TORT LAW READING LISTS
2017-2018

Plan of reading lists
1. Introduction to tort law
2. Negligence (1): the basics
3. Negligence (2): liability for omissions
4. Protection of property in tort law
5. Strict liability and tort law
6. Difficult issues in tort law (1): protection from pure economic loss and distress
7. Difficult issues in tort law (2): causation and risk
8. Defences and damages

Books
There is only one textbook you need for this course – McBride and Bagshaw, Tort Law, 5th edition (Pearson Education, 2015) (‘M&B’ on the reading lists). You will also need an up to date version of Blackstone’s Statutes on Contract, Tort and Restitution – make sure that you don’t mark it; you won’t be able to take a marked version of any statute book into the exams with you.

Cases
You will be primarily working your way through McBride & Bagshaw in the course of doing these reading lists. However, you will also be referred to four or five cases in each reading list, which you should read. The point of referring you to these cases is not just to help enhance your understanding of the law, but also to get an understanding of how good tort lawyers think and write, so that you will start thinking and writing like good tort lawyers as well. So when you read these cases, don’t spend so much time taking notes on them that you forget to read them with an eye out for how the case was decided: how the judge used the existing case law to support his or her conclusions and to what extent considerations of public policy or common sense relevant to the decision. I will also refer you to various casenotes on the cases mentioned on the reading lists. You should read these casenotes, again with a view both to enhancing your understanding of the law, and to gaining an appreciation how academics analyse and criticise cases, so that you will start acquiring the same kind of analytical and critical skills yourself.

Further reading
There is a lot of reading to get through, if you are going to do well as a tort lawyer. I recognise that there isn’t enough time in term time to get through all of the reading that you need to do. For that reason, each supervision reading list will include a list of ‘Further reading’ which you should do in the holiday. This is not suggested further reading – this further reading that you must do, but which I recognise there isn’t enough time to do while term is going on. But you must take advantage of the breathing space provided by the holidays to catch up on this necessary further reading.

mcbridesguides
I have set up a website – www.mcbridesguides.com – which is designed to help you with your legal studies generally. Under the ‘Tort Law’ section there is a link allowing you to obtain access to the companion website to McBride and Bagshaw. You can get to it by going: mcbridesguides → Tort Law → McBride & Bagshaw companion website → 3rd edition (free to access). (The 4th edition companion website is a bust.)

The companion website contains some model answers to tort problem questions, as well as some tips on how to answer tort problem questions. You should definitely consult these before you do your first answer to a tort problem question. The companion website also contains notes written by me and Rod Bagshaw on a large number of tort cases decided since the first edition of McBride and Bagshaw came out in 2001, but these are better organised together on a separate webpage that you can access by going: mcbridesguides → Tort Law → McBride & Bagshaw companion website →
McBride & Bagshaw Tort Updates. When I want you to refer to a casenote on this webpage, your reading list will direct you to ‘M&BUpdate’.

You should also keep your eye on the ‘Tort casenotes’ section of mcbridesguides (accessible by going mcbridesguides → Tort Law → Tort casenotes), where casenotes on particular areas of law are gathered together, and casenotes on very recent cases are posted up. When I want to refer you to a casenote on this part of the mcbridesguides website, your reading list will direct you to ‘M&BCaseNote’.

**Written work**
Every two supervisions, you will be expected to do some written work and hand it in, in the supervision. What written work will be specified on the reading list.

**Questions for the supervision**
For some of the supervisions, you will be given a number of question to consider and bear in mind in your reading. We will run through these questions in the supervision, so do make sure that you think about them while doing your reading – they will both direct you to issues that you need to focus on in your reading and force you, in thinking about them, to deepen your understanding of the law.

**Past paper questions**
At the end of every supervision reading list, you will find some past paper questions relevant to the reading for that supervision. We will hope to look at some of these in the supervision, but they will also provide good practice for you to try in revising your work over the holidays.

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Reading

(1) Tort law
M&B, chapter 1
mcbridesguides → Tort Law → Introduction

(2) A model tort: trespass to the person
M&B, chapter 2
B v An NHS Hospital Trust [2002] 2 All ER 449 (noted, M&BUpdate)
KD v Chief Constable of Hampshire [2005] EWHC 2550 (QB) (noted, M&BUpdate)

(3) The key tort: negligence
M&B, chapter 4

(4) A fundamental distinction: acts and omissions
M&B, pp 110, 212-28
mcbridesguides → Tort Law → Tort articles → Negligence liability for omissions: some fundamental distinctions

Further reading
Rudden, ‘Torticles’ (1991-2) 6/7 Tulane Civil Law Forum 105 (find it on HeinOnline)

Aims and objectives
One of the things that makes tort law such a difficult subject for students to master is that there is so much information a student has to hold in their head all at the same time in order either to make sense of a tort law case that he/she is reading, or to analyse a tort law problem question that he/she has been set.

You have to remember, first of all, that in order to bring a claim in tort, a claimant must normally show first of all that the defendant has not only committed a tort, but has committed a tort in relation to the claimant. You also have to remember the full range of torts that someone might commit under English law (and remember that in the case of one of those torts – negligence – there a huge number of different ways of committing that tort). If you have identified a tort that the defendant has committed in relation to the claimant, you have to then remember what remedies will, or might be, available to the claimant in that situation. The most important of these remedies is compensation. But you can’t just say that the claimant is entitled to sue the defendant for compensation. You have to remember that the claimant is only entitled to sue the defendant for compensation in relation to those losses that the claimant has suffered that were caused by the defendant’s tort, and that were a non-remote consequence of the defendant’s tort. And even if you remember all this, and have identified which of the losses suffered by the claimant as a result of the defendant’s tort are compensable, you have also to remember that the damages that the claimant can claim for those losses may be reduced if the claimant was partly to blame – or contributorily negligent – for the fact that he/she suffered those losses.
That is a lot to remember! And by the time of the exam, this sort of way of thinking, and analysing tort problem situations, has to have become second nature to you. The reading list for this supervision is designed to bring you up to speed on how tort lawyers think as quickly as possible. Don’t try to do all the reading all at once. If you try to break the reading up and do a bit a day, you will absorb more. Try to master the big picture before you move in on the small details. Don’t panic if you think you are forgetting everything – you will need to go over this work a few times before it will finally all sink in. Focus on achieving small victories, rather than going for big wins – though don’t settle for just a few small victories, but seek to build on them.

Questions for the supervision

1. Has a tort been committed in the following situations:
   (a) On the day she was due to get married to Clive, Sandra got a text message from him saying that he was breaking up with her because he and Sandra’s best friend were in love.
   (b) Casper, a very silly student, got very drunk one night and fell into the Cam. Fred happened to see Casper drowning in the Cam as he was walking home, but did nothing. Casper drowned.
   (c) Vera asked her neighbour, Steve, to help her do an ‘ice bucket challenge’. Steve duly poured a bucket of ice water over Vera in her back garden. She collapsed in shock, but Steve went home and did nothing to help Vera. Vera was later found by her husband, suffering from the effects of hypothermia.
   (d) Nigel got very drunk at the pub and drove home, with his car veering all over the place. He narrowly missed hitting Kylie as she was walking home.
   (e) The same as (d), except Kylie stepped in front of Nigel’s car as he drove down the road, because she wanted to kill herself. She was severely injured in the ensuing collision.
   (f) Bill, a film buff, bought a ticket for a showing of ‘Gravity’ at an IMAX 3D cinema. His enjoyment of the film was ruined by his neighbour constantly whispering to his date such things as, ‘Isn’t this cool?’, ‘Where shall we go later?’, ‘You’re way sexier than Sandra Bullock’, ‘I think the guy on my left is getting annoyed with me’.

2. Who can sue in these situations? Who can be sued?
   (a) Charles could not bear the idea of the love of his life, Sally, going out with Walter. Charles beat Walter up. Sally was very upset. Walter’s injuries were so extensive, he had to take six months off work. As a result, the company for which Walter worked suffered a downturn in its profits, as Walter was a crucial part of the company.
   (b) Martin was crossing the road when he was hit by a car driven by Peter; Peter was not looking where he was going because he was distracted by some naked protestors by the side of the road. The collision was at such a speed that Martin’s body was flung through the air and fell on the other side of the road, where he was run over by Keith, who was similarly distracted by the naked protestors. Martin suffered severe brain injuries as a result of being run over by Keith.
   (c) Teacher was told by his School to lock the doors of his classroom during lessons to stop children wandering down the halls. The doors were locked and unlocked using a remote locking device controlled by Teacher so most of the children were unaware that they were locked in during lessons. One day, Teacher forgot to lock the doors, and Dennis – a 5 year old – slipped out of the classroom while Teacher’s back was turned. He wandered out of the school, and crossed the road outside the school without looking out for traffic. Ian crashed his car, swerving out of the way to avoid running into Dennis, and was severely injured.
3. 500 demonstrators for peace, love and understanding agree to turn up at the new concourse at Kings Cross for a mass ‘hug-in’, where they will all start hugging each other at a prearranged signal. Albert is one of the demonstrators. He ends up hugging Rosie, who is not one of the demonstrators at all, but happened to be hugging her boyfriend goodbye before he got a train back to Cambridge – when Rosie had finished hugging her boyfriend she was instantly grabbed by Albert, who had mistaken her as being one of the demonstrators. Rosie is very offended to have been hugged by Albert.

