability, if it is caused by an occurrence, which affected the mother during pregnancy or the mother or child during labour, causing disabilities which would not otherwise have been present

Nervous shock

- This area of law has developed since the late 19th century - there is a line of cases in which 'nervous shock' cause physical injury

- An early Australian case before the PC:

Victorian Railway Commissioners v Coultas (1887) 13 App.Cas. 222

FACTS: individual on horse and carriage, over a railway line, negligence of railway keeper, the gates hadn't been lowered, nearly hit by a train (if they were, they would have had a claim against him in negligence) > a person sat in the carriage suffered nervous shock due to being so scared about what had happened to her

HELD: PC said they had no claim > no claim where someone negligent causing you fear for your safety and subsequent nervous shock

INTERESTING > one of the first references to floodgates in this area of law - worrying that lots of people will claim for psychiatric injuries which may or may not exist

The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

(1887) 13 App.Cas. 222, 226 (Sir Richard Crouch)

Dulieu v White [1901] 2 K.B. 669

FACTS: carriage crashed through front of a pub and scared the barmaid who suffers physical symptoms from the shock

HELD: first successful claim for 'nervous shock' caused by fear for own safety (first primary victim)

- PC not binding on an English court

- Floodgates argument brushed aside and the C here was able to recover

Hambrook v Stokes Brothers [1925] 1 K.B. 141

FACTS: woman sending children off to school > a runaway lorry (brakes had failed) whilst her children were walking

ISSUE: she is not scared for her own safety BUT is very scared for her children > she suffers a nervous breakdown and had a miscarriage as a result - dropped dead 11 weeks later - *can she claim for this despite being a secondary victim?*

HELD: the reason she dropped dead was a delayed response to this shock - husband brought claim and she was able to claim

- Duty of care extends

- If you have a duty of care to a child and they are injured, parent or guardian sees and suffers psychiatric - the DOC extends to them

I should find it difficult to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations of life also involving intimate associations; and why it did not eventually extend to bystanders.

P. 158-9 (Atkin LJ)

Owens v Liverpool Corporation [1939] 1 K.B. 394 (CA)

FACTS: Funeral, car carrying coffin overturned, revealed corpse, family suffered psychiatric injury

HELD: family able to claim

Bourhill v Young (Hay v Young) [1943] AC 92 (HL)

FACTS: woman getting off tram, hears but does not see a traffic accident

ISSUE: why shouldn't bystanders be able to recover? It is foreseeable that some people who have seen the accident may suffer psychiatric injury?

HELD: HL denied the claim - the motorist at fault did not owe a DOC - was not in the reasonable contemplation > application of the neighbour principle > D did not owe a DOC to C - not in the reasonable contemplation

As a result of trespass to the person?

- Psychiatric injury arising as a result of trespass to the person is recoverable.

- This requires the court to take into account the utility, or benefit to society of any action in which D was engaged at the time of the incident; whether they demonstrated a 'predominantly responsible approach'; and whether they were acting heroically by intervening to assist an individual in danger.
- If you are a hero, you are exempt from claims in negligence > Good Samaritan claim *eg. someone has a heart attack in public, a Dr takes care, if it goes wrong, should V have a claim against the person that helped them? No obligation to rescue, trying to act with good intention > sue for interference? Is this correct? No the courts would not consider this - technically a hero - a hero is someone who intervenes to save the life of another*
- Says the court MUST take it into account

'This always was and it remains the most ridiculous piece of legislation approved by Parliament in a very long time... A pitiful creature of a Bill' (Lord Pannick, Hansard 6/6/15 Col. 262).

Other relevant factors

- When determining the SOC, the courts will take all the circumstances of the case into account. Other factors include:

The magnitude of the risk:

- This is determined by the likelihood of it occurring and the seriousness of the potential injury

Likelihood:

Miller v Jackson [1977]

POL: a greater risk of damage than normal increases the SOC required by a potential D.

Seriousness:

- If D knows that a specific individual is at risk of suffering greater damage than normal, D may be required to reach a higher SOC

Paris v Stephney Borough Council [1951]

POL: D owed a higher SOC to C because they knew that an injury to his good eye would cause him much more serious consequences than the same injury to a worker with two good eyes

Cost and practicability of precautions:

- The court will also take into account what (if any) measures D could have taken to avoid the risk of injury, the cost of those measures and the ease with which they could have been implemented

Latimer v AEC Ltd [1953]

FACTS: where oil mixed with water during a flood and made surface slippery. C slipped on part of the floor not covered with sawdust

POL: the only way to remove the risk would have been expensive and disproportionate to the relatively small risk of injury (close the affected part of the factory)

- SO... the greater the risk of injury, the more a D has to do to reduce the risk, even if it is costly. D will not generally be able to rely on the fact that the cost of precautions was too expensive to excuse their breach of duty.

