

## TORT LAW READING LISTS 2025-2026

### Plan of reading lists

1. A simple claim in tort
2. A simple claim in negligence
3. Occupiers' liability claims and other claims for omissions
4. More complex claims in negligence (1): pure economic loss
5. Claims in private nuisance and under the rule in *Rylands v Fletcher*
6. Product liability and vicarious liability claims
7. More complex claims in negligence (2): causation and exposure to risk
8. Wrongful death claims and assessment of damages

### Books

We will be using McBride & Bagshaw, *Tort Law*, 7th ed (Pearson Education, 2024) ('M&B' on the reading lists) – do not use any earlier edition. I will also be referring from time to time to Morgan, *Great Debates in Tort Law* (Hart, 2022) ('Morgan' on the reading list). You will also need an up-to-date version of *Blackstone's Statutes on Contract, Tort and Restitution* – make sure you bring it with you to the supervisions.

### Companion website

The 7th edition of McBride & Bagshaw has a companion website that can be found here:

[https://media.pearsoncmg.com/intl/ema/ema\\_uk\\_he\\_McBride\\_tortlaw\\_7e/cw/index.php](https://media.pearsoncmg.com/intl/ema/ema_uk_he_McBride_tortlaw_7e/cw/index.php)

(It would be a good idea to bookmark this website so as to save you constantly coming back to this link).

The companion website provides you with, for the chapters of the book that it covers, case notes on various important cases relevant to those chapters, and a sample question (either an essay or a problem question) relating to that chapter with some tips as to how to answer the question. These reading lists will occasionally refer you to casenotes that you can access on the companion website ('CWChapterX' on the reading lists). You should have a look at the sample questions in the holiday as a revision aid.

### Claims

The reading lists for each supervision will be organised around a particular past paper problem question, or a couple of past paper problem questions. In doing the reading for the supervision, you should be constantly thinking about the relevance of the reading to that(those) problem question(s). Think about: Who can bring a claim here? Who would they bring a claim against? What would they have to make out to bring that claim? What would be the obstacles in the way of their making that claim out? Make sure you do this thinking, as you will be asked to talk about these issues in the supervision. In organising your thinking about the problem question(s) you should have a look at the section on my website ([www.mcbridesguides.com](http://www.mcbridesguides.com)) on 'Doing tort problem questions' (you will find it in the drop-down menu under 'Tort Law' on the website, as well as any relevant tips on the McBride & Bagshaw companion website).

### Issues

The reading lists for each supervision will conclude with some reading relating to a particular issue that is both relevant to tort law, and may come up in the form of an essay question in the exam. Make sure you do this reading and think about it – it is far easier to score a high mark for an essay than it is for a problem answer. But to score a high mark in doing an essay, you have to show a degree of intellectual sophistication that can only come from doing some advanced reading, and thinking about that reading.

### Cases

The point of referring you to cases on the reading list 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.

### **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 questions 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.

### **Supervisions**

Please note that:

**\*\*I will not be holding any supervisions on Zoom \*\***

If you are feeling ill, do not struggle on and attend the supervision and potentially make others sick. Simply get in touch with me (my email address is below) and we can see about slotting you into a later supervision group when you are better. If that isn't possible, you will always be able to get the notes for the supervision from someone else in your year. One person disregarded these rules last year, and as a result I was made very seriously ill – please respect these rules and do not try to circumvent them.

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SUPERVISION 1  
A SIMPLE CLAIM IN TORT

## Reading

### (1) *The question:*

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.

### (2) *Relevant reading*

#### (a) *The basics*

M&B, ch 1

#### (b) *Trespass to the person*

M&B, ch 2

*Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 (noted, CWChap2; Palmer and Steele, (2008) 71 MLR 801)

*B v An NHS Hospital Trust* [2002] 2 All ER 449 (noted, CWChap2)

*KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB) (noted, CWChap2)

*Iqbal v Prison Officers' Association* [2010] QB 732 (noted, Varuhas, (2010) 69 CLJ 438) Morgan, ch 2

#### (c) *Wilkinson v Downton; harassment*

M&B, 461-70

Protection from Harassment Act 1997

*O v Rhodes* [2016] AC 219 (noted, <https://mcbridesguides.com/wp-content/uploads/2016/07/o-v-rhodes.pdf>)

### (3) *The issue: why do we have tort law?*

Williams, 'The aims of the law of tort' (1951) 4 *Current Legal Problems* 137 (Google it)

Kelly, 'The inner nature of the tort action' (1967) 2 *Irish Jurist (New Series)* 279\*

Cane, 'Justice and justifications for tort liability' (1982) 2 *OJLS* 30\*

Goldberg, 'Ten half-truths about tort law' (2008) 42 *Valparaiso University LR* 1221\*

\*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. What can we learn from:
  - (a) *Bradford v Pickles*;
  - (b) *Ashby v White*;
  - (c) *Ashley v Chief Constable of Sussex Police*?
2. This is a story from *The Independent*:

## Australia nightclub bans staring at strangers without verbal consent

'We do this to make everyone feel safe and to ensure our patrons are comfortable'

Saman Javed • Thursday 25 August 2022 15:01 • [Comments](#)



Is this sort of thing already a tort (in the UK)? Should it be?