4. Linda has sex with a policeman, Nigel, on the understanding that if she does so, he will then release her husband from the station where he is currently being held in custody on suspicion of armed robbery. Nigel has no intention at all of helping Linda’s husband.

Past paper questions

7. Consider any claims in tort that may arise from the following incidents at the Anyshire National Health Service Trust’s hospital:

(a) Nurse Bolter, the night nurse in sole charge of a ward of elderly patients, locked the door of the ward at 3 a.m. and went to get a meal in the hospital canteen. When she returned half an hour later she found that Mr Crusty, a patient, was very agitated because he had been unable to leave the ward; and she was extremely alarmed when Mr Crusty pointed a gun at her. The gun was in fact an unloaded toy water pistol which Mr Crusty’s grandson Derek had accidentally left in the ward when visiting his grandfather. None of the other patients had noticed that exit was impossible.

and

(b) Dr Easiecut, a part-time orthopaedic consultant at the hospital, advised Mrs Frail, who suffered from a degenerative bone disease which caused her considerable pain and made walking difficult, to have an operation to replace her right hip. He warned her that her left hip (which was less severely affected) would probably also need to be replaced in several years’ time. Mrs Frail signed a consent form which specified ‘right hip replacement’. When she came round from the anaesthetic after the operation, she found that Dr Easiecut, who had not bothered to read his notes and the form properly, had replaced her left rather than her right hip. Although the operation had been competently performed, its immediate effect was to increase the pressure and pain in Mrs Frail’s right hip and to make walking even more difficult. She has now learned that this condition is likely to continue until the right hip can be replaced, which will probably not be for another three years because of the length of the hospital’s waiting list for orthopaedic surgery.

6. Discuss the possible tortious liability of Jaron, a dishonest dentist, in the following situations:

(i) anxious to increase his work, he falsely tells a gullible patient, Dave, that he needs twenty fillings, which he then carries out and charges for, drilling and filling twenty previously good teeth;

(ii) he has an affair with a married patient, Slapper, failing to inform her that he is suffering from hepatitis B; when she contracts the disease from Jaron her rich husband, Peeve, discovers the affair and promptly divorces her, leaving her in reduced financial circumstances;

(iii) despite being struck off the Dental Register for professional misconduct because of (i) and (ii) he continues to practise, thereby committing a criminal offence against the Dentists Act 1984, the statute regulating dental practice; during this period he gives innovative dental treatment to Richard; although Jaron carries out the procedure with due care, an unfortunate side-effect is that Richard suffers a permanent loss of sensation in his mouth.
2. Xavier and Yuri, law students at Camford University, decide to play a Rag Week stunt on their lecturers. At 8.30 am, Xavier rushes into the Law Faculty building and falsely informs Zeb, the caretaker employed by Camford University to look after the Law Faculty building, that Zeb’s house is on fire. Zeb rushes out of the building in a panic, leaving his keys to the security control room on the reception desk. Xavier then locks himself in the security control room and, just before lectures begin, makes an announcement over the public address system saying ‘Emergency! We have discovered a serious electrical fault! Do not attempt to leave the lecturers’ common room – the metal doors are live and you will be electrocuted!’ Alice and Brian, two lecturers, do not realise that the announcement is a joke and remain in the common room, not daring to try and leave. Ajice becomes increasingly distressed and begins to suffer severe chest pains, so Brian attempts to climb up a bookcase to see if they can make their escape through the ceiling tiles, but slips and breaks his arm.

After four hours, Xavier makes a further announcement that the common room has been made safe and Alice stumbles out, where she is met by Yuri, dressed as a paramedic. Yuri tells Alice to strip to her underwear so that he can administer first aid for her chest pains. Because Alice is so distressed by her ordeal that morning, she complies and allows Yuri to rub her chest. Just then Zeb returns and, in a furious temper, hits Xavier over the head with a heavy law textbook, which dislodges a blood clot that is lying dormant in Xavier’s brain, causing him severe brain damage. Xavier is now in a coma and is not expected to live for more than five years.

Consider any tortious claims that may arise.

9. Hoping to provide a service to the community, the Governors of St Horace’s, an independent day school, decided to make the school gym and its equipment available after school hours for a sports club for local children, and arranged for George, the school gymnastics teacher, to run the club as part of his normal contractual duties. Jane, Lucy and Mary, all aged fifteen, attended the first session of the club. At the start of the session, George informed the children (in accordance with instructions from the Governors) that the doors of the gym would be locked for security reasons and no one would be permitted to leave until the end of the session. The session started uneventfully, but whilst George was supervising a game of table tennis at the other end of the gym, an argument broke out between Jane and Lucy, who both wanted to climb on the same section of the climbing wall. Lucy grabbed Jane, who had started to climb, and caused her to fall and bang her head on the floor; Jane was unconscious for ten minutes and suffered the effects of concussion for several weeks afterwards. Mary, seeing Jane unconscious on the floor and fearing that she was dead, became agitated and tried to leave the gym, but George, who was attending to Jane, refused to unlock the door. When he eventually unlocked it at the end of the session, Mary, screaming hysterically, ran to her mother Nancy, who had come to meet her and who was holding a small, timid-looking dog on a lead. After discovering the reason for her daughter’s distress, Nancy confronted George and shouted ‘How dare you treat my daughter like that? I’ve a good mind to set the dog on you.’ George, who was terrified of dogs, ran away from her, but his arthritic knee gave way and he fell and broke his leg.

Consider any claims in tort that may arise.
SUPERVISION 2
NEGLIGENCE (1): THE BASICS

Reading

(1) The elements of a claim in negligence
M&B, chapter 4 (you should have already covered this last time)

(2) Duty of care (1): overview
M&B, chapter 5

(3) Duty of care (2): duties to take care not to harm people, physically or mentally
M&B, 126-165
Donoghue v Stevenson [1932] AC 562 (Lord Atkin only)
Bolton v Stone [1951] AC 850
O v Rhodes [2016] AC 219 (noted, M&BCaseNote)

(4) Establishing a breach of a duty of care
M&B, 255-270, 280-281
Dunnage v Randall [2016] QB 639 (noted, M&BCaseNote)
Montgomery v Lanarkshire Health Board [2015] AC 1430 (noted, Bagshaw, (2016) 132 LQR 182; McGrath, (2015) 74 CLJ 211; M&BCaseNote)
Tomlinson v Congleton BC [2004] 1 AC 46 (Lord Hoffmann only) (noted, M&BUpdate)
Compensation Act 2006, ss 1-2

(5) Establishing that a breach caused harm
M&B, 283-291, 312-318, 323-339 (we will be covering this in much more detail next term: this is just a basic introduction to causation questions)
Steel, ‘Defining causal counterfactuals in negligence’ (2014) 130 LQR 564

(6) Establishing that harm caused by a breach was not too remote to be actionable, or was not the wrong kind of loss to be actionable
M&B, 340-354
Hughes v Lord Advocate [1963] AC 837

Further reading
Michalowski, ‘Trial and error at the end of life: no harm done?’ (2007) 27 OJLS 257

Aims and objectives
You should have a number of aims in going through the reading for this supervision:

(1) To understand what has to be established if a claimant (C) wants to sue a defendant (D) in negligence: (a) that D owed C a duty of care; (b) that D breached that duty of care; (c) that D’s breach caused C harm; and (d) that part of all of the harm suffered by C as a result of D’s breach was actionable.

(2) To understand that where C has suffered physical harm as a result of D’s positive act, C will normally be able to establish that D owed her a duty of care not to act in that way if she can show that it was reasonably foreseeable that D’s acting in that way would result in her suffering physical harm; and to understand in what situations D will not owe C a duty of care even if C can show foreseeability of physical harm (principally, where C consented to D’s
doing what he did, and where it was reasonable in the circumstances for D to do what he did despite the foreseeable risk of harm to others).

(3) To understand that where C has suffered psychiatric illness as a result of D’s positive act, if C cannot show that it was reasonably foreseeable that D’s doing what he did would result in her suffering a physical injury, she will not usually be able to establish that D owed her a duty of care not to do what he did merely by showing that it was reasonably foreseeable that she would suffer a psychiatric illness as a result of D’s actions: she will have to show that something more is true, depending on how her psychiatric illness was caused.

(4) To understand the basic principles that the courts take into account in determining whether D breached a duty of care that he owed to C, and the basic tests (‘but for’, ‘break in the chain of causation’) that the courts use to determine whether D’s breach of duty caused C any harm.

(5) To understand when the courts will refuse to allow C to sue D for compensation in respect of a harm that was caused by his negligence, either because that harm was a remote consequence of D’s tort, or because it was not the kind of loss that the duty D owed C was designed to protect C from suffering.