Social value:

- Where D's behaviour is in the public interest is likely to require the exercise of a lower SOC: *Daborn v Bath Tramways Motor Co Ltd [1946]*

What would the reasonable person have foreseen?

- The SOC is predicted upon what the reasonable person would have foreseen. This depends on the probability of the consequence. A D must take care to avoid 'reasonable probabilities, not fantastic possibilities' (*Fardon v Harcourt-Rivington [1932]*)

Proving breach of duty

- The legal burden of proof is on the C
- This must be established on the balance of probabilities
- There are certain circumstances where C may have some assistance:

- Where the maxim *res ipsa loquitur* applies:

- 'The thing speaks for itself' > in certain circumstances the courts will be prepared to find a breach of duty against D without hearing detailed evidence. Four conditions must be satisfied for C to be able to use this:

Scott v London & St Katherine Docks Co (1865)

- Established criteria for the availability of *res ipsa loquitur*:

1. the thing causing the damage must be under the control of D or someone whose negligence the D is responsible
2. the cause of the accident is unknown
3. the accident is such as would not normally occur without negligence

- If this is satisfied, it raises a prima facie presumption of negligence against D. The D must then explain how the accident could have occurred without negligence. If D succeeds C must then prove D's negligence. This will be difficult since, if negligence could be proved it is unlikely that C would have relied on *res ipsa loquitur* in the first place.

- Civil Evidence Act 1968, S.11: Convictions as evidence in civil proceedings

'he shall be taken to have committed that offence unless the contrary is proved'

- C's in negligence proceedings may also be assisted by this provision

- If D has been convicted of a criminal offence by a UK court this is taken as proof that D did commit it in any associated civil proceedings unless the contrary is proved.

- If D has been convicted of an offence which includes negligent conduct, then the BOP shifts to D to prove that there was no negligence: *eg careless and inconsiderate driving, gross negligence manslaughter*

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DEFAMATION

Defamation: a tort, which protects a person from loss of reputation by prohibiting the publication of information likely to attract negative attention from others.

- We have a right not to have people to make untrue assertions about us that will damage our reputation > orally/written
- The law provides the tort of defamations as a remedy
- A successful claim = damages/injunctions
- Based on the law upholding the true state of someone's reputation BUT, the law will not protect a true statement - TRUTH is ALWAYS a defence

The Defamation Act 2013

- The Defamation Act 2013 came into force 1st January 2013 - consider the law as it was prior to the act and also the main changes since its enactment
- The Defamation Act did not fundamentally change the law relating to defamation: does not change the nature of what is a 'defamatory' statement or the legal rules relating to the true meaning of words and whether they would lower the claimant in the eyes of ordinary persons.
- BUT it did address **some of the criticisms that have been made of the English law of defamation** and the perception that English law was 'claimant friendly': that claimants were using English courts to restrain free speech
- KEY the big change the act introduces is to remove the presumption of harm
 - Makes the tort less 'claimant friendly'
 - Damage to reputation is no longer presumed: onus is on claimant to show 'serious damage'
- ALSO - reduces the ability of claimants to come to an English courts
 - English courts would hear any case where the claimant had a reputation in this country and the Libel had been published in this country (with the internet - most things are published in UK) SO enormous scope for people to bring claims in English courts BUT this has now been restricted by the act
- ALSO - common law defences abolished in favour of statutory defences - didn't change the nature of a defamatory statement
- The act also changed the defences available to D. In particular, the common law defences of justification, fair comment and the Reynolds defence have now been put on a statutory footing and the common law rules abolished. However, as the explanatory notes to the Act make clear, **these new defences of truth, honest opinion and public interest are based on, and intended to reflect, the previous common law defences.**

Who may be defamed?

- Defamation is a tort, which can be relied upon by any individual, BUT many cases involve high-profile public figures in conflict with the media. This demonstrates the struggle of the law to balance between two competing rights: an individual's right to privacy (Art.8 ECHR) and the media's right to freedom of expression (Art. 10 ECHR). The involvement of these conflicting rights has led defamation to become more prominent as a topic for consideration since the enactment of The Human Rights Act 1998.