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

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.

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 Easicut, 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 Easicut, 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.

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. Alice 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 bloodclot 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.

1 'Not every infraction of a right causes damage. That is precisely why the law of trespass does not insist on damage. But if jurists believe that damage is of the essence of a tort claim, they will regard trespass as anomalous, deride it as antiquated, ignore the values it enshrines and proceed to diminish the protection it affords to the rights of the citizen.'  
(WEIR)

Examine critically the law of trespass to the person in the light of this statement.

SUPERVISION 2  
A SIMPLE CLAIM IN NEGLIGENCE

## Reading

### (1) *The question:*

One weekend earlier this year, Storm Donoghue blew through the UK; once the worst of the winds had died down, the country was hit by heavy rainfall and severe flooding. Unfortunately, because their meteorologists had not been paying enough attention to the data, the Met Office failed to extend their severe flood warning to certain parts of the country. Bolton, an elderly man with severe arthritis, consulted the Met Office's website, which did not mention the possibility of floods in his area, so he set off to the shops on his mobility scooter. Calliope, an agency nurse who had occasionally provided care for Bolton in his home, was dashing along the same pavement, eager to get home to enjoy her day off work. Calliope recognised Bolton on his mobility scooter and realised he was about to drive into a deep flood from the road that had engulfed the pavement, but did nothing to alert him. Bolton's mobility scooter drove into the flood; in a panic, Bolton activated the accelerator instead of the brake. The scooter skidded off the pavement, into the path of a bus driven by Froom. Froom was a newly-qualified bus driver, who had lost concentration for a moment looking for the bus's windscreen-wiper controls; a more experienced driver would probably have been able to swerve to avoid Bolton. Bolton suffered serious leg injuries as a result of the collision.

Mortified by what had happened, Calliope called for an ambulance to help Bolton, and Emeh answered the call. Emeh told Calliope that the service was over-stretched, and suggested Calliope should transport Bolton to hospital herself. In fact, the air ambulance was free, and could have reached Bolton within 15 minutes, but Emeh had carelessly failed to check. It took Calliope an hour to drive Bolton to hospital, longer than the 30 minutes that the drive would normally take, because of floodwater on the roads. Despite impeccable medical treatment, both of Bolton's legs had to be amputated. The evidence suggested that patients with comparable injuries to Bolton who received medical intervention within 15 minutes had a 75% chance of a full recovery, but that percentage fell to 40% with a 30-minute delay before treatment. Bolton was traumatised by the incident, but was happy to be free of the arthritic pain in his legs that he had previously endured.

Advise the parties as to their rights and liabilities in tort.

### (2) *Relevant reading*

**(a) *The elements of a claim in negligence***

M&B, ch 3

**(b) *Duty of care (1): overview***

M&B, ch 4

*Robinson v Chief Constable of West Yorkshire* [2018] AC 736 (noted, CWChapter5)

**(c) *Duty of care (2): duties to take care not to harm people, physically or mentally***

M&B, 77-87, ch 6

Morgan, chs 8-9

**(d) *Establishing a breach of a duty of care***

M&B, 159-72, 177

*Tomlinson v Congleton BC* [2004] 1 AC 46 (Lord Hoffmann only)

Compensation Act 2006, ss 1-2

**(e) *Establishing that a breach caused harm***

M&B, ch 11 (disregard 192-94)

Steel, 'Defining causal counterfactuals in negligence' (2014) 130 LQR 564

Steel, 'Material contribution to damage, again' (2022) 138 LQR 540

**(f) *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, ch 13

**(g) Establishing whether or not there is a defence to the claimant's claim for damages**  
M&B, 545-46, 553-55, 558-66, 579-82

**(3) The issue: the relevance of the duty of care requirement**

McBride, 'Duties of care: do they really exist?' (2004) 24 OJLS 417

Howarth, 'Many duties of care – or a duty of care? Notes from the Underground' (2006) 26 OJLS 449

Priel, 'Tort law for cynics' (2014) 75 MLR 703

McBride, 'Review of Plunkett, *The Duty of Care in Negligence*' (2018) 34 *Journal of Professional Negligence* 216

Morgan, ch 6

**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 available at mcbridesguides → Tort Law → Doing tort problem questions).

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.

(To deal with the fact that Jim is only expected to live for another five years, see M&B, 571-72.)

### Questions for the supervision

1. What can we learn from:

- (a) *Donoghue v Stevenson*;
- (b) *Robinson v Chief Constable of West Yorkshire*;
- (c) *Montgomery v Lanarkshire Health Board*?