**Written work**

Answer the following question (and remember, before you do so, to check out the advice and model answers on the companion website to the 3rd edition of McBride & Bagshaw, available at mcbridesguides → Tort Law → McBride & Bagshaw companion website → 3rd edition (free to access)):

7 Helen telephoned her fiancé Jim, with whom she had lived for several years, from their home. Jim received the call on his mobile phone. Jim was driving carefully on the inside lane of a dual carriageway when the mobile phone, which he had placed on the passenger seat, rang. He answered the phone with his left hand, using only his right hand to control the steering wheel of the car and began to talk to Helen. Suddenly Mike, a thirty year old man with a mental age of ten, ran across the carriageway a short distance in front of Jim’s car. Jim tried to swerve to avoid Mike but, steering with only one hand, he lost control of the car and crashed into a lorry being driven too fast by Gill in the outer lane. Jim’s car burst into flames and he was very badly burnt. Gill and Mike were, however, unhurt. Helen heard Jim’s screams of agony and the roar of the flames on the telephone before the line went dead, and suffered a nervous breakdown as a result. Medical evidence suggests that Jim is only expected to live for another five years, and that Helen would probably have suffered a nervous breakdown anyway, even if she had not heard the accident on the phone, because of the strain of caring for Jim after the accident.

Advise the parties as to their tortious claims and liabilities.

**Questions for the supervision**

1. When he was 12 years old, Jamie started smoking – he would regularly buy cigarettes from Dodgy, a newsagent who was happy enough to sell cigarettes to children. Jamie is now
21 and has quit smoking but cannot stop worrying that he is going to get lung cancer in the future as a result of all the cigarettes he smoked when he was younger. Can Jamie sue Dodgy?

2. Boy and Girl were admiring the view of the sea from the top of a cliff when they started playfully pushing each other around, pretending to push the other person over the edge. The game went wrong, and an over-heavy push from Girl sent Boy over the edge of the cliff. Boy’s dead body was found at the bottom of the cliff with a bullet wound through his head. It was concluded that as Boy fell to the bottom of the cliff he was actually killed by a bullet that had been carelessly fired from Hunter’s gun. (Hunter had been on the beach, trying to shoot seagulls, and had carelessly fired a shot in the direction of the cliff when he rested his gun against his shoulder.) Who (if anyone) can Boy’s estate sue? Who (if anyone) can Boy’s dependants sue?

3. Steve, a school bus driver, kidnapped a bus load of schoolchildren and threatened to blow the bus up unless his wife was given a very expensive drug to treat her breast cancer. TV stations showed live pictures of the stand-off between the police and Steve, which was resolved when Steve gave himself up. The School that employed Steve as a bus driver had been unhappy with his performance as a driver – in particular, the fact that he regularly turned up for work late, smelling of alcohol, and sometimes swore at the children – but had not taken any action against him, other than warning him about his future conduct. Who of the following can sue, and who can they sue: (1) Frankie, a child on the bus, who thought at the time that Steve was playing a big game, but now he knows what really happened, is severely traumatised; (2) Mary, Frankie’s mother, who watched the live TV pictures of the stand-off between the police and Steve, knowing that Frankie was on the bus, and is suffering post-traumatic stress disorder; (3) Vera, who also watched the live TV pictures, thinking that her daughter was on the bus, when in fact her daughter was not because she was truanting from school that day, but is nevertheless severely traumatised.

Past paper questions

3. ‘... the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury ... . The second solution is to abolish all the special limiting rules applicable to psychiatric harm’ (LORD STEYN, White [Frost] v. Chief Constable of South Yorkshire Police (1998)).

Discuss.

5. ‘[T]here still seems to be a need to demystify the law of causation, to explain why the law sometimes uses the standard criteria and sometimes departs from them’ (LORD HOFFMANN).

Discuss.
2. "There is no single test for deciding whether an act or omission of a third party, an act or omission of the claimant himself, or a natural event, breaks the chain of causation so as to relieve a defendant from liability for negligent conduct."
   Discuss.

1. **Either (a)** 'The “but for” test of factual causation in tort is under-inclusive – it rules out events that should count as factual causes."
   Discuss.

7. "While a tortfeasor is not liable for damage that was not reasonably foreseeable, it does not follow that a tortfeasor is liable for all damage that was reasonably foreseeable."
   Discuss.

   **Or (b)** 'The courts seem to think that the concept of "reasonable foreseeability" can provide all the answers when determining fault and remoteness of damage in negligence. In fact, the concept is so unhelpful and incoherent that it can do no more than justify conclusions reached on other grounds."
   Discuss.

7. "The notion that a statutory duty has a "scope" is an inherently problematic concept for determining whether loss is recoverable, but at least a statutory duty has a fixed text and context. When applied to the common law duty of care, the notion of the "scope of the duty" is wholly meaningless and is no help in answering the inevitable, difficult questions of attribution of responsibility in negligence actions."
   **Do you agree?**
SUPERVISION 3
NEGLIGENCE (2): LIABILITY FOR OMISSIONS

Reading
(1) The reluctance to impose liability for omissions
M&B, pp 212-229
Capital & Counties plc v Hampshire CC [1997] QB 1004
Michael v Chief Constable of South Wales Police [2015] AC 1732 (noted, M&BCaseNote)
(2) General situations giving rise to a duty to act
M&B, pp 229-253
(3) Occupiers’ liability
M&B, chapter 11
Occupiers’ Liability Act 1957
Occupiers’ Liability Act 1984

Further reading
Weir, ‘Governmental liability’ [1989] Public Law 40
Nolan, ‘The liability of public authorities for failing to confer benefits’ (2011) 127 LQR 260

Aims and objectives
You should have a number of aims in doing the reading for this supervision:

(1) To understand that while foreseeability of a (non-trivial) risk of physical injury is normally sufficient to give rise to a duty of care not to act in a particular way, the fact that it is foreseeable that someone will suffer physical injury unless you act to save them from some danger that they are in will never be enough on its own to give rise to a duty of care; something more – some special circumstances or some special relationship between you and the person in danger – will always be required before you will owe them a duty of care to save them from the danger they are in.

(2) To understand the circumstances in which one person will owe another a duty to take reasonable steps to save them from being physically injured.

(3) To understand when an occupier of land will owe a duty of care to a visitor on his/her land a duty of care to protect that visitor from being physically harmed as a result of: (a) the premises being in a dangerous state; (b) a danger arising on the premises which has nothing to do with the state of the premises.

(4) To understand the three requirements that have to be satisfied before an occupier of land will owe a trespasser on that land a duty to take reasonable steps to protect that trespasser from being physically injured by a dangerous feature on that land.
Questions for the supervision

1. Which of the following situations involves an act, and which an omission:
   (a) A is driving along the road and fails to brake when B walks into the road, with the result that he runs over B.
   (b) A, a lifeguard on a deserted beach, spots that B is drowning at sea. A goes into the sea to rescue B but abandons the attempt when he realises that B is the man who has been having an affair with his wife.
   (c) Same as (b), but A does attempt to rescue B but is so incompetent that when he is hauling B back towards shore, he is holding B’s head underwater for most of the time, with the result that B drowns.
   (d) The brakes on B’s car do not work very well. B hands the car into A’s garage to be repaired. A is extremely busy working on other cars and does not have enough time to repair B’s car – but when B turns up to get his car back and asks ‘Is my car ready?’, rather than say that he has not repaired it, A simply gives B the keys to the car and says ‘That’ll be £500.’
   (e) A has sex with B without telling her that he is HIV+.
   (f) A performs a vasectomy on B but botches the operation without realising that he has done so. B subsequently has unprotected sex with his wife and his wife becomes pregnant.
   (g) A manufactures a rape alarm that does not work very well. Not knowing this, B carries the rape alarm with her. One night she is attacked, and the alarm does not work when she tries to use it.
   (h) A is driving a fire engine towards a fire at B’s house when he carelessly crashes the fire engine. B’s house burns down.
   (i) The same as (h), except the result of A’s crashing the fire engine is that a fire engine following A’s fire engine cannot get to B’s house. B’s house burns down.

2. Should the law distinguish between acts and omissions in determining when a defendant owes a claimant a duty of care? Should it be less willing to draw such a distinction when the defendant’s job is to save the claimant from harm?

Past paper questions

7. Should the law relating to liability for omissions be the same for public authorities and private actors?

5 ‘Outside special areas for which public policy is deemed to require immunity from liability for negligence, public bodies are subject to the same rules concerning liability in tort as any other persons.’
   Discuss.

4. ‘If in no way instrumental for the other’s plight, one may with impunity refrain from tendering a helping hand even when to do so would avert the peril with little effort’ (Fleming).
   Does this statement accurately describe the rules of English tort law relating to liability for omissions? Should these rules be modified?

