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Sport and the Law

LECTURE SIX : SPORT AND TORT

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INTRODUCTION TO TORTS : OUTLINE

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Tort is a French word meaning a civil wrong. It is an area of **CIVIL LAW,** which is used by an aggrieved party to redress a legal wrong. Relationships in modern society are very complex. Interaction can lead to conflicts, some of which are suited to legal resolution.

Distinguish between civil courts and criminal courts. A Civil court gives the victim compensation. A criminal court punishes the wrongdoer by fines or imprisonment.

QUESTION: What is a civil wrong ?

QUESTION: What remedies could the courts order in such a situation?

Classification of torts by reference to wrongdoer's thought process

Some torts require a person to intend to do an act in order to be held legally responsible for the consequences of the act eg

- Trespass to the person – assault and battery, fraud & deceit.

Some torts require a person to have been careless in order to be held legally responsible for the consequences of the act eg

- The Tort of Negligence, Defamation – Libel & Slander.

Strict Liability Torts : Some torts require a person to have done something without good excuse, e.g.

- Nuisance, **Rylands v Fletcher**, Fire Damage, Injury by animals

Absolute liability torts : Some torts simply require that a person did a forbidden act, e.g.

- Selling food which is not safe to eat.

CLASSIFICATION OF TORTS by reference to interest protected

There are a number of different torts which protect a variety of different types of interest such as :-

- Personal rights e.g. not be injured when using a road by another road user
- Economic rights e.g. losing wages because of someone else's carelessness
- Property rights e.g. trespass to land or damage to land or property.
- Reputation e.g. false accusations of bad character
- Freedom of person eg trespass to person and privacy

Rylands v Fletcher		Trespass to Land
	LAND BASED TORTS	
Public Nuisance		Private Nuisance

Restricted Duties		Duty of care
Nervous Shock	**NEGLIGENCE**	Negligent Misstatement
Public Policy		Breach, causation & remoteness

Occupiers Liability Acts 1957 & 1984		Trespass to the person
	INTERFERENCE WITH THE PERSON	
Economic torts		Defamation Libel Slander

Important general principles of tortious liability that have to be considered include vicarious liability, defences such as contributory negligence and consent and the remedies available to the victim.

What is TORT? It is a French word, meaning a civil wrong. The tort of negligence forms one of the most dynamic and rapidly changing areas of liability in the modern common law. Duty, breach, causation, and damage are the elements, which together make up any successful negligence claim. Their requirements may be rephrased as a series of questions, each must be answered affirmatively if the plaintiff is to win:

- Does the law recognise liability in this type of situation (**DUTY**)?
- Was the defendant careless in the sense of failing to confirm to the standard of care set by law (**BREACH**)?
- Has the plaintiff suffered a loss (**DAMAGE**) for which the law regards the defendant as responsible either in whole or in part (CAUSATION)?

The tort of negligence connotes the complex of DUTY, BREACH and DAMAGE thereby suffered by the person to whom the duty was owing;[1] it is now elementary that the tort of negligence involves three factors : a duty of care, a breach of that duty and consequent damage.[2]

The emphasis on privity of contract amounted to a view that in the area of negligence, tort was subordinate to contract as a source of civil liability. However, the restriction of tort claims came to be seen as outmoded becaused the courts could no longer find a coherent explanation for the admission of some exceptions and the denial of others. The treatment of claims for compensation was perceived as having become arbitrary and unjust.