2. *Alfred* gives *Bruce* a gun. As *Alfred* knows, *Bruce* is both a child and very clumsy. *Bruce* accidentally fires the gun while playing with it, and the bullet fired from the gun hits and severely injures *Alfred*. Can *Alfred* sue *Bruce*, and if so for how much? What would be the situation if the bullet hit and severely injured *Mavis*? What would be the situation if the bullet hit and severely injured *Mavis* and *Alfred* developed a psychiatric illness as a result?

### 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 'It is now, I think, generally accepted that the "but for" test does not provide a comprehensive or exclusive test of causation in the law of tort.' (LORD BINGHAM OF CORNHILL in *Chester v. Afshar*) (2004)

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  
OCCUPIERS' LIABILITY CLAIMS AND  
OTHER CLAIMS FOR OMISSIONS

**(1) The question:**

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, howsoever caused.'

Consider any tortious claims that may arise.

**(2) Relevant reading**

**(a) The reluctance to impose liability for omissions**

M&B, 91-94, 107-15

*Michael v Chief Constable of South Wales Police* [2015] AC 1732 (noted, CWChapter5)

*D v Commissioner of Police of the Metropolis* [2019] AC 196 (noted, CWChapter5)

*N v Poole BC* [2020] AC 780 (noted, CWChapter5)

**(b) General situations giving rise to a duty to act: physical injury cases**

M&B, 94-107

*HXA v Surrey CC* [2023] UKSC 52 (noted, CWChapter5)

*Tindall v Chief Constable of Thames Valley* (UKSC decision in this case should be available by the time you read this – look it up on Westlaw)

**(c) Situations giving rise to a duty to act: psychiatric illness cases**

M&B, 156-58, Appendix C

*Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1 (noted,

<https://mcbridesguides.com/wp-content/uploads/2024/03/Paul-v-Royal-Wolverhampton-NHS-Trust-Robert-Stevens-note.pdf>)

**(d) Occupiers' liability**

M&B, ch 14

Occupiers' Liability Act 1957

Occupiers' Liability Act 1984

Consumer Rights Act 2015, ss 62, 65

Notes on *Tomlinson v Congleton BC* (2004), *Darby v National Trust* (2001), *Keown v Coventry Healthcare NHS Trust* (2006) on CWChapter14

**(3) The issue: should public bodies owe more extensive duties to rescue than private persons?**

Weir, 'Governmental liability' [1989] *Public Law* 40

Tofaris and Steel, 'Negligence liability for omissions and the police' (2016) 75 CLJ 128

McBride, 'Michael and the future of tort law' (2016) 32 *Journal of Professional Negligence*

McBride, *The Humanity of Private Law, Part I* (Hart Publishing, 2019), 119-23\*

\*Find it on BloomsburyCollections (Google it)

### **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. What can we learn from:

- (a) *Michael v Chief Constable of South Wales Police*;
- (b) *Tindall v Chief Constable of Thames Valley*;
- (c) *HXA v Surrey CC*?

2. 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 is driving a fire engine towards a fire at B's house when he carelessly crashes the fire engine. B's house burns down.

(f) 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.

### 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.

'[W]e should ditch both the "principle" and "policy" terminology and simply describe these concerns neutrally as "legal concerns" while openly acknowledging that the law takes on new values and sheds old ones as society changes.' (STAPLETON)

Discuss in relation to the duty of care in negligence.

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 *Katharine* (*Emma's* mother) on her videophone. *Katharine* sees pictures of the collapsing building and *Emma* lying injured. As a result of their experiences, *Hermione*, *Julia* and *Katharine* 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 *Katharine*.

SUPERVISION 4  
MORE COMPLEX CLAIMS IN NEGLIGENCE (1):  
PURE ECONOMIC LOSS

**(1) The question:**

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. Alas, 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.

Advise Tracey of any potential claims in tort.

**(2) Relevant reading**

M&B, ch 8

*Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (Lord Denning MR's judgment especially)

*Caparo Industries Plc v Dickman* [1990] 2 AC 605 (noted, Fleming, (1990) 106 LQR 349)

*Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (noted, Griffin, (1999) 115 LQR 36; Payne, (1998) 57 CLJ 456)

*Customs & Excise Commissioners v Barclays Bank* [2007] 1 AC 181 (noted, M&B Update; Capper, (2006) 65 CLJ 484; Gee, (2006) 122 LQR 535)

*Robinson v PE Jones (Contractors) Ltd* [2012] QB 44 (noted, O'Sullivan, (2011) 70 CLJ 291)

*Playboy Club v Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041 (noted, Foxtan, (2019) 78 CLJ 18)

**(3) The issue: What should be the scope of liability in negligence for pure economic loss?**

Notes by Tony Weir at: (1963) 21 CLJ 216, (1989) 48 CLJ 12, (1991) 50 CLJ 24, (1995) 111 LQR 357

Witting, 'Distinguishing between property damage and pure economic loss in negligence: a personality thesis' (2001) 21 *Legal Studies* 481

Stapleton, 'Comparative economic loss: lessons from case-law-focused "middle theory"' (2002) 50 *University of California Los Angeles Law Review* 531

O'Sullivan, 'Suing in tort where no contractual claim will lie – a bird's eye view' (2007) 23 *Journal of Professional Negligence* 165

**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.

### Written work

Answer the following question:

'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.