3 ‘There are good reasons for treating public and statutory bodies as special classes of defendants in tort law.’
   Discuss.
2 Zaphod has information which suggests that Yellow, a businessman, is defrauding the Customs and Excise. He approaches Xenon, a Customs and Excise officer, and says to him that he will tell all he knows on condition that the source of the information does not become known to Yellow, a fellow Freemason to whom he does not want to be thought disloyal. Xenon agrees, but carelessly includes a copy of a note of his conversation with Zaphod in a letter to Yellow. The note reveals Zaphod’s identity to Yellow. Unknown to Zaphod or Xenon, Yellow is connected with the Mafia, and he immediately sends his friends to beat up Zaphod, which they do very vigorously.

Advise Xenon and the Customs and Excise.

8. Anthony owns and runs a shop. Bob, a builder acting under a contract with Anthony, builds an extension to the shop. The building works are inspected by Colin, the local authority inspector. Some months later, Anthony notices cracks in the walls of the extension, but because his business is not prospering, he lacks the financial resources to undertake any investigation or repairs.

After three months the wall of the extension collapses, injuring Anthony and Emma, a teenage customer.

Emma’s best friend, Hermione, is standing inside the shop but is not physically injured. Hermione sees the wall collapse, and pulls Emma from the rubble. Emma’s sister Julia is standing outside the shop and immediately phones Katherine (Emma’s mother) on her videophone. Katherine sees pictures of the collapsing building and Emma lying injured. As a result of their experiences, Hermione, Julia and Katherine suffer psychiatric illnesses.

When it collapses the wall of the extension also pulls down part of the wall of the original shop to which it was joined.

Advise Anthony, Emma, Hermione, Julia and Katherine.

1 Giles owned Blossom Farm, which consisted principally of fields used for the commercial growing of crops. Two years ago, when profits from farming were falling, Giles diversified and opened a ‘children’s farm’ in a small enclosed paddock area adjoining the crop fields, for children and other visitors to learn about farm life. One day, a party of ten-year-old school children visited the ‘children’s farm’. Before the visit, Giles had asked Jim, the children’s teacher, to make it clear to the children that they were not permitted to go beyond the boundaries of the ‘children’s farm’ because, as Giles explained, ‘farmers’ fields are dangerous places’. Jim forgot to tell the children in advance, but made a brief announcement to this effect as the children were disembarking from the coach on arriving at the farm; however, Kurtis, one of the children, was not listening to Jim’s announcement.

After stroking some baby lambs, Kurtis got bored, squeezed through a narrow gap in the fence surrounding the ‘children’s farm’ area into a field of crops and lay down for a sleep. The field had recently been sprayed with highly toxic insecticide; as a result Kurtis suffered a painful allergic skin reaction and his expensive school blazer was damaged. On hearing Kurtis’s screams of pain, Jim climbed onto the fence to look for him, but fell from the top and broke his arm. Displayed on the fence, a short distance away from the gap, was a sign which read ‘Warning: Farmer Giles accepts no liability for any damage to anyone, however caused.’

Consider any tortious claims that may arise.
SUPERVISION 4. PROTECTION OF PROPERTY IN TORT LAW

Reading

(1) Negligence: liability for damage to things
M&B, pp 165-175

(2) Trespass to land
M&B, chapter 14

(4) Private nuisance
M&B, chapter 15, pp 851-853, 857-858, 859-863


Bright, ‘Liability for the bad behaviour of others’ (2001) 21 OJLS 311

(5) Strict liability: Rylands v Fletcher
M&B, chapter 16


Stannard v Gore [2012] EWCA Civ 1248 (noted, M&BUpdate)

Further reading

Ogus and Richardson, ‘Economics and the environment: a study of private nuisance’ (1977) 36 CLJ 284


Murphy, ‘The merits of Rylands v Fletcher’ (2004) 24 OJLS 643

Nolan, ‘The distinctiveness of Rylands v Fletcher’ (2005) 121 LQR 421

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand the distinction between cases of liability in private nuisance and cases of liability for trespass to land (though not in as much detail as we got into it in McBride & Bagshaw – it is enough for your purposes to think of trespass to land as covering interferences arising from the defendant’s going onto the claimant’s land, and private nuisance as covering interferences that the defendant is responsible for even though he has not gone onto the claimant’s land).

(2) To understand the different ways in which the tort of private nuisance can be committed, and the requirements that have to be satisfied before a defendant will be held to have committed the tort in each of those ways.
(3) To understand when a landowner will be held liable for a private nuisance emanating from his land, and to understand that the extent of the landowner’s liability will depend on whether he is in possession of the land (or has let it out to someone else).

(4) To understand that while liability under the rule in *Rylands v Fletcher* may be classified as a ‘subspecies’ of liability in private nuisance, the two forms of liability remain formally distinct in that someone who is liable under the rule in *Rylands v Fletcher* is simply liable under that rule and is not liable ‘in nuisance’. And to understand the debate over whether the rule in *Rylands v Fletcher* is truly an extension of the principles governing when a defendant will be held liable to a claimant in private nuisance.

(5) To understand the requirements for a defendant to be held liable to a claimant under the rule in *Rylands v Fletcher*, with particular emphasis on obtaining an excellent understanding of when the defendant can be said to have been using his land in a ‘non-natural’ or ‘extraordinary’ way in bringing onto his land, or collecting on his land, a thing liable to do damage to neighbouring land if it escapes.

**Written work**

Write an essay in response to any of the essay questions (that is, *not* problem questions) featuring in the ‘Past paper questions’ for this supervision or the previous three supervisions.

**Questions for the supervision**

1. In *Coventry v Lawrence (No 1)*, Lords Sumption (at [159]-[161]) and Mance (at [168]) disagreed on how ready the courts should be to award injunctions in private nuisance cases. What do you think?

2. Do you agree with Lord Hoffmann’s analysis of the nature of the tort of private nuisance in *Hunter v Canary Wharf*?

3. In the Aberfan disaster (1966), debris from mining operations at the Merthyr Vale Colliery that had been piled up in a huge tip slid downhill and covered a school, killing 116 children and 28 adults. If the rule in *Rylands v Fletcher* were applied in its current form to determine the liabilities of the owners of the colliery, what would be the effect? Is this satisfactory?

**Past paper questions**

1. In what ways could the common law tort of private nuisance be improved?
"It is hard to escape the conclusion that the intellectual effort devoted to the rule [in Rylands v. Fletcher] by judges and writers over many years has brought forth a mouse." (LORD HOFFMANN in Transco plc v. Stockport Metropolitan Borough Council (2003))

Consider:

(a) whether this is a fair description of the present status of the rule,

and

(b) whether any reforms of the rule are desirable.

*11.* Pleasuredays Ltd is given planning permission to open a holiday camp on the edge of a quiet residential neighbourhood. One feature of the camp is its lively nightlife, which attracts many young holidaymakers. Quentin lives in a house near the perimeter of the camp. He is an academic who has already done much of his writing in the evening, but now cannot work because of the loud music emanating from the camp. The holidaymakers frequently leave the camp at night, and vandalise the playground of the local playgroup, which is owned and run by Robyn. Robyn makes a number of complaints about this to Pleasuredays.

Quentin becomes so incensed by the noise that he goes to the camp one evening to complain. He enters by a gate which has been left open by mistake, which leads into an area of the camp where the holidaymakers are not permitted. There is an unlit sign saying 'Warning: Dangerous equipment'. In the dark, Quentin trips over the hose leading to a tank in which the oil for the heater is stored. Quentin breaks his leg and the hose is pulled out of the tank, allowing the oil to flood out of the camp. It floods Sam's garden, which is adjacent to the camp, and kills his plants. Tracy is driving along the road next to the camp. The oil which has flooded onto the road causes her car to skid and hit a lamp post. Tracy is severely injured.

Advise Quentin, Robyn, Sam and Tracy.

*11.* Several years ago Waste'y Ltd built a factory on a disused airfield near Moletown to recycle old cooking oil by converting it into bio-diesel. In recent years Moletown has expanded and a housing estate has been built next to Waste'y Ltd's factory. When the weather is hot a strong smell from the factory reaches the houses in the estate. Vernon buys a house on the estate for his daughter, Ursula, to live in whilst she is studying at Moletown University. Vernon plans that Ursula will get some money to pay for her studies by renting rooms in the house to other students. Ursula finds the smell exceedingly unpleasant and is unable to find any students who are willing to live in a house subject to such a smell. Vernon only visits the house once and finds the smell 'disgusting'.

Last year demand for bio-diesel fell unexpectedly and Waste'y Ltd had to store a larger quantity of it than usual. Waste'y Ltd arranged for Xtra Tanks Ltd to install a temporary storage tank next to their factory. Xtra Tanks Ltd failed to seal the tank properly and as a result a large amount of bio-diesel flowed out of the tank and into Vernon's house. It destroyed the carpets in the house and collected in a large puddle in the driveway. When Ursula drives home her car skids in the puddle and collides with the garage door. Ursula suffers minor injuries, but both the car and garage door are destroyed. It is discovered that it is not worth pursuing a claim against Xtra Tanks Ltd.

Ursula decides to organize parties for students at her house every weekend during the summer. She sets off fireworks at the first party, and this proves to be so popular that many guests bring fireworks to set off at subsequent parties even though Ursula does not encourage this. The fireworks greatly worry Waste'y Ltd, which receives advice from safety consultants that the risk of a fire being caused by a defective or misdirected firework is sufficient to mean that it ought to install an additional expensive fire safety system.