The decision in Donoghue v Stevenson finally established the duty of a manufacturer to an ultimate consumer to ensure that goods sent into circulation are free from defects which he should have foreseen might cause physical injury or damage to property. The House of Lords held that there was a duty of care on these facts, overturning the old cases which had limited the scope of duty. In his judgment, Lord Atkin addressed the question of how to formulate a 'general conception of relations giving rise to a duty of care in the following terms :

"*The rule that you are to love your neighbour becomes in law 'You must not injure your neighbour.' And the lawyer's question 'Who is my neighbour?' receives a restricted reply. 'You must take reasonable care to avoid acts or omissions, which you can reasonably foresee would be likely to injure your neighbour.' Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."*

According to Lord Atkin, the decision in **Donoghue v Stevenson** supplied a legal remedy to meet an obvious *'social wrong' thereby giving legal expression 'to a general public sentiment of moral wrongdoing'*. The basis of negligence liability – the Plaintiff has to show that the defendant's behaviour was careless. Damage is also an essential requirement. While to some extent the courts have achieved this by references to causation, including the concept of 'remoteness' or 'legal cause', it is above all the concept of **DUTY OF CARE**, which they have used to shape the tort of negligence.

The concept of duty is concerned with the important distinction between **ACT and OMMISSIONS**. In order to establish a duty of care in a particular case, the harm in question must have been foreseeable to the individual plaintiff. In **Bourhill v Young**, Lord Wright explained that foreseeability is always relative to the individual affected although Lord Atkin's 'neighbour principle' stresses foreseeability or 'reasonable contemplation' of harm as a preliminary test of duty, the use of this criterion fails to explain why many kinds of non physical damage which are entirely foreseeable nevertheless lie outside the scope of negligence liability.

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1 Per Lord Wright in the **Lochgelly Iron Case**

2 Per Dillion LJ in **Burton v Islington**

Again, we must remember that foreseeability is only one part of the concept of breach of duty. A breach of duty arises where the conduct of the defendant is 'unreasonable' in the sense of failing to reach the appropriate standard of care. This will be the standard of normally careful behaviour in the profession, occupation or activity in question; in applying this standard.

The courts frequently balance the degree of foreseeability or risk of harm against the costs to the defendant of avoiding the harm and the wider benefits foregone if a certain activity cannot be carried on. The level at which the standard is set is an evaluative question which the courts have acknowledged involves issues of policy and judgment, and not a question which can be addressed solely by asking whether the particular harm was foreseeable in the circumstances.

From what we have seen so far an important distinction exists between negligence as a state of mind and the tort of negligence. Negligence as a state of mind, distinct from both intention and recklessness, denotes the failure to foresee the consequences of one's actions in terms of the risk of harm they create to others. While negligence in this sense is necessary condition of liability in tort, it is very far from being sufficient: even assuming the existence of a causal link between the defendant's lack of care and the resulting damage, to assess whether the negligence is tortious in character one has to know not simply whether the damage in question is one which the courts recognize as a recoverable in principle (**DUTY**), but also whether the defendant could have avoided the harm by taking precautions which the law regards, in the circumstances, as an acceptable burden (**BREACH**).

The question of whether a duty of care exists in a given situation is a question of law upon which the appellate courts are the final arbiters. In Donoghue v Stevenson Lord Macmillan asserted that 'the categories of negligence are never closed', in the sense that the courts possess the power to create new duty situations expanding the area of liability.

In **Dorset Yacht Co. v Home Office** Lord Reid commented of the neighbour principle, 'the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion'. This case was concerned with liability for omissions and with responsibility for the acts of third parties.

Then the courts expanded its two-tier stage test of liability. Suddenly it is no longer sufficient, if it ever was, to establish a prima facie duty of care by reference simply to foreseeablity of harm or even, as Lord Wilberforce put it, ' a sufficient relationship of proximity or neighbourhood'. (**Anns n Merton London Borough Council).**

In place of the two stage test some courts have enunciated and applied a new three stage test through which claims for the extension of duty of care must proceed. In addition to foreseeablity, it is now necessary to show that plaintiff and defendant were in a relationship of 'proximity' and that it would be 'fair, just and reasonable' to impose a duty on one party for the benefit of the other.