### Questions for the supervision

1. What can we learn from:

- (a) *Spartan Steel v Martin*;
- (b) *Hedley Byrne v Heller*;
- (c) *Playboy Club v Banca Nazionale del Lavoro SpA*?

2. *Keen* sat her A-Levels, having been given an offer of a place to study Law at Cambridge, conditional on her getting A\*AA in her exams. She unfortunately lost her place because she achieved AAA grades instead. The subject in which *Keen* had the best chance of obtaining an A\* was marked by *Harsh*, who pursued a secret policy of giving out as few A\* marks as possible because 'there is too much grade inflation in the world and I'm doing my bit to cut down on it'. Had *Keen*'s papers in that subject been marked fairly, she would have obtained an A\*. *Harsh*'s approach to marking exams was only discovered after *Keen* had graduated from university, when he got drunk at a party to mark his retirement and started boasting about 'my struggle to save civilisation from mediocrity'. Who, if anyone, could *Keen* sue in this situation, and for what?

### 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 ROSKILL in *Caparo v. Dickman* (1990))

'I doubt 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.

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 Balbus, 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 Balbus decided not to employ him.

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

(iii) Aulus wrote Stichus a glowing reference, on the strength of which Balbus 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 Balbus 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 overflow and water flows 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?

'In *Smith v. Eric S Bush* (1989) Lord Griffiths said, "I do not think that voluntary assumption of responsibility is a helpful or realistic test for liability." Yet thirty years later, "voluntary assumption of responsibility" is treated as the solution to every controversial duty of care issue.'

Discuss in relation to the duty of care in negligence.

SUPERVISION 5. CLAIMS IN PRIVATE NUISANCE AND  
UNDER THE RULE IN *RYLANDS v FLETCHER*

**(1) The question:**

Several years ago Wastey 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 Wastey 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 strong 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 Wastey Ltd had to store a larger quantity of it than usual. Wastey 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 Wastey 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.

**(2) Relevant reading**

**(a) Private nuisance**

M&B, ch 17

*Fearn v Tate Gallery Board of Trustees* [2023] UKSC 4 (concentrate on Lord Leggatt's judgment) (noted, CWChapter17)

*Jalla v Shell International Trading* [2023] UKSC 16, [18] (Lord Burrows' summary of the law after *Fearn*)

**(b) *Rylands v Fletcher***

M&B, ch 337-49

*Cambridge Water Co Ltd v Eastern Counties Leather* [1994] 2 AC 264 (noted, Heuston, (1994) 110 LQR 185)

*Transco Plc v Stockport MBC* [2004] 2 AC 1 (noted, M&BUpdate; Amirthalingam, (2004) 63 CLJ 273; McNall, [2004] Conv 240)

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

**(3) The issue: what should we do about these areas of law?**

**Private nuisance**

Morgan, chs 10-12

McBride, *The Humanity of Private Law, Part I* (Hart Publishing, 2019), 123-26, 127-31, 143, 146-48

## Rylands v Fletcher

Simpson, 'Legal liability for bursting reservoirs: the historical context of "Rylands v Fletcher"' (1984) 13 *Journal of Legal Studies* 209

Murphy, 'The merits of *Rylands v Fletcher*' (2004) 24 OJLS 643

Nolan, 'The distinctiveness of *Rylands v Fletcher*' (2005) 121 LQR 421

McBride, *The Humanity of Private Law, Part I* (Hart Publishing, 2019), 72

## Aims and objectives

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

- (1) 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.
- (2) 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).
- (3) 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.
- (4) 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.

## Questions for the supervision

1. What can we learn from:
  - (a) *Hunter v Canary Wharf*;
  - (b) *St Helen's Smelting Co v Tipping*;
  - (c) *Fearn v Trustees of Tate Gallery* (if the decision has come out)?
2. 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?

(NOTE: the above essay is **not** about *Rylands*)

8 '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 always 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 late 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 boiler 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*.

8 In Effluent Road, Stretchford, there stands an empty warehouse, owned by *Weird*. Next door there stands a building which *Shifti*, 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 *Shifti's* warehouse, where his polystyrene is ignited, and burns furiously. The fire in *Shifti'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 unsuccessfully to rescue *Green's* truck, which despite his efforts perishes in the flames.

Discuss the tortious liabilities that arise.

5 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 screeches, 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.