Discuss any claims in tort raised by these facts.
In Effluent Road, Stretchford, there stands an empty warehouse, owned by Weird. Next door there stands a building which Shiftt, in breach of planning permission, uses for the bulk storage of polystyrene, having bribed Bakanda, an inspector employed by the Stretchford City Council, to turn a blind eye. Further down the street there is a gym, owned and run by Truss. Behind all three buildings stands a market garden, owned and occupied by Green. One winter, Weird’s warehouse is occupied by squatters, whose drunken and disorderly behaviour in the street causes many of Truss’s clients to stay away, so damaging his business. Truss complains about this to Weird, who does nothing. When the weather turns cold the squatters take it upon themselves to reconnect the gas supply. Their amateur gas-fitting is incompetent, so that the building later fills with gas, causing an explosion and a fire. The fire spreads to Shiftt’s warehouse, where his polystyrene is ignited, and burns furiously. The fire in Shiftt’s warehouse rapidly engulfs Truss’s gym next door, which is totally destroyed. Clouds of poisonous smoke and fumes from the burning polystyrene pollute Green’s market garden, ruining his crops, and causing injury to Brown, Green’s head gardener, who inhales fumes when trying unsuccessf ully to rescue Green’s truck, which despite his efforts perishes in the flames.

Discuss the tortious liabilities that arise.

Lenny has always enjoyed renovating old motorbikes from a shed at the bottom of his garden and, two years ago, Lenny’s hobby was featured in a specialist magazine for motorbike enthusiasts. He was immediately inundated with requests from owners of old motorbikes, asking for his help with renovation, and he soon decided to give up his job and turn his hobby into a business, having successfully obtained planning permission to run the business from his garden shed.

Marian, Lenny’s next door neighbour, objected to the noise from roaring motorbike engines, which disrupted her baby daughter’s daytime naps and disturbed the tranquillity of the garden. Eventually, Marian sold her house to Nobby, an elderly man, at a discounted price that took into account the impact of the noise on the value of the house. Nobby assumed he would not mind the noise because he was mildly deaf, but in fact the reverberations from the motor bike engines interfered with his hearing aid and made it emit high-pitched siren noises, which caused Nobby to suffer severe earache and headaches. Nobby complained to Lenny, but Lenny said that he was already taking every possible precaution to keep the noise to a minimum.

A few weeks after Nobby moved in, Lenny was testing a renovated motorbike by revving the engine, but accidentally pressed the accelerator at the same time – the motorbike shot out of Lenny’s shed, through Nobby’s fence and smashed into Nobby’s garden, ploughing up several rosebushes that Nobby had recently planted and destroying Nobby’s extensive collection of garden gnomes. Furious, Nobby rushed indoors, found his old military revolver and fired a shot in the direction of Lenny’s shed. The shot ruptured a storage tank outside the shed, containing chemical solvent used for degreasing motorbike parts. The solvent leaked into the ground, contaminating Lenny’s fish pond (killing a number of carp) and rendering Nobby’s garden unsafe for growing vegetables.

Advise the parties of their rights and liabilities in tort.
SUPERVISION 5
STRICT LIABILITY AND TORT LAW

Reading
M&B, 26-27

(1) The trespass torts
These have already been covered in the reading for supervisions 1 and 4

(2) The rule in Rylands v Fletcher
This was covered in the reading for supervision 4

(3) Liability under the Consumer Protection Act 1987
M&B, chapter 12
Note on A v National Blood Authority (2001) on M&BUpdate
Wilkes v Depuy International Ltd [2017] 3 All ER 589 (noted, Bild, (2017) 76 CLJ 230)

(4) Liability for breach of statutory duty (can give rise to strict liability where statutory duty
is strict, i.e. a duty ‘to ensure’ that something happens)
M&B, chapter 22
Enterprise and Regulatory Reform Act 2013, s 69 (designed to ensure employers are never
held strictly liable for breach of a statutory health and safety duty)

(5) Liability for breach of non-delegable duty of care
Technically, this form of liability straddles the divide between negligence and strict liability,
as the defendant is held liable in negligence, but is held liable in negligence because someone
else’s faulty conduct put the defendant in breach of a duty of care that he owed the claimant
M&B, 272-277
Woodland v Swimming Teachers Association [2014] AC 537 (noted, M&BCaseNote;
George, (2014) 130 LQR 534)

(6) Vicarious liability (strict liability for torts committed by others)
M&B, chapter 37
mcbridesguides → Tort Law → Tort casenotes → Vicarious liability cases (pay special
attention to the notes on Lister, Various Claimants, and Mohamud)
Brown, ‘Liability for the crimes of others’ [2010] Kemp News 1
Brodie, ‘Enterprise liability: justifying vicarious liability’ (2007) 27 OJLS 493

Aims and objectives
In doing the reading for this supervision, you should have a number of aims:

(1) To understand what it means for someone to be held strictly liable for a given outcome,
and why all the heads of liability gathered together in this supervision are capable of giving
rise to strict liability.

(2) To understand in what respects liability under the Consumer Protection Act 1987 is wider
than, and narrower than, liability in negligence for physically injuring someone, or causing
them to suffer a psychiatric illness, or damaging their property.

(3) To understand why liability under the Consumer Protection Act 1987 is not a form of
liability for breach of statutory duty, and to consider why liability under the 1987 Act exists,
and whether it has anything in common, in terms of its rationale, with any of the other heads
of liability dealt with in this supervision.
(4) To understand why liability for breach of a non-delegable duty of care is not a form of vicarious liability, and to understand when someone will be subject to a non-delegable duty of care and what that means.

(5) To understand the recent changes in the law on vicarious liability: in particular, (a) the change in the test for determining whether an employee has committed a tort in the course of his employment from the old Salmond test to the new Lister test; and (b) the expansion of the categories of situations where a defendant might be held vicariously liable for another’s tort to include cases where the defendant and the tortfeasor were in a relationship ‘akin to employment’ when the tortfeasor committed his tort.

Past paper questions

1. Diggit Ltd, a machinery hire company, agreed to hire a digger with a driver to Eden College for a day to remove surplus soil from the College’s front garden before a new lawn was laid. When the digger arrived at Eden, Eden’s Head Gardener, Adam, showed the area to be excavated to the driver, Bob (who was an employee of Diggit), and Bob set to work. Whilst he was operating the digger, he made a call to his girlfriend, Carol, on his mobile telephone, although Diggit’s standard instructions for employees provided that no employee should make or receive a telephone call whilst operating machinery. Bob became so absorbed in his conversation that he allowed the digger to swerve towards the public footpath adjacent to the Eden garden and collided with Faith, a pedestrian, breaking her leg. Adam, who had witnessed the accident, rushed towards Bob and punched him in the face, and for the next month sent abusive emails every day to an email address shared by Bob and Carol, threatening to tell Diggit that the accident was the result of Bob’s breach of Diggit’s instructions unless Bob paid him £1,000. Bob was unperturbed by the emails but Carol, who also read them, became very anxious and distressed.

Advise Faith, Bob and Carol as to their possible claims in tort.

6. Mr and Mrs Quibble bought a toy scooter as a Christmas present for their five-year-old daughter Rose. The scooter, which was manufactured by Scootfree Ltd., was made of rigid plastic but was coated with a varnish which gave it the appearance of steel. The carton in which it was packed was marked: ‘Warning: this scooter is designed for use by children aged 3 to 7 years, and is unsuitable for use by younger or older children’.

One day, Rose left the scooter outside the front gate of the Quibbles’ house. Tom, who was delivering milk to the house, decided to try it out, and scooted down the road on it. The scooter shattered under him and Tom fell to the ground, suffering a head injury and consequent brain damage. Tom’s wife Una, who had been helping him to deliver the milk, saw the accident and was so distressed that she suffered a nervous breakdown.

Discuss any claims in tort which might arise.

5. The (fictional) Highways (Gritting) Act 2003 imposes a duty on local authorities to make satisfactory arrangements to grit the roads and pavements whenever necessary given the cold weather conditions. Ambridge District Council contracted with a private company, Sellers Ltd, to discharge the council’s responsibility for gritting in its district.

One evening, Bob (Sellers’ managing director) was alerted to the forecast of bad weather overnight, but (anxious to save money and preserve limited stocks of grit) instructed his staff not to grit the roads until the following morning. Heavy snow fell overnight and, before the gritters began work, Carl was seriously injured attempting to reverse out of his drive, because his car slid across the road into a brick wall. The accident would not have happened if the road had been gritted, but it could also have been avoided if Carl had been more experienced at driving in snowy conditions. Elsewhere in the region, the ungritted roads were grid-locked and Dave (a salesman) was stuck for 12 hours in his car, unable to reach an important business appointment, as a result of which he lost several thousand pounds in commission. Only one gritter, Eric, ignored Bob and gritted the roads and pavements overnight in one part of Ambridge. Unfortunately, in his eagerness to help the public, Eric used excessive amounts of grit on the pavements. When Frieda took her poodle for a walk later that morning, the dog’s paws became painfully inflamed through contact with the salt in the grit. Infection set in and the poodle died, causing Frieda immense distress.