The concept of proximity is not new to the law of negligence. The term is mentioned both in late 19th century attempts to formulate the test duty of care and by Lord Atkin in Donoghue v Stevenson and by Lord Wilberforce in **Anns v Merton LBC** in their respective formulation of the test. What is new though is the emphasis placed on proximity as a central control device within the definition of duty of care. In **Yuen Kun Yeu v Attorney General of Hong Kong** Lord Keith of Kinkel referred to two possible meanings of the term 'proximity' : the 1st sees it as a synonym for foreseeablity, or the 'reasonable contemplation of likely harm', while the 2nd and , for his Lordship, the preferred meaning '[imports] *the whole concept of the necessary relationship between plaintiff and defendant described by Lord Atkin in* ***Donoghue v Stevenson***'. According to Lord Keith in this case ' the directness and closeness of the relationship between the parties are very apparent'.

Yet it is difficult to be precise in the application of the so called three stage test, and it is far from clear what, if anything, has been achieved by replacing Lord Wilberforce's formulation of the duty question in **Anns** with the present orthodoxy.

In a Canadian case of **Canadian National Railway v Norsk Pacific Steamship Co**, McLachlin J of the Supreme Court of Canada remarked that, 'Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors … Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so closed that it is just and reasonable to permit recovery in tort'.

The judges responsible for developing the new test have themselves recognized its open-ended nature. In **Caparo Industries plc v Dickman** Lord Bridge said : "The concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope."

To similar effect, Sir Donald Nicholls VC in **White v Jones**, stated that the second and third stages of the test 'shade into each other. Both involve value judgements. Under the third heading the court makes its assessment of the requirements of fairness, justice and reasonableness. Likewise, although less obviously, built into the concept of proximity or neighbourhood is an assessment by the court that in a given relationship there "ought" to be liability for negligence. These two headings are no more than two labels under which the court examines the pros and cons of imposing liability in negligence in a particular type of case'.

In a similar vein, Lord Oliver has referred to the need to locate discussion of the duty of care in specific situation such as negligent misstatements, liability for the acts of third parties, and the exercise of statutory duties and powers thus renewed attention will be paid to the specific contexts in which the duty question arises.

NEGLIGENCE

The tort of negligence refers to cases where a Plaintiff states that a defendant has behaved in a careless manner i.e. negligently, which has caused them some loss or injury. It has three elements, all of which must be proved by the Plaintiff in order for he/she to succeed in their claim:

DUTY OF CARE
+
BREACH OF DUTY
+
CAUSATION / REMOTENESS

THE DUTY OF CARE

Consider the following scenario: Suppose you have parked your car in the college car park. You have walked down the steps in to the lower car park, looking both ways as you cross. Jim, a motorist is reversing out of a car parking space, but did not check his mirror. He fails to realise you are behind the car and reverses in to you. You are knocked to the ground. Jim leaps from the car, totally shocked at what has happened. The doctrine of the duty of care states that the Plaintiff must first establish that the defendant owed him or her a duty of care i.e. that the defendant should have had the Plaintiff in mind when committing the act in question and realised that there was a possibility harming that person. **QUESTION**: Should Jim have had you in mind when reversing his car and realised there was a possibility of harming you ?

This is a very simple scenario. In law the question can be far more complex than this and it is not always clear who is owed a duty of care e.g. in business situations. What we are basically asking is: "**Who is owed a duty of care and claim compensation ?"** One or more persons may have been affected by the actions of the defendant but the law lays down rules about which of these persons can actually sue by means of case law which we shall now examine in detail.

Before 1932 there was no generalised duty of care in negligence. The original land mark case in this area was **Donoghue v Stevenson.**[3] On the 26th August, Miss M'Allister was drinking in a cafe with her friend. The friend bought her a bottle of ginger beer (manufactured by the respondent) which the shopkeeper opened. The bottle was made of opaque glass. Some of the beer was poured into a tumbler which contained ice cream which Miss M'Allister ate. Her friend then poured out the rest of the drink, but out floated a snail which was decomposing. As a result she claimed that she contracted gastro-enteritis and shock. She sued the respondents claiming that they were liable in negligence to a person injured by the product. **QUESTION**: Why was she unable to sue in contract?