4 The Solstice Theatre Company (STC) was a travelling theatre company specialising in improvised outdoor performances. For many years Clotville Council had granted a licence to STC permitting them to camp on one of its fields, from April to September, and to put on performances there each night. The field was in an otherwise residential area. Last year Doug, who owned a house next to the field as an investment, complained that the noise from STC's exuberant productions and from crowds of spectators leaving late at night greatly reduced the value of his house, which he eventually sold at a considerable undervalue to Eric. Almost immediately after moving in, Eric complained about the noise, and also that his young daughter Gretchen was experiencing headaches because of the smell from STC's chemical toilets wafting into their home and garden.

Clotville Council therefore decided to erect a permanent public lavatory on a vacant building plot just outside the field, immediately next to Horace's bungalow. Horace was very distressed at the prospect of having to look at a public lavatory right outside his kitchen window. Idris, the builder employed by Clotville Council to build the public lavatory, used Horace's adjacent flat roof to store building materials during the building work, which blocked Horace's rain gutter. In a violent thunderstorm, the blocked gutter caused a flood in Horace's living room, ruining his collection of valuable antiques. In the same thunderstorm, STC's chemical toilets were blown over and chemicals leaked into Gretchen's play-sandpit in Eric's garden; the sand and surrounding soil needed to be replaced at considerable expense to Eric.

Advise the parties of their rights and liabilities in tort.

SUPERVISION 6  
PRODUCT LIABILITY AND  
VICARIOUS LIABILITY CLAIMS

**(1) The questions:**

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.

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.

Discuss the rights and liabilities of the parties in tort.

**(2) Relevant reading**

**(a) Liability under the Consumer Protection Act 1987**

M&B, 257-70

Nolan, 'Against strict product liability' in Nolan, *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, 2023) (available on Bloomsbury Collections)

**(b) NOT vicarious liability: liability for breach of a non-delegable duty of care**

M&B, 172-73, 174-76

*Woodland v Swimming Teachers Association* [2014] AC 537 (noted, M&BCaseNote; George, (2014) 130 LQR 534)

*Hughes v Rattan* [2022] 1 WLR 1680

**(c) Vicarious liability**

M&B, ch 30

CWChapter30 casenotes (pay special attention to the notes on *Lister*, *Various Claimants*, and *Mohamud*)

*Armes v Nottinghamshire CC* [2018] AC 355 (noted, Dickinson, (2018) 134 LQR 359)

*Barclays Bank Plc v Various Claimants* [2020] AC 973 (noted, CWChapter30)

*Wm Morrison Supermarkets v Various Claimants* [2020] AC 989 (noted, CWChapter30)

*BXB v Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15, especially [58], [70]-[82]

**(3) The issue: when should someone be held liable for the torts of others?**

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

Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27 OJLS 493

Morgan, 'Recasting vicarious liability' (2012) 71 CLJ 615

Giliker, 'Analysing institutional liability for child sexual abuse in England and Wales and Australia' (2018) 77 CLJ 506

McBride, *The Humanity of Private Law, Part I* (Hart Publishing, 2019), 247-49

**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.

**Written work**

Answer **one** of the *problem* questions listed in the reading lists for the 5th and 6th supervisions. **Make sure** to paste the question at the top of your answer – failure to do this will mean your answer will not be marked.

## Questions for the supervision

1. What can we learn from:

- (a) *Lister v Hesley Hall Ltd*;
- (b) *Various Claimants v Catholic Child Welfare Society*
- (c) *Barclays Bank v Various Claimants*, and *Wm Morrison Supermarkets v Various Claimants*?

2. How might one go about establishing that an mRNA vaccine is defective under the Consumer Protection Act 1987?

## Past paper questions

**8** '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.

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

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.

**1** Diggitt 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 Diggitt), and Bob set to work. Whilst he was operating the digger, he made a call to his girlfriend, Carol, on his mobile telephone, although Diggitt'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 Diggitt that the accident was the result of Bob's breach of Diggitt'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.

5 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 any 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.

6 Advise the parties of their rights and liabilities in tort in **each** of the following situations:

(i) Atrionix Industries produced Curetis, a revolutionary new drug that cures prostate cancer. It was expensive and difficult to produce, and there was no way of preventing a small proportion of the drug being contaminated with Hepatitis D. Hepatitis D was undetectable. After six months of using Curetis, Eric's prostate cancer was in remission, but he contracted Hepatitis D.

(ii) Bonex Ltd produced bottles of caustic soda. Each bottle had a child-resistant cap in compliance with British industry standards. Labelling on the bottles included a warning that the contents could cause severe injuries and that they should be kept out of children's reach. Peter, a convenience store owner who had a licence to sell caustic soda, had not read the label on the bottles and thought they were a normal household cleaner, so he placed them on the bottom shelf. Uda, aged 4, accompanied her mother, Sophia, to Peter's convenience store. While there, Uda got hold of a bottle of Bonex Ltd's caustic soda, managed to remove the cap and ingested some of its contents, suffering serious injuries as a result.

