HC 6, 21-12-2017, Common Law

The nature of a tort

Prof. Winfield: 'tortious liability arises from a duty primarily fixed by law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.' You should remember that the Court decides what torts are about, not academics.

Is it tort or torts? The Courts still think that common law has a system of torts (plural). It's quite similar to the Roman law system. Torts were more or less the same as crimes. In the middle ages there was no distinction between civil and criminal torts. Under Roman law the victim of theft had a special action where he could ask for a penalty to be put on the thief. Whereas common law is not based directly on Roman law, it often does resemble it. There is not one general principle of liability, there are only specific torts.

Under the law of torts you can ask for punitive damages. You want to punish the person who damaged you. In *Hargreaves v Berthenton,* they wanted to create a tort of perjury, which was not successful. In the *Perera v Vandiyar* case, the Court also decided they were not going to create a new tort. But there was another new tort created in those years.

The tort of negligence

The tort of negligence was applied in 1932 in the case of *Donoghue v Stevenson,* where they said: 'the categories of negligence are never closed.' It was created in 1856 in the case *Blyth v. Birmingham Waterworks.* This tort is all about behaving like a reasonable man. It was not applied very often because there were a lot of limitations to it. Remember: you can only be liable when you act, it can not just be an omission.

There are limitations to the tort of negligence. The privity of contract means that when a product is made, and it turns out to be defective, the facturer is only liable to whom he has a contract with. Not to the ultimate consumer. There is only a duty of the manufacturer to the buyer, not to the ultimate consumer. There also is no general duty of care, there are only specific ones. This is because civil cases on this topic were decided by juries. Judges to not like juries, and so they want to decide for themselves. They tried to give the juries the most limited scope of application they could. The jury could only decide whether there was a breach of the duty of care, not what this duty meant.

And then there was the case of *Donoghue v Stevenson.* It was about a bottle of ginger beer. It was bought by a friend of miss Donoghue. She went to a pub and ordered a bottle of ginger beer to pour over her ice cream. There appeared to be a snail in the bottle. It was dead. Miss Donoghue wanted to sew the manufacturer for this, based on the tort of negligence. Traditionally this was not possible, because she did not have a contract with the manufacturer. But it was decided that she should be able to claim damages from the manufacturer on the basis of negligence. 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'. Who is your neighbour? Persons who are so closely and directly affected by your actions that you, reasonably, have to have them in contemplation as being affected by your acts/omissions.

Later in time, the juries went away and England gradually went towards a general duty of care. Important was the case of *MacPherson v Buick Motor Co.* He was driving a car and, while driving, noticed that the steering wheel was not connected to the car anymore. He suffered serious injuries and damages. 'If something is reasonably certain to place life and limb in peril when negligently done, it

is then a thing of danger'. Irrespective of contract, the manufacturer is under a duty to make his products carefully. If he is negligent where danger is to be foreseen, a liability will follow.

Duty of care
First of all there needs to be a duty of care. Secondly, there needs to be a breach of this duty. This used to be decided by the jury, but from 1933 the judges made both of these decisions. The third part of the question is whether there has been damage. And, did the breach actually cause the damage (causation). To find the existence of the duty of care you have to take a look at proximity. This is the *Palsgraf v Long Island Railroad Co* case. 'Negligence is a term of relation. If the harm was not willful, he has to show that the act had possibilities of danger, which entitle him to be protected against the doing of it, though the harm was unintended.' In this case the final consequence could not be foreseen. This is another limitation to liability.

The test applied here is the one formulated by Baron Alderson. The test of a reasonable man. What can a reasonable man foresee? Two important cases here are *Bolton v Stone (*cricket ball on the head) and *Hilder v Associated Portland Cement Manufacturers* (death after a football on the head). In the first case the damage was not foreseeable, in the second it was. It's all about the specifics of the case. The foreseeability test was applied in both cases.

Damage
There should be damage, otherwise there is no claim. If there is personal injury or damage to property due to a negligent act, that damage can always be claimed. Can pure economic loss be claimed? There is a distinction between economic loss caused by words and by acts. For acts the answer is no. But, pure economic loss caused by words can be claimed. In *Hedley Byrne v Heller* [170] for example, there was a specific duty of the bank to tell the truth, and damages could be claimed because they didn't. Economic loss caused by an acts cannot be claimed. Two important cases are *Spartan Steel and Alloys Ltd v Martin Co* (cutting cables, disabling electricity and causing economic loss because of it) and *Weller v Foot & Mouth Disease Research.*

Causation
The damages have to be caused by the negligent act. There needs to be a causal link between the act and the damages. The Court decided in the *Polemis* case that a cause had to be a direct or natural consequence. Then you would have a proximate cause and there would be liability. Although the link might be small, if it's a direct or natural consequence you were liable. In 1961 the famous case of *Wagon mound* was decided. In this case they went from consequence to foreseeability. Was the damage foreseeable as a consequence of the act? Then there is liability. 'Damage which a reasonable man would have foreseen as a likely consequence of his act.' The foreseeability test is used twice. First at the duty of care, then to determine causation.

Duty, remoteness and causation are all devices by which Courts limit the range of liability for negligence (this is what Lord Denning says). It is all about policy, where do you draw the line. Sometimes is is possible to not only claim compensation but also punitive damages.

- It can be about arbitrary or unconstitutional action by servants of state
- It can be about conduct to make profit exceeding compensation
- It can be expressly authorised by statute

In the US it is possible to award large amounts of punitive damages based on torts. This leads to cumulation, you can claim more types of damages. In England these matters are decided by judges,

and they don't like punitive damages, they like real damages. But in the US this is decided by juries. Juries do like punitive damages. In the US this system cannot be changed because of the constitution. It is a constitutional right to have your case tried before a jury.

Structural differences between the law of torts and the law of contract

Pure economic loss is not recoverable under the law of torts, but it is recoverable under the law of contract. In the law of contract it's all about what could be foreseen by the contract. Causation is also different between these types of law. Two cases on this are *Hadley v Baxendale* [261] and *OVerseas Tankship v Morts Dock* [450] *(Wagon Mound)*. Were the damages foreseeable or not. And the last difference is nonfeasance. The duty of care is placed upon you under the law of torts. If you start acting and you make mistakes, then you are liable.