Discuss the rights and liabilities of the parties in tort.
Greedy Bank plc, a merchant bank in the City of London, had an underground car park for use by its directors. Bryan, a car cleaner, had an informal arrangement with the bank whereby he agreed to be available on two specified days each week so that, if any director wanted to have a car cleaned, he or she could telephone Bryan and book him to clean the car in the underground car park. Bryan was paid by the individual director and paid his own tax and national insurance; the bank provided the cleaning equipment and hot water, and allowed Bryan the use of its canteen and leisure facilities.

One day, Bryan was booked to clean two cars for directors of the bank. He decided to move another car (a Rolls Royce belonging to Colin) a short distance, without Colin's permission, to create more space in which to clean the two cars. Bryan omitted to apply the handbrake and Colin's car rolled backwards, crashed into the automatic exit barrier and was badly damaged. The automatic barrier was meant to rise automatically whenever a vehicle approached it, but was notoriously unreliable and, three times out of four, did not work unless the driver of the car got out and banged on the top of it. The barrier had been purchased last year by Greedy Bank plc directly from the manufacturers, Fudgit Ltd., at the bargain price of £260 because it was the last of a discontinued line.

Advise Colin.

Amy, Brian and Charlie work in an exclusive hotel in central London owned and run by Davina. Amy is a waitress employed by Davina on a "casual" basis, coming in from time to time when needed. During one of her shifts she carelessly spills red wine over Evgeny, a customer, whose jacket is ruined. Brian is a chef whose contract with Davina describes him as "self-employed" even though he has worked exclusively for Davina for several years. As a practical joke he pours a vat of custard over the head of Gary, a trainee on secondment from the local catering college. Gary, feeling deeply humiliated, abandons his training course. Charlie is a doorman whose services are supplied to Davina by Francesca's employment agency. Francesca tells Davina that Charlie does not have a criminal record; in fact he has several convictions for assault, as Francesca would have discovered had she checked properly. Charlie becomes involved in a fight outside the hotel with Hank, a customer, who Charlie wrongly thinks is trying to leave without paying. Hank is knocked unconscious and spends a week in hospital recovering. The incident is widely reported and Davina's hotel suffers a severe loss of business, eventually closing.

Davina's hotel suffers a severe loss of business, eventually closing.

Advise the hotel.

Discuss the rights and liabilities of the parties in tort.

The producer of a defective product is liable in tort for some, but not all, kinds of damage caused by the defect.

Discuss this statement with reference to:

(i) the Consumer Protection Act 1987;

and

(ii) the common law.

The Consumer Protection Act 1987 would be more accurately called the Act for the Persecution of Producers.

Discuss.

The tort of breach of statutory duty gives claimants little more than what is already provided for them by the tort of negligence.

Discuss.

The courts should abandon the fiction that the questions of whether breach of statutory duty gives rise to a tort action for damages, and if so of the appropriate standard of liability, are answered by a process of statutory interpretation. If the courts openly admitted that the relevant considerations concern the place of this form of liability in the overall scheme of the law of tort, the law would be simpler and more coherent.

Discuss.
5. ‘In a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy. In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy.’ (LORD STEYN in Gorringe v. Calderdale Metropolitan Borough Council (2004)) (italics in the original)

Discuss.

8. ‘The role of strict liability in tort law is steadily diminishing. This is regrettable, since fault-based liability is not capable of protecting all the interests which tort law should protect.’

Discuss.

3. In what circumstances, and for what reasons, may an employer be held liable in tort for a wrongful act deliberately committed by an employee?

3. When, if ever, is one person liable in tort for the consequences of a criminal act committed by another?

Or (b) ‘The law of vicarious liability is on the move.’ (LORD PHILLIPS in Catholic Child Welfare Society v. Various Claimants (2012))

Explain this statement and consider whether any further development of the law of vicarious liability would be beneficial.
SUPERVISION 6
DIFFICULT ISSUES IN TORT LAW (1):
PROTECTION FROM PURE ECONOMIC LOSS AND DISTRESS

Reading

(1) Instances of no-liability for pure economic loss in negligence
M&B, pp 111 footnote 30, 175-176
Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27 (Lord Denning MR’s judgment especially)

(2) Instances of liability for pure economic loss in negligence
M&B, pp 176-199

(3) Further no-liability cases since Hedley Byrne
Caparo Industries Plc v Dickman [1990] 2 AC 605 (noted, Fleming, (1990) 106 LQR 349)

(4) The SAAMCO principle as a limit on liability under Hedley Byrne
M&B, 354-358

(5) Explanations of the law on liability in negligence for pure economic loss
M&B, pp 200-207, 210-211
O’Sullivan, ‘Suing in tort where no contractual claim will lie – a bird’s eye view’ (2007) 23 Professional Negligence 165

(6) Fraud/deceit
M&B, p 712

(7) Liability in negligence for pure distress
M&B, pp 160-163

(8) Liability for causing pure distress through harassment
Protection from Harassment Act 1987
M&B, pp 597-603

Further reading

Aims and objectives
You should approach the reading for this supervision with the following aims in mind:

(1) To understand that the mere fact that it is reasonably foreseeable that A’s doing \( x \) will result in B suffering pure economic loss or distress will not mean that A will owe B a duty of care not to do \( x \); and to understand why this is so.

(2) To understand that as a normal rule, strangers will not owe each other duties of care not to cause each other to suffer pure economic loss; and to understand in what situations an exception to that rule will be made, and why.
(3) To understand when a defendant will be held to have owed a claimant a duty of care not to cause the claimant to suffer pure economic loss because he ‘assumed a responsibility’ towards the claimant, and to understand the debates over whether the concept of an ‘assumption of responsibility’ is meaningful or empty.

(4) To obtain a rough understanding of when a defendant will be held liable to a claimant for (a) deceit; and (b) causing another to suffer pure distress.

Written work

Answer the following question:

2. ‘In cases of personal or physical injury, reasonable foreseeability of harm is usually enough ... to generate a duty of care. In the case of economic loss, something more is needed.’
   (LORD HOFFMANN in Customs & Excise Commissioners v. Barclays Bank plc (2006))
   Discuss.

Past paper questions

5. ‘Protection against economic loss should be left to a person’s own contractual arrangements and should not be the province of the tort of negligence.’
   Discuss.

6. Describe and evaluate the rules of English tort law which determine when a professional will be liable to a third party for loss caused as a result of a failure to provide a reasonably competent service to a client.

4. ‘I confess ... I find considerable difficulty in phrases such as “voluntary assumption of responsibility” unless they are to be explained as meaning no more than the existence of circumstances in which the law will impose a liability upon a person making the allegedly negligent statement to the person to whom the statement was made; in which case the phrase does not help to determine in what circumstances the law will impose that liability or, indeed, its scope.’ (LORD ROSSKILL in Caparo v. Dickman (1990))
   I ought whether the same criticisms would have been directed at the phrase “voluntary assumption of responsibility” if the words had been understood, as I think they should be, as referring to a conscious assumption of responsibility for the task rather than a conscious assumption of legal liability to the plaintiff for its careful performance. (LORD BROWNE-WILKINSON in White v. Jones (1995))
   In the light of these two statements, comment critically on the role of “voluntary assumption of responsibility” in the context of claims for pure economic loss in the tort of negligence.

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8 Vernon owned a modern building, designed and built by Jerry, in which Vernon housed his collection of sculptures. Unfortunately, Jerry was incompetent and constructed the building in such a way that, although structurally safe, its internal walls sloped fairly significantly. Vernon decided to sell the building because the sloping walls irritated him every time he looked at his sculptures. Damien was interested in buying the building and instructed Sandy, a surveyor, to survey it for him. Sandy omitted to notice the problem with the walls and issued a report describing the building in very favourable terms. Eventually Damien decided not to proceed with the purchase, but showed Sandy’s report to his friend Tracey and also told Tracey that the building would make a perfect art gallery. Tracey then purchased the building from Vernon. Immediately it became obvious that the walls sloped too steeply to be used for displaying paintings. Tracey was determined not to admit defeat, but instead carried out very expensive remedial work in an attempt to straighten the internal walls. Also, after two years of such attempts, it became obvious that the sloping walls’ problem could not easily be remedied and Tracey put the building up for sale, by which time the property market had slumped. Vernon is now bankrupt.

Advisory Tracey of any potential claims in tort.
2. Stichus was employed for 10 years by Aulus. In 2007 he left to set up in business on his own, but things did not work out, and in 2009 he sought employment with Baebus, who offered him a job ‘subject to satisfactory references’.

Consider the possible tortious liability of Aulus in each of the following situations:

(i) Aulus refused to provide a reference for Stichus, and in consequence Baebus decided not to employ him.