(iii) Florex Ltd produced Inex, a machine used to provide radiation therapy for cancer patients. Inex was controlled by computer software, developed by Gamma Ltd. As a result of defective software, Hannah, a cancer patient, received excessive radiation during radiation therapy using Inex. This caused her to develop sensitivity to chlorine and she could no longer attend her weekly pool swimming sessions.

(iv) Duncan, a professional portrait painter, left his mobility scooter, manufactured by Terac Ltd, in his garage overnight with the switch in the 'on' position. Owing to a defective battery, the mobility scooter caught fire. The battery was supplied by Quivox Ltd in accordance with Terac Ltd's strict design instructions. Duncan's mobility scooter (worth £750), paints, brushes and canvas (worth £1,000), washing machine (worth £350) and gardening clothes (worth £100) were destroyed.

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.

3 'It is hard to justify the extraordinary breadth of vicarious liability as applied by the courts in recent years.'

Examine critically the law of vicarious liability in the light of this statement.

SUPERVISION 7  
 MORE COMPLEX CLAIMS IN NEGLIGENCE (2):  
 CAUSATION AND EXPOSURE TO RISK

**(1) The question:**

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.

**(2) Relevant reading**

**(a) The effect of uncertainty about what would have happened but for the defendant's tort**

M&B, ch 12

*Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (noted, Weir, (2002) 61 CLJ 519; Morgan, (2003) 66 MLR 277)

*Barker v Corus UK Ltd* [2006] 2 AC 572 (noted, Kramer, (2006) 122 LQR 547)

Compensation Act 2006, s 3

*Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229 (noted, Stapleton, (2012) 128 LQR 221)

**(b) Coincidences: denying causation where there was no material increase in risk**

M&B, 192-94

*Chester v Afshar* [2005] 1 AC 134 (noted, CWChapter 11; Amirthalingam, (2005) 64 CLJ 32; Stevens, (2005) 121 LQR 189)

**(c) Liability for pure risk: depriving someone of a chance of avoiding harm or obtaining a benefit**

M&B, 226-27

Notes on *Gregg v Scott* [2005] 2 AC 176 at CWChapter 11; Spencer, (2005) 64 CLJ 282; Peel, (2005) 121 LQR 364

**(3) The issue: Is the current state of the law on causation defensible?**

Steel, 'Justifying exceptions to proof of causation in tort law' (2015) 78 MLR 729

Hoffmann, 'Review of Steel, *Proof of Causation in Tort Law*' (2017) 133 LQR 516

Morgan, chs 4&5

**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. '[T]here 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.

2 'The courts should not allow sympathy with one of the parties to sway them into making any modifications to the strict requirement that a tort claimant must prove factual causation. Such modifications rarely serve the interests of justice in the long term.'

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.

9 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.

SUPERVISION 8  
WRONGFUL DEATH CLAIMS AND  
ASSESSMENT OF DAMAGES

**(1) The 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 week days. 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.

**(2) Relevant reading**

M&B, ch 29

**(a) Wrongful death claims**

Fatal Accidents Act 1976

**(b) Assessments of damages awarded to victim of tort...**

**(i) ...in respect of own losses**

M&B, 568-72, 575-79

Law Reform (Miscellaneous Provisions) Act 1934, s 1

Lewis, 'When people matter: finding humanity in tort law' [2019] *Journal of Personal Injury Law* 10 (available on Westlaw)

*XX v Whittington Hospital NHS Trust* [2021] AC 275

**(ii) ...in respect of third party losses**

M&B, 586-88

*Hunt v Severs* [1994] 2 AC 350 (noted, Kemp, (1994) 110 LQR 524)

**(3) The issue: Should we abolish tort law (in whole or in part)?**

M&B, 588-93 (also skim read chs 28-29)

Atiyah, 'Personal injuries in the 21st century: thinking the unthinkable' in Birks (ed), *Wrongs and Remedies in the 21st Century* (OUP, 1996)

Sumption, 'Abolishing personal injuries law – a project', 16 November 2017, Personal Injuries Bar Association Annual Lecture (Google it)

McBride, 'The cost and value of personal injury law' (available on SSRN at:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3761404](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761404))

**Aims and objectives**

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

(1) To understand how the compensatory damages payable to the victim of a tort are assessed, in particular where the victim of a tort's life expectancy has been reduced as a result of that tort

being committed, and where the victim of a tort has received some benefit 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 reflect on whether tort law adequately achieves its aims, and whether some other scheme or institution would more adequately achieves those aims.

### Written work

Answer any *one* of the past paper *essay* questions (i.e. not problems) supplied for the supervisions this term. **Make sure** that you copy and paste the essay question into the top of your answer – a failure to do this means your answer will not be marked.

### 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. 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?
4. Are you better off under tort law negligently (i) paralysing a city solicitor so that they have to quit their job, or (ii) killing them outright?