HELD: The defendant could be liable to such a Plaintiff in negligence. Lord Atkin stated that you must take care not to injure your neighbour. He decided that a person had a duty to take care based on proximity, not just physical, but where the act complained of directly affected a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

This case developed the neighbour test. The significance of this case is that it was the first time that the law recognised a general principle of negligence. Up until this point, negligence had only been recognised in very special circumstances e.g. running down pedestrians. Now the law was laying down a specific test which could be applied in the future: thus to be owed a duty of care, the plaintiff had to satisfy the neighbourhood test. The neighbourhood test was confirmed in the case of **Hedley Byrne v Heller.**[4]

This was further developed in the following case which stated that the neighbourhood test was to be applied in all cases unless there was a good reason not to. **Dorset Yacht v Home Office.**[5] A party of borstal trainees from the Portland borstal was taken on a training exercise to Brownsea Island in Poole Harbour. They were under the immediate control of three Borstal Officers, who, in breach of their instructions, went to bed one evening leaving the trainees. During the night seven of the trainees escaped and went aboard a yacht, which they were able to start, but it then collided with the plaintiff's yacht, Silver Mist. They then boarded the Silver Mist and did further damage. The owners of the yacht sued the Home Office as being vicariously liable for the negligence of the three officers.

HELD: The Home Office was liable. The plaintiffs fell within a category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers. It was reasonably foreseeable that if the boys did escape that boats moored in the area could be in danger. (The judges did point out by way of obiter comment, that the Home Office would not be responsible for the actions of the boys had they actions of the boys had they actually completed their escape and moved on). Lord Reid stated that there could be no responsibility for the acts of the boys, only the officers carelessness. The boys had criminal records, it was a likely consequence of the officer's negligent of duty that the respondent's yacht would suffer damage.

This case was important because the Court held that it was settled law that the elements of forseeability and proximity as well as considerations of fairness, justice and reasonableness were relevant to all cases whatever the nature of the harm sustained by the plaintiff (whether physical or economic).

This was taken a stage further in the case of **Anns v Merton Borough Council.**[6] The plaintiffs were the lessees of flats in a block, which had been built under plans passed by Merton Borough Council. The plaintiffs claimed that there had been structural movements in the block of flats because it had been built on inadequate foundations which did not comply with the plans. The negligence alleged against the Council related to approving the foundations and/or failing-to inspect them. When the

3 **Donoghue v Stevenson** (1932) AC 562
4 **Hedley Byrne v Heller** [1964.]
5 **Dorset Yacht v Home Office** (1969) 2 QB 412
6 **Anns v Merton Borough Council** 1978) AC 728.

case reached the House of Lords, leave was given for the council to argue that it owed no duty of care to the plaintiffs.[7] **HELD**: The defendants could be liable in such a situation.

The great significance of this case is that the court developed what was known as the two-tier approach i.e. two questions had to be asked.

First, was there a sufficient relationship of proximity such that in the reasonable contemplation of the wrongdoer, there is a reasonable contemplation of the subsequent damage sustained by the claimant. So, the courts were being asked to apply the neighbourhood test.

Second, if the answer to the first question is YES, then the court should go on to consider whether there are any considerations which out to negative or to reduce the scope of the duty of the class of person to whom it is owed or to the damages to which a breach may give rise. This meant that the court could discuss policy factors such as social or economic considerations.

The **Anns** principle was immediately seen as a liberating principle, and was used to justify extensions of duty of care into new areas. This two tier approach was used frequently but subsequently suffered considerable criticism.

A case which applied policy considerations was: **Hill v Chief Constable of West Yorkshire.**[8] This was an allegation of behalf of the estate of a murder victim. The allegation was that the murders and attempted murders had previously been committed by the murderer, that it was reasonable to infer that the same person had committed these offences, that it was foreseeable he would commit further offences of the same nature if not caught and that the police owed a duty of care to catch him so as to protect potential future victims. The House of Lords held that there was insufficient proximity for a duty to exist, but they also considered the question of public policy.