(ii) Baebus approached Aulus for a reference; Aulus, being irritated with Stichus, wrote him an unfairly bad one and in consequence Baebus decided not to employ him.

(iii) Aulus wrote Stichus a glowing reference, on the strength of which Baebus employed him; in fact, as Aulus was well aware, Stichus had left Aulus’s employment under a cloud, having been suspected of theft and fraud; Stichus abuses his new position with Baebus to steal a large amount of money, which he is unable to repay.

*12. Zane tells Argon College that he would like to make a donation of £1 million to the College ‘in the most tax efficient manner’. Argon College asks Clifton, an expert on some parts of tax law who is employed as a law teacher by Barium College, about what the most tax efficient way of making such a gift might be and explains why it is asking. Clifton asks his son, Ethelred, who is a law student, to look up some legislation which is relevant to the question. Unfortunately Ethelred provides Clifton with a copy of a piece of legislation which was repealed the previous month. Clifton gives advice to Argon College which is based on the repealed legislation, but this advice is clearly wrong on the basis of the current legislation: this legislation both eliminates the tax benefit and imposes a penalty on any taxpayer who makes a donation in the way recommended by Clifton. Argon College passes on Clifton’s advice to Zane, who follows it. As a result Argon College receives £250,000 less than it would have done if Zane had made his donation in the most tax efficient manner, and Zane has to pay a penalty of £100,000 on top of his tax liability.

Argon College uses Zane’s donation to purchase a student accommodation block from Barium College. Doom Ltd recently finished building this block for Barium College, but Barium College subsequently decided that the block did not meet its needs. During a storm shortly after the purchase, the gutters overflowed and water flowed into several student rooms causing damage to the possessions of students, including Felix. Investigations reveal that the problem was partly a result of Gwen, an architect hired by Barium College, making a basic mistake when calculating how wide the gutters ought to be, and partly a result of Doom Ltd carelessly failing to follow Gwen’s plans properly. The problem will cost £100,000 to correct.

Advise Zane, Argon College, and Felix on any claims in tort raised by these facts.

1. Either (a) ‘The phrase ‘assumption of responsibility’ means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law.’ (LORD SLYNN in Phelps v. London Borough of Hillingdon [2000])

In the light of this statement, what use is the concept ‘assumption of responsibility’ in determining when the law should or should not impose liability in negligence?

Or (b) ‘The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case. So it must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle ... It is also important, so far as possible, that the distinctions produced by this process make sense to ordinary people.’ (LADY HALE in Woodland v. Essex County Council [2013])

To what extent does the common law of negligence live up to these ideals?
SUPERVISION 7
DIFFICULT ISSUES IN TORT LAW (2):
CAUSATION AND RISK

Reading
(1) The effect of uncertainty about what would have happened but for the defendant’s tort
   (a) The normal rule
       M&B, 291-297
   (b) The Fairchild exception: finding causation based on material increase in risk
       M&B, 297-304
       CLJ 519; Morgan, (2003) 66 MLR 277)
       Compensation Act 2006, s 3
       Note on BAI (Run Off) Ltd v Durham (the ‘Trigger Litigation’ case) [2012] 1 WLR 867
       at M&BUpdate
   (2) Coincidences: denying causation where there was no material increase in risk
       M&B, 318-321
       Chester v Afshar [2005] 1 AC 134 (noted, M&BUpdate; Amirthalingam, (2005) 64 CLJ 32;
       Stevens, (2005) 121 LQR 189)
   (3) Liability for pure risk: depriving someone of a chance of avoiding harm or obtaining a
       benefit
       M&B, 304-312
       Notes on Gregg v Scott [2005] 2 AC 176 at M&BUpdate; Spencer, (2005) 64 CLJ 282; Peel,
       (2005) 121 LQR 364

Further reading
Steel, ‘Justifying exceptions to proof of causation in tort law’ (2015) 78 MLR 729
35 OJLS 697
Weinrib, ‘Causal uncertainty’ (2016) 36 OJLS 135, 152-57

Aims and objectives
In doing the reading for this supervision you should have the following aims:

(1) To understand the standard rules on when a claimant who wants to sue for damages in
    relation to a particular harm has to show, and does not have to show, that it was more likely
    than not he would not have suffered that harm but for the defendant’s tort. (Clue: the claimant
    usually has to show it was more likely than not he would not have suffered that harm, unless
    the harm is a form of economic loss, and the defendant’s tort is such that the claimant would
    normally be entitled to sue for economic loss flowing from that tort.)
(2) To understand the Fairchild exception to those standard rules, and in particular when a
    claimant will be able to rely on the Fairchild exception: (a) where more than one wrongdoer
    may have caused the harm suffered by the claimant (the situation in Fairchild); (b) where
    only one wrongdoer may have caused the harm suffered by the claimant but the harm might
    alternatively have been caused by innocent/non-wrongful means (the situation in McGhee,
    Wilsher, and Sienkiewicz); (c) where there are two, or more than two, possible alternative
    causes of the harm suffered by the claimant and the means by which they may have caused
    that harm are very different (the situation in Wilsher).
(3) To understand why, on the standard rules on causation, the House of Lords should have denied that there was a causal link between the defendant’s tort and the claimant’s injury in Chester v Afshar, and why the House of Lords still found that there was a causal link in that case.

(4) To understand that there is a difference between saying that the defendant’s tort might have deprived the claimant of a chance of avoiding some harm or obtaining a benefit, and saying that the defendant’s tort did deprive the claimant of such a chance, and to know what side of the line Hotson, and Gregg v Scott, respectively fell on. And to understand when a claimant who was deprived of the chance of avoiding some harm or obtaining some benefit will be able to sue for damages in respect of the loss of that chance. (Clue: the answer is the same as in (1).)

Questions for the supervision

1. Would McGhee be decided the same way today?

2. How would Cook v Lewis be decided in the English courts nowadays?

3. Was Fairchild wrongly decided? Was Sienkiewicz?

4. Was Hotson rightly decided? Was Gregg v Scott?

Past paper questions

2. "There is a danger, if special tests of causation are developed piecemeal to deal with perceived injustices in particular factual situations, that the coherence of our common law will be destroyed" (Lord Phillips of Worth Matravers M.R., Gregg v. Scott (2005)).

   Discuss.

8 In what circumstances and to what extent may a defendant be held liable for negligence in respect of damage, even though it cannot be proved that his negligence was on a balance of probabilities the cause of the damage? Is the state of the law on this matter satisfactory?

1 Either (a) Explain how far the law of tort allows a claim in respect of (i) exposing another person to a risk of future harm and (ii) causing another person to lose the chance of a benefit.
In 1980 George (then aged twenty-five) entered the employment of Hothouse plc as a plumber, and on several occasions during the next ten years he was exposed to asbestos in the course of his work. In 2004 he developed lung cancer, but doctors were unable to determine whether this was caused by the asbestos or by George’s habit of smoking forty cigarettes a day for the last thirty years, or both. On learning that his expectation of life had been reduced to three years, George became very depressed. In April 2005 Hothouse plc’s personnel officer, Jane, advised George to seek help from the company’s counsellor, but because the counsellor only worked half a day each month for Hothouse, the first appointment available for George was six months away, in October, and in June George took early retirement because of his physical and mental ill-health. His wife Kate gave up her job in order to look after him, but in September George committed suicide.

Advise Kate, who is the executrix of George’s estate, as to her possible claims in tort.

Graham, a professional snowboarder, trips on a step in the street and injures his left leg. Shortly before this Helen, a pedestrian returning from a shopping trip, had accidentally spilled a bottle of olive oil near the step and made no attempt to clear it up. Also Inge startled Graham immediately before he fell by running towards him and shouting ‘I am going to get you’ because she had confused him with someone else. Graham cannot say whether he tripped because he slipped in the oil or because Inge’s shout distracted him, but he is sure that one of these factors must have caused his fall.

Graham is taken to the Jellyfield Hospital where Karl, a doctor, negligently fails to diagnose that his ankle is broken. Because he is unaware that his ankle is broken he attempts to drive to a snowboarding competition the next day. Whilst driving to the competition he is involved in a road traffic accident caused by the negligence of Lisa, and his left hip is broken. His broken ankle is then diagnosed. Experts agree that Graham would have lost earnings as a result of missing one month of snowboarding events because of his broken ankle, but that he will have to miss events for three months because of his broken hip. Experts also agree that Graham’s ankle will always remain weak as a result of the break, and that consequently he is likely to earn far less by way of signing-on fees from snowboard teams during his career. The delay in diagnosing the ankle injury substantially reduced the likelihood that this permanent weakness could have been avoided.