### 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.

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.

**1** 'From a purely utilitarian point of view, if the cost of compensating people for personal injury falls on society at large, there is no rational reason to distinguish between personal injury which has been caused by some one's fault, and personal injury which has occurred without fault. Equally, there is no rational reason why the victims of accidents, however caused, should necessarily recover a full indemnity as the law of tort presently requires. Since we are all paying for the tortiously inflicted injuries, we might as well treat it as a social service and make it respond to our collective social priorities rather than to the common law rights of individual claimants.' (LORD SUMPTION, writing extra judicially)

Discuss.

**1** 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 *Foote*, 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 *Foote*'s van, killing *Glinda* instantly and damaging *Foote*'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.

5 *Tanika*, a very highly-paid fashion model, was a patient at *Camtown Hospital* for debilitating headaches. Her doctor, *Dr Geoff*, recommended they try a new laser treatment which could cure her much more quickly than conventional treatments, but which trials had shown to cause hallucinations in a tiny proportion of patients. *Tanika* agreed to be treated with the new laser treatment, and *Dr Geoff* explained the procedure in broad terms. *Dr Geoff* forgot, however, to mention the very small risk of hallucinations. The treatment was successful in curing her headaches; however, the night after it was performed, *Tanika* hallucinated that she was being chased and leapt from a window in the hospital, breaking her ankle. Still hallucinating, *Tanika* staggered towards the main road, where she was struck by a police car being driven at great speed by *PC Paul*, who was chasing two joyriders. As a result, both *Tanika*'s legs needed to be amputated, and she could no longer work as a model, though she did subsequently earn a lot of money writing a best-selling book about her life-journey.

*Tanika*'s agent, *Ken*, who earned commission on all her modelling contracts, suffered significant financial loss as a result of *Tanika*'s accident. Grateful for *Ken*'s support in the past, *Tanika* decided to make an irrevocable commitment to pay him an annual income, and instructed *Luna*, a solicitor, to draft a legal document to give effect to this commitment. *Luna* forgot the formalities required to make such a document legally enforceable; *Tanika* subsequently fell out with *Ken* and was delighted to discover that the document she had signed was of no effect.

Advise the parties of their rights and liabilities in tort.

**TURN OVER!**

## What happens when someone dies

If someone, A, has died in a problem as a result of something B has done, the only possible claimants are *A's estate* and *A's dependants*.

A's estate will sue for any injury and associated pain and suffering/loss of income suffered by A as a result of B's actions *before A died*. In order to sue it's got to be established that:

- (1) B committed a tort in relation to A; and
- (2) A was injured as a result; and
- (3) A's injury was a non-remote consequence of B's tort; and
- (4) B doesn't have any defence to being sued.

A's dependants will sue for any loss of support that they've suffered as a result of A's death (though if A was a minor when he died, then A's parents may be entitled to sue for a fixed sum for bereavement; similarly if A was married when he died, A's wife may be entitled to sue for a fixed sum for bereavement). A's dependants will bring their claim under the Fatal Accidents Act, but they will only be entitled to sue if:

- (i) B committed a tort in relation to A; and
- (ii) B's tort caused A's death; and
- (iii) had A survived and merely been injured as a result of B's tort, A would have been entitled to sue B for damages.

If A was injured as a result of B's actions before he died, consider whether A's estate can sue B first *before* you consider whether A's dependants can sue B under the Fatal Accidents Act – if the estate can't sue, the dependants won't be able to sue either.<sup>1</sup>

If, on the other hand, A died instantaneously as a result of B's actions, then A's estate won't have a claim against B (A didn't suffer any loss before he died for which A's estate could claim compensation) and you'll have to proceed directly to considering whether A's dependants can sue under the Fatal Accidents Act.

Below is a model answer to a problem question that illustrates the claims that might be brought when someone dies in a tort problem question, and what needs to be established to make out those claims:

**John was driving his wife Anne, who was about to give birth, along the local high street to the Maternity Hospital. The car in front was being driven extremely slowly by Marian, who had only just passed her driving test. Marian did not look in her rear view mirror, so did not notice John's frantic gestures to her to pull over and let him pass. Anne was becoming increasingly agitated at**

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<sup>1</sup> Proof: if the estate can't sue it will be because either (1) is not true, or because (3) or (4) are not true. If (1) is not true, then (i) will not be true and A's dependants won't be able to sue under the Fatal Accidents Act. If (3) or (4) are not true, then (iii) will not be true, and A's dependants won't be able to sue under the Fatal Accidents Act. QED.

their slow progress, so John pulled out suddenly to overtake Marian. Just at that moment Bob stepped off the pavement to cross the road into the path of John's car. Bob was listening to music on his personal stereo and so he did not hear the sound of John's horn beeping. When he finally spotted John's car, Bob dived out of the way and landed sharply on his back on the kerb. This impact activated a tumour, which had been dormant in Bob's spine for many years. As a result Bob was paralysed and could no longer work. Bob became very depressed, increased his alcohol consumption dramatically and died of liver failure two years later. The evidence is that, having been activated by the accident, the tumour would probably have killed him within a further two years.