LORD KEITH: An action for damage should not lie against the police on the grounds of public policy. The general sense of public duty, which motivates the police is unlikely to be appreciably reinforced by the imposition of such a liability when investigating crime. A great deal of care would have to be taken during investigation to justify operational decisions, if a case came to court then this would divert valuable manpower.

The retreat from Anns : The first major criticism of the two-tier approach was contained in: Governors of the Peabodv Donation Fund v Sir Lindsey Parkinson Ltd.[9] Atkin said that when imposing a duty of care the courts should take into consideration whether it is just and reasonable to do so.

There was further criticism of Lord Wilberforce's two-tier approach in **Leigh and Sullivan v Aliakmon Shipping Ltd.**[10] Oliver J stated that it is not right to regard ANNS as establishing some new and revolutionary test of the duty of care the logical application of which is going to enable the court in every case to say whether or not a duty exists. DONOGHUE has been applied to a wider range of circumstances than was contemplated in 1932. So he did not believe that each court should be able to develop its own policies without reference to decided authorities.

This judgement adopts a more conservative approach than Lord Wilberforce in ANNS. The fear is expressed that the first tier of his approach, that of proximity is too broad and that it leaves too much to the second stage based on policy, In particular, Lord Oliver said that the courts were not free to evolve their own conception of policy without regard to the established lines of authority. This is an attack on the generality of the principles in ANNS and takes us back to the pre-Donoghue position where a duty of care only existed in well-defined circumstances and was not to be extended.

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7 The Court of Appeal in **DUTTON v BOGNOR REGIS UDC** 1972 decided that a council could be liable if there had been negligent approval of foundations).

8 **Hill v Chief Constable of West Yorkshire** (1988) 2 ALL ER 238

9 **Governors of the Peabodv Donation Fund v Sir Lindsey Parkinson Ltd** (1984) 3 ALL ER *529*

10 **Leigh and Sullivan v Aliakmon Shipping Ltd** (1986) 2 ALL ER 145.

It is apparent that the problems with **ANNS** may not be its substance, but the way it had been used. It got to the stage where the courts would impose a duty provided damage was foreseeable, unless there was a good reason not to allow it. A case of great importance in the restrictions on the doctrine of the duty of care is **Yuen Kun-Yea v AG Hong Kong**[11] where someone tried to sue Commissioner in charge of taking Deposits from Companies when they are established, by someone who lost money to a company which had not paid a deposit but which had been wrongly registered. **HELD:** The Commissioner owed no duty.

LORD KEITH: It is clear that foreseeability does not of itself lead to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. So the two-stage test in ANNS is no longer to be regarded as a suitable guide to the existence of a duty of care. He though that Lord Wilberforce's approach had been elevated to a degree of importance greater than it merits, and perhaps greater than its author intended.

This crescendo of criticism came to a head with the landmark case of **Caparo Industries v Dickman.**[12] The plaintiffs were shareholders in Fidelity plc. and after the accounts were published (which the defendants audited) they purchased further shares, ultimately making a take-over bid which was successful. They alleged that the accounts for 1984 should have shown a loss of £465,000 rather than a profit of £1.3. **HELD:** The defendant auditors owed no duty of care to the plaintiffs.
LORD BRIDGE believed that the law had now moved in the direction of attaching greater significance to the more traditional categorisations of distinct and recognisable situations as guides to the existence of the duty of care which the law imposes. It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which a must take care to save B harm. "The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it" : per Brennan J in **Sutherland Shire Council v Heyman**. In this case, Lord Bridge could not see how it could extend beyond the protection of any individual shareholder from losses in the value of the share which he holds. As a purchaser of additional shares in reliance on the auditor's report, he stands in no difference position from any other investing member of the public to whom the auditor owes no duty.