Eligible claimants:

- Natural OR legal persons
- Companies trading for profit (but must show statement has caused or is likely to cause serious financial loss: Defamation Act 2013 s.1(2))
- Non trading bodies (eg. charities) do not need to show loss, but do need to show serious harm

Ineligible claimants:

- Dead people: *R v Topham (1791)*
 - Most tort claims can be started or continued after death with the exception of defamation
 - Dead people cannot sue for defamation
 - The family of a dead person may, in theory, bring a human rights claim, if the family's reputation is damaged: *Putistin v Ukraine*
- Groups of people: *Knuppfer v London Express (1944)*
 - You cannot defame a class of people: lawyers, football players, students etc.
 - You can defame a group, but only if your words refer to every individual in the group concerned:
Barron MP v Collins MEP HELD: capable of defaming all three MPs
- Public authorities: *Derbyshire CC v Times (1993)* POL: Claim thrown out by HOL stating government bodies cannot be defamed
- Political parties: *Goldsmith v Bhoyrul (1998)*
 - For the same reason as government bodies, cannot claim for defamation

BUT individual politicians CAN bring claims

Galloway v Telegraph (2006) POL: Galloway slated in Telegraph as a traitor, Galloway able to bring a claim despite being an MP and he won

- Claims must be brought within 12 months: s.4(a) Limitation Act 1980 > s.8 Defamation Act 2013

- No public funding for defamation, SO tort favours those who can afford to protect their reputations > this may explain the high volume of cases involving high-profile public figures in conflict with the media

Meaning of defamatory words

DEFINE; A statement, whether oral, written or otherwise, is defamatory if it has the effect of exposing another to 'hatred, ridicule or contempt'; or lowering the claimant in the estimation of right thinking members of society.

- Words may be capable of more than one meaning ISSUE: how should words be interpreted? As a matter of law - words can only have one meaning

Objective test

- The law = a publication without lawful excuse, which tends to hold an individual up to **hatred, ridicule, or contempt**, is a libel *Wilson v Reed @150 (Hill J)*.

TEST

- Does the statement lower the claimant in the eyes of 'right thinking people'? > *Sim v Stretch (1936)* 'I do not intend to ask your Lordships to lay down a formal definition, but after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?' @ 1240 (Lord Atkin).

ALSO It does not matter what D intended to mean by the statement BUT what reasonable people would understand it to mean:

Capital & Counties Bank v Henty (1882) POL: HOL developed an objective test: 'The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense' @ 744-45 (Lord Selbourne LC).

- A statement may also be defamatory if it causes other people to 'shun or avoid' C, even no reasonable person would think any the worse of the C.

[N]ot only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on [the plaintiff's] part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on [the plaintiff's] part.

Yousouppoff (1934) @ 587 (Slessor LJ).

- However only in the case of libel > proof of special damage still exists for claims of slander

Right thinking persons

[W]ould the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? *Sim v Stretch @ 1240 Lord Atkin*

Byrne v Deane POL: moral duty > Right thinking people would not condemn someone for upholding the law.

HELD: claim failed because C was doing the right thing as a citizen > right thinking people have a sense of moral rectitude that others don't

Implication:

- No defence to claim the words are literally true or do not actually defame C, if they there are inevitable conclusions that a reasonable person would draw. Reasonable persons capable of reading between the lines and drawing logical conclusions from the words or other representation and its context.

Monson v Tussauds POL: placing a waxwork near a 'Chamber of Horrors' was defamatory. Inevitable conclusion drawn that Tussauds were stating C was a murderer.

Cassidy v Daily Mirror FACTS: Cassidy at the races with a young woman, photographer asked Cassidy if they could post the picture and who they should call the woman in the photo > he said his fiancé

HELD: it was defamatory to his wife > Mr Cassidy had a fiancé and was therefore unmarried - the woman passing herself off as Mrs Cassidy was not his wife but someone living in a state of sin

Lord McAlphine v Bercow FACTS: Sally Bercow, former wife of the speaker of the HOC John Bercow, twitter account > news night was making some vague allegations of paedophilia to an unnamed politician, tweeted something to do with this referring to Lord McAlphine > Lord McAlphine claimed this was her suggesting it was him

HELD: Lord McAlphine won and the court accepted his meaning, not hers

- Refers to words spoken, or in a transitory form.

Special damage

- Main distinction between slander and libel is that, for an action of slander to succeed, the claimant must show 'special damage', in that they have suffered some loss as a result of the slander; or that the statement fell within the cases of slander actionable per se.
- Special damage must have an economic value: that people might shun or ostracise C is not special damage; the society of others has no economic value.
- In cases of libel – where the statement is in permanent form – the damage must be serious (s.1 Defamation Act 2013), but does not need to have an economic or material value.