Advise Graham.
SUPERVISION 8
DEFENCES AND DAMAGES

Reading

(1) Defences
M&B, 735-736

(a) Consent
M&B, 744-746

(b) Illegality
M&B, 749-758
Weir, ‘Swag for the injured burglar’ (1996) 55 CLJ 182
Criminal Justice Act 2003, s 329
Note on Patel v Mirza [2016] UKSC 42 at M&BCaseNote

(c) Contributory negligence
M&B, 792-799
Law Reform (Contributory Negligence) Act 1945

(2) Compensatory damages

(a) Awarded to victim of tort
M&B, chapter 10 (skim areas already covered), 773-792, 799-806

(b) Awarded in wrongful death cases
M&B, 744, chapter 34
Law Reform (Miscellaneous Provisions) Act 1934
Fatal Accidents Act 1976

(d) Availability to other third parties
M&B, chapter 35
Civil Liability (Congenital Disabilities) Act 1976

(3) Non-compensatory damages

(a) Aggravated damages
M&B, chapter 29

(b) Exemplary damages (not often awarded)
M&B, chapter 30

Further reading

Weir, ‘All or nothing’ (2003-2004) 78 Tulane Law Review 512 (look it up on HeinOnline)

Aims and objectives

You should have a number of aims in mind when going through the reading for this supervision:

(1) To understand what remedies by way of damages are available to the victim of a tort, and in particular what remedies will be available in the case where the victim of a tort’s life expectancy has been reduced as a result of that tort being committed, and when the damages payable to the victim of a tort are liable to be reduced because of some benefit that she has received as a result of that tort having been committed.

(2) To revise what requirements have to be satisfied before a claimant will be allowed to bring a claim under the Fatal Accidents Act 1976, and to get a much better understanding of what kind of claims can be brought under that Act.
(3) To understand how the Congenital Disabilities (Civil Liability) Act 1976 works.

(4) To reflect on what purposes are served by damages awards in tort cases.

Questions for the supervision

1. Why are the areas of tort law dealt with in this supervision more affected by statutes than any other area of tort law?

2. Should the law reduce the damages payable to a claimant in the respect of some harm she has suffered if the claimant was partly to blame for the fact that she suffered that harm?

3. When can a defence of illegality be raised to a claim in tort; should such a defence ever be available?

4. Why is it so much easier for the victim of a tort to sue for damages, than it is for a deserving third party who has suffered loss as a result of that tort being committed?

5. Michelle is five months pregnant. She goes in for a routine scan and the Doctor conducting the scan carelessly fails to spot that Michelle’s baby’s spine has not developed properly. This is only spotted when Michelle has a scan after seven months of pregnancy. She is asked whether she wants to consider having an abortion, but she refuses. Michelle’s baby, Freddie, is born with various disabilities. At the age of three, Freddie dies of his disabilities and Michelle is distraught. Who can sue Doctor and for what?

6. Bruce and Robin are members of a society that stages re-enactments of various battles. While re-enacting the 1715 Battle of Preston, Bruce carelessly discharges his gun (which contains blanks) near Robin’s face, with the result that Robin suffers some small cuts to his face and is temporarily deafened. Enraged by this, Robin strikes Bruce with the flat of his sword. Unfortunately, the blade is slightly angled when it strikes Bruce and he suffers a deep cut as a result. Unknown to Robin, Bruce is a haemophiliac. Bruce bleeds out and dies before there is a chance to get him to hospital. Who can sue Bruce and for what?

Written work

Answer the following question:

Mary, a merchant banker, had a contract with Olivia, a childminder registered with Ponkville District Council, that Olivia would look after Mary’s two year old daughter Nellie at Olivia’s home on weekdays. One Sunday evening, Olivia discovered that her cold water tank had burst, flooding her kitchen and hallway. As a result, the linoleum on the kitchen floor became uneven and slippery. Olivia failed to mention the flood to Mary until she arrived with Nellie the next morning (en route to an important meeting). That afternoon, while playing on the kitchen floor, Nellie picked up and swallowed a tiny speck of rat poison which, unknown to Olivia, the flood had washed out from behind her fitted kitchen cupboards. Nellie went into a coma and died six months later. The Ponkville District Council had a statutory power to vet applicants who applied to be registered as childminders, but had a policy of checking the criminal records of only one in five applicants (selected at random), because it was too expensive to vet every applicant. Olivia’s record was not checked and so her criminal convictions for theft and dangerous driving were not discovered. Mary is now grief stricken and has been unable to work since the death of her daughter.

Advise Mary.
Past paper questions

6. "It is hard to know what damages in tort claims are meant to achieve. They cannot be used to punish wrongdoers and they do not deter the careless. They are also a highly inefficient way of compensating accident victims."
Discuss.

10. "The system of tort liability can only be justified on the basis of individual, moral responsibility not to cause harm to others by one's own fault. Therefore there can be no justification either for liability for the fault of another person, or for liability without fault."
Discuss in relation to the English law of tort.

7. "Different torts serve very different functions - some compensatory, others vindicatory. So it is inherently implausible and naive to expect that the same general set of defences should apply across the board in the law of tort."
Discuss.

1. Should any part of the present tort system be replaced by a system of compensation which does not rest on civil liability?

7. To what extent, if at all, is insurance, and the capacity of a party to insure against a loss or liability, relevant to tort liability? To what extent should it be?

What reforms, if any, would you recommend to the rules which determine how much compensation will be awarded where a tort has resulted in a death?

Critically assess the law relating to collateral benefits received by victims of torts who have suffered personal injuries and by estates and dependants after torts causing death.

Is abolition of tort liability for personal injuries a realistic policy option?

To what extent is it true to say that the remedies that may be awarded when a tort has been committed are designed to achieve the 'next best' position to the tort not having been committed in the first place?

Critically assess the principles governing the deduction of collateral benefits from awards of damages for personal injury and for loss of dependency under the Fatal Accidents Act 1976.

10. "The relatives of a tort victim are much better off if the victim dies than if he or she is merely badly injured."
Discuss.

2. "The rules as to who is entitled to damages for the economic losses caused by negligently inflicted personal injury and death, and how much they get, are incoherent: some people get too much, some get too little, and some deserving people get nothing at all."
Discuss.
Anne, a learner driver, decided to take her father’s car for a drive, to see how it felt to drive unaccompanied. Anne drove carefully, but lost control of the car when it skidded on a concealed patch of oil and hit Bob, a pedestrian walking along the pavement, breaking his leg. While being treated at the Camford General Hospital, Bob was visited by Derek, a solicitor. Derek’s visit was part of a voluntary scheme arranged by the Camford General Hospital, under which patients were offered free legal advice, on Saturday mornings, by unpaid volunteers from local law firms. Bob asked Derek to prepare a will for him, leaving a large legacy to Ettersley Dogs’ Home, and Derek agreed. However, the voluntary scheme ceased to operate shortly afterwards and Derek never drafted the will. Bob died six months later from bone cancer, triggered by the broken leg, leaving a widow and two young children, who inherited all Bob’s property under the intestacy rules. Advise the following parties of their claims in tort: (a) Bob’s estate; (b) Bob’s widow and children; and (c) Ettersley Dogs’ Home.

*11. Tom and Ursula are expecting the birth of their second child. A disabling genetic disorder, ZZ Syndrome, runs in Tom’s family, so they request prenatal screening. A National Health Service (NHS) geneticist, Dr Victor, misreads the screening report and erroneously advises Tom and Ursula that the foetus does not have the defective gene. Their baby Will is born with ZZ Syndrome, and will always require a personal carer to help him to eat, wash, and get dressed. He will never be able to live independently. Tom and Ursula say that, if they had known the correct test result, they would have considered terminating the pregnancy.

Carers’ Charity (CC) purchases a stair lift designed and manufactured by Mobility Equipment (ME) to enable Will to be moved between floors in Tom and Ursula’s house. ME’s employee, Xavier, assures CC that the motor on the stair lift requires no maintenance and will last 10 years. CC passes on this assurance to Tom and Ursula. It turns out that the motor requires expensive monthly servicing, and must be replaced every three years at Tom’s and Ursula’s expense. CC refuses to pursue a claim against ME because of the cost of litigation. The purchase contract between CC and ME expressly excludes the Contracts (Rights of Third Parties) Act 1999.

Advise Tom, Ursula, and Will.

4 Footie, a freelance delivery driver working that week for Waitburys plc, was driving his Waitburys delivery van between jobs, but took a detour to visit his girlfriend. The visit made him late for his next scheduled delivery, so he drove too fast on a dual carriageway and pulled out to overtake the driver in front of him without checking his rear view mirror. He collided with a car driven by Glinda, causing severe damage to the car. Henrietta, a lorry driver, was texting on her mobile phone while driving, and did not notice the collision ahead of her, so drove at high speed into Glinda’s car and Footie’s van, killing Glinda instantly and damaging Footie’s spine. Iris, also driving towards the collision, braked very violently and managed to stop just in time. Jonah, another motorist whose car had broken down before the accident and was waiting on the hard shoulder for recovery, allowed Iris to shelter in his car. Unfortunately, when the emergency services arrived, Iris was beginning to panic, was struggling to breathe and was complaining of severe neck pain, so firefighters cut the roof off Jonah’s car to allow paramedics to rescue Iris.

Glinda leaves a young son, Kevin, who is now looked after by his father (who previously took no part in Kevin’s upbringing). Iris is so traumatised by what she witnessed that she can no longer work and now lives on social security benefits.

Advise the parties of their rights and liabilities in tort.