**His widow now seeks your advice.**

There are two types of claim that Bob's widow might want to bring in this situation. First, in her capacity as the representative of Bob's estate she might want to sue someone for the losses that Bob suffered (such as pain and suffering) as a result of his accident before he died. Such a claim would be brought in Bob's name. Secondly, she might want to bring a claim in her own name for loss of support under the Fatal Accidents Act 1976. In order for her to bring such a claim against a defendant, she would need to establish that: (1) the defendant committed a tort in relation to Bob; (2) the defendant's tort caused Bob to die; (3) had Bob lived and not died when he did, he would have been entitled to sue the defendant for damages.

Taking each type of claim in turn:

### Bob's estate

#### *vs John (in negligence)*

John owed Bob a duty to take care not to drive dangerously, as it was reasonably foreseeable that someone like Bob (a nearby pedestrian) would be injured if he did so. John breached this duty when he pulled out suddenly to overtake Marion. The fact that his wife was about to give birth and that he was anxious to get to hospital as quickly as possible does not excuse his driving in such a dangerous way. While it is well-known that people tend to react sub-optimally in emergencies, and the courts will take this into account in judging whether a defendant has breached a duty of care (the Carmathenshire case, Surtees), there are limits to the courts' indulgence and understanding, and those limits are reached in this case.

John's negligence caused Bob to injure his back, activate a tumour, and become very depressed: none of these things would have happened in the way they did but for John's negligence, and there is no obvious break in the chain of causation between John's negligence and Bob's suffering these items of loss. (For example, Bob did not react in a deliberate, informed and unreasonable way in jumping out of the way of John's car.) Of these losses, are any of them too remote to be actionable? The back injury was plainly a foreseeable consequence of John's negligence and is not too remote. It may not have been foreseeable that John's negligence would result in Bob getting cancer, but that does not matter: because it was reasonably foreseeable that Bob would suffer some kind of physical injury as a result of John's negligence, Bob can recover for all the physical injuries caused by John's negligence, no matter how unforeseeable. The eggshell skull rule will apply (*Smith v Leech Brain*). Bob's depression would seem not to be a remote consequence of John's negligence – it was foreseeable that if John drove badly that someone might suffer a physical injury as a result, and that physical injury might result in depression.

So a claim can be brought in Bob's name for all the items of loss that he suffered as a result of John's negligent driving. The damages will, however, be reduced for contributory negligence because Bob was partly to blame for the fact that he suffered these items of loss because he should not have been listening to music while doing something like crossing the

road.

*vs Marion (in negligence)*

Marion – like any other driver on the road – owed someone like Bob a duty to take care not to drive dangerously. She breached that duty by driving excessively slowly, something which can be just as dangerous to other users of the road (particularly in prompting responses like John's) as driving excessively fast. So Marion breached a duty of care owed to Bob and will be liable for all the items of loss that Bob suffered as a result of almost being run down by John as none of these items of loss would have been suffered had Marion not been negligent; John's actions did not break the chain of causation between Marion's negligence and Bob's suffering those losses (John did not deliberately try and run Bob down); and none of these items of loss will count as a remote consequence of Marion's negligence for the reasons given above. The damages payable by Marion to compensate Bob's estate for these losses will be reduced for contributory negligence, for the reasons given above.

Bob's widow

*vs John (under Fatal Accidents Act 1976)*

Of the three things that Bob's widow would need to establish to bring such a claim, we have already established that: (1) John committed a tort in relation to Bob; and (3) had Bob lived and not died when he did, he would have been entitled to sue John for damages. The real difficulty in the way of the widow's suing is establishing that: (2) John's tort caused Bob to die. We are told that Bob died of liver damage, and this liver damage was caused by excessive alcohol consumption. While John's negligence was a 'but for' cause of the liver damage, in that Bob would not have started drinking heavily had he not been injured in the accident resulting from John's negligence, there is an issue as to whether Bob's decision to drink heavily broke the chain of causation between John's negligence and Bob's death. I think it did. Bob was responsible for his decision to drink heavily (see, in another context, *Barrett v Ministry of Defence*), he was aware of the risks involved in doing so, and he acted unreasonably in increasing the amount he drank so dramatically. This is sufficient to establish a break in the chain of causation between John's negligence and Bob's death: deliberate, informed and unreasonable acts break chains of causation.

It follows that (2) cannot be established, and Bob's widow will not be able to bring a claim for loss of support against John.

*vs Marion (under Fatal Accidents Act 1976)*

Even though Marion committed a tort in relation to Bob, and Bob – had he lived – would have been entitled to sue Marion for damages, Marion's tort did not cause Bob's death (for reasons given above) and so this particular claim will fail.