Roberts v Roberts

FACTS: D said that C was 'as great a whore as any in the town of Liverpool'.

HELD: This is clearly defamatory; and would cause serious harm to the reputation of the person defamed. However, it could not support a claim in slander. Serious accusation, suggesting they're a prostitute causing right thinking people to think the less of her, causing serious harm to her defamed reputation but see Cockburn CJ's quote below.

Extent of Special Damage

- Where the statement is repeated, is the original maker of the statement liable for the damages that flow from its repetition?
- Where a defamatory statement is repeated by a third party, it is generally, no defence to say that you were merely repeating another's words. The repeater of the libel is liable; and the original maker of the statement is also liable if the repetition is foreseeable. *McManus v Beckham*
- Lynch v Knight* POL: To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities and having regard to the relationship of the parties concerned, might fairly and reasonable have been anticipated and feared would follow from the speaking of the words. (Lord Wensleydale).

What damage is foreseeable?

Special damage occurs over the full extent of what is foreseeable:

McManus v Beckham (Victoria Beckham)

HELD: it was foreseeable that as she was famous, her words would be reported in the press, constituting slander and causing this measurable financial loss to C. A reasonable person could have foreseen this, meaning she had to pay the owner for his business. The autographs were not actually fake meaning she didn't have the defence of truth either.

"I would suggest further that if a jury were to conclude that a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated in whole or in part in the press and that that would increase the damage caused by the slander, it is not unjust that the defendant should be liable for it. Thus I would suggest a direction along the above lines rather than by reference to 'foreseeability'." Per Waller LJ.

Slipper v BBC

HELD: BBC argued they weren't liable for what the papers said. Court disagreed – this was foreseeable and the BBC were liable for anyone who repeated the statements/ libel they made.

Slander 'actionable per se

- There are a number of exceptions to the general rule that the claimant in a claim for slander must prove special damage. Asquith J in *Kerr v Kennedy* [1942] explained the rationale of these exceptions. The exceptions are:

1) A statement that C committed a criminal offence

- The offence must be punishable only by imprisonment; *Hellvig v Mitchell*
- It is insufficient merely to cast suspicion, *Simmons v Mitchell*
- Although a statement that C is involved in 'crime' without reference to a particular crime is sufficient, *Webb v Beavan*
- The words spoken will be considered by the court in their context, *Thompson v Bernard*

2) A statement that C is suffering from a disease.

- A sexually transmitted disease certainly falls within this exception, *Bloodworth v Gray*
- although a statement that C had previously had such a disease is not actionable per se, *Wainwright v Hall*
- The status of other forms of contagious disease is uncertain.

3) Statements concerning C's professional activity > C is unfit, dishonest or incompetent in relation to his trade, profession or business

- This common law exception is now in statutory form in s.2 Defamation Act 2013. Unlike at common law it is not necessary that the words relate to the claimant's office etc.

4) Statements relating to a woman's chastity.

- This exception is contained in the Slander of Women Act 1891. In the case of *Kerr v Kennedy*, Asquith J considered whether an accusation of lesbianism was against C within the Act. Asquith rejected the argument - suggesting the statute was restricted to illegitimate intercourse between opposite sexes

- However, two of the former actionable per se statements have been repealed by the Defamation Act 2013, s.14:

(1) The Slander of Women Act 1891 is repealed.

(2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

- It is no longer actionable per se to impute that a person has an infectious or contagious disease; or to impute unchastity or adultery to a woman (Slander of Women Act 1891 is repealed).

- Only 2 remain:

1. Criminal Offences:

- To state that a person has committed a criminal offence punishable by imprisonment is actionable per se.

Webb v Beavan

FACTS: "I will lock you up in Gloucester Gaol next week. I know enough to put you there"

HELD: to imply that C had committed an offence punishable by imprisonment. It was not necessary that there was an accusation of an indictable offence. Sufficient the offence is punishable by imprisonment SO, here Webb could prove the claim without having lost any money by virtue of the statement.

2. To state that any person is unfit or incompetent to carry on their profession, business or calling is actionable per se:

- This is the most commonly invoked of the actionable per se categories.
- At Common Law, it was necessary that the accusation was directly related to the profession or business: *Hopwood v Muirson*

BUT The Defamation Act 1952 s.2 extends the scope of the cause of action:

'In an action for slander in respect of words calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the claimant in the way of his office, profession, calling, business or trade.'

2. Which causes or is likely to cause serious harm to the reputation or good name of C OR serious financial loss to a commercial organisation

s.1 Defamation Act 2013

S.1 Defamation Act 2013: Serious harm

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss

- This is a new requirement: both reverses the burden of proof and introduces a minimum level of seriousness.

- The requirement that the statement causes 'serious harm' or 'serious financial loss' has been introduced by the 2013 Act. Formerly, harm was presumed in the case of libel.

- Defamation Act 2013 s.1: states there must be serious harm to the reputation of a body that trades for profit which must cause the body 'serious financial loss'

- Protective of free speech BUT protection of reputation where serious harm is caused - prevents trivial claims succeeding AND claimant friendly
E.g. McDonalds suing the couple handing out defamatory leaflets – this would now be thrown out of court as McDonald's could not prove serious financial loss.

Slander: Special Damage

- Replaces the common law defence of justification
- D must show the statement is 'substantially true'
- Effectively protects those expressing honest opinions - protecting freedom of speech - creating a balance
- BUT this section does little more than restate the previous common law defence of justification > no substantive development of the law - mere clarification of old law

s.3 = defence of 'honest opinion'

- Replaces the common law defence of fair comment
- D must show an opinion, which could be held by an honest person, based upon a fact at the time of writing
- This defence therefore means, even if a statement is untrue, the defamation may be innocent
- A defence to show that:
 - The statement complained of was a statement of opinion
 - The statement complained of indicated the basis of the opinion
 - An honest person could have held the opinion based on any fact which existed at the time the statement was published (or anything asserted as fact in a privileged statement published before the statement complained of)

s.4 = defence of 'publication on matter of public interest'

- Replaces the previous common law defence of *Reynolds* which protected responsible journalism
- A defence to show that the statement complained of was on a matter of public interest and that D reasonably believe that publishing that statement was in the public interest
- The impact of this provision however, remains to be seen
- The decision as to whether a publication falls under a matter of public interest is a question to be decided by the judge
- Regardless, this is a key example of a provision in the 2013 act that aims to strike a fair balance between the right of freedom of expression and the protection of reputation

s.5 = defence for 'operators of websites'

5 Operators of websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
 - (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.
- (5) Regulations may—
 - (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);
 - (b) make provision specifying a time limit for the taking of any such action;
 - (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;
 - (d) make any other provision for the purposes of this section.
- (6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—
 - (a) specifies the complainant's name,
 - (b) sets out the statement concerned and explains why it is defamatory of the complainant,
 - (c) specifies where on the website the statement was posted, and
 - (d) contains such other information as may be specified in regulations.
- (7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint may be treated as a notice of complaint for the purposes of this section or any provision made under it.
- (8) Regulations under this section—
 - (a) may make different provision for different circumstances;
 - (b) are to be made by statutory instrument.
- (9) A statutory instrument made under subsection (8) is not valid unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (10) In this section "regulations" means regulations made by the Secretary of State.
- (11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.
- (12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

- Provides protection for operators of websites which host user-generated content
- There is now a defence that allows them to show it was not them who published a defamatory statement
- If the poster can be identified and served with legal proceedings, there is a complete defence for the website operator and C must pursue the poster
- If the poster is anonymous and the website provider has received a complaint, the operator must respond to C
- In all other circumstances, unless the operator decides that it wants to defend the content on one of the other available grounds of defence, it will need to remove the content complained of

s.6 = defence for 'peer-reviewed statement in scientific or academic journal etc'

6 Peer-reviewed statement in scientific or academic journal etc

- (1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.
 - (2) The first condition is that the statement relates to a scientific or academic matter.
 - (3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—
 - (a) the editor of the journal, and
 - (b) one or more persons with expertise in the scientific or academic matter concerned.
 - (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
 - (a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and
 - (b) the assessment was written in the course of that review.
 - (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
 - (6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
 - (7) Nothing in this section is to be construed—
 - (a) as protecting the publication of matter the publication of which is prohibited by law;
 - (b) as limiting any privilege subsisting apart from this section.
 - (8) The reference in subsection (3)(a) to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.
- Creates a niche category of qualified privilege for those publishing in a scientific or academic journal.
 - The defence will apply provided the statement relates to a scientific or academic matter which has been subjected to an independent review as to its scientific/academic merit by either the editor of the journal OR by one or more other experts of the matter in question

s.7 = reports etc protected by privilege

- Updates and extends the circumstances in which the defences of absolute and qualified privilege apply
- The main changes = an extension of the privilege from reports of certain UK or EU proceedings or official documents to reports of equivalent proceedings or documents anywhere in the world AND a new qualified privilege for fair and accurate reports of proceedings i) at press conferences ii) of