LORD OLIVER: It is not enough to ask whether A owed B a duty. One has to go further and ask in what capacity was his interest to be served and from what, was he intended to be protected? A company's annual accounts can be used for many purposes, not just investment.

In the light of this judgement it is difficult for us to say that we have a general principle for determining the existence of a duty of care which is applicable in all cases. The law in this area was finally clarified with the following case. By this point the Law Lords were determined to make clear their views. They did so by using their discretion under the 1966 Practice Direction to state that an existing precedent set by themselves (i.e.**Anns v Merton LBC**) was no longer to be considered good law in **Murphy v Brentwood District Council**.[13]

In 1970 the plaintiff purchased one of a pair of newly built semi-detached houses from a construction company. The houses were built over filled ground on concrete raft foundations. The design had been submitted to the defendant council for approval under building regulations. The council had sought the advice of independent consulting engineers who recommended the approval of the plans. In 1981 serious cracks appeared and it was discovered that as a result of defective design the concrete raft had cracked and become distorted which resulted in cracks in the walls and the fracturing of a gas and Soil pipe. The Plaintiff sold the house subject to defects for £35,000 less than

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11 **Yuen Kun-Yea v AG Hong Kong (1987) 2 ALL ER 705**

12 **Caparo Industries v Dickman** [1990] 1 ALL ER 568

13 **Murphy v Brentwood District Council** [1990] 2 ALL ER 908

its value in sound condition. He brought an action against the council claiming damages on the grounds that they were liable for the consultant engineer's negligence. The trial judge found in the plaintiffs favour, the court of Appeal upheld the judgement based on **Anns v Merton**. The Council appealed to the House of Lords.

HELD: the local authority owed no duty of care here to Murphy because he had not suffered any damage to the house Oust a latent defect) and no personal injury had resulted. There had also been no damage to the semi next door. The owner had lost money only.

Lord Keith believed that the two-stage test had not been accepted as stating a universally applicable principle. Reservations were made about it in **Peabody**; **The Aliakmon** and **Sutherland Shire Council,** where the Australian court declined to follow **Anns**, Brennan J disagreeing with Lord Wilberforce's approach stating: ***"It is preferable, in my view that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom is owed".***

What Brennan J was saying in simple terms was that he believed that the incremental approach is **Sutherland** is to be preferred to the two-stage test.

The house may have overruled **Anns** concerning the duty of care owed, but they left open the question whether there might be a duty of care on the part of a local authority in respect of injury to a person or other property. Because this point was left open, **ANNS** remains of relevance. In fact, the local authority appeared to accept this point. It is safe only to conclude that the court would not compensate for a defect before things got bad i.e. they caused injury or damage to other property.

Murphy was immediately applied in **Dept of the Environment v Thomas Bates & Sons Ltd**.[14] A builder was held not to be liable in tort for the cost of remedying defects in a building in order to make it safe when there was no damage and no immediate danger to personal safety and health.

Post Murphy cases : Marc Rich v Bishops-rock Marine Co Ltd (The Nicholas H).[15] Held that when determining the defendant's liability for negligence the courts had to consider not only foreseeability and proximity but also whether it was fair, just and reasonable to impose a duty of care (as settled by **Dorset Yacht**). But Lord Lloyd warned that in physical cases it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair. Without any coherent principle the retreat from **Anns** would turn into a rout.

The present position. There has been a significant contraction in the scope of the duty of care. It would appear that the incremental approach as indicated by Brennan J in **Sutherlandshire Council** has been adopted. There would appear to have been a policy decision made here. (By policy we mean that the judiciary will adapt or change the law in order to respond to changing social or economic conditions. The House of Lords appeared to be anxious to restrict the scope of the duty.

Michael Jones identifies the main requirements of a duty of care as follows:

a) Forseseeability of damage i.e. what would a reasonable man have foreseen could happen in this situation?
b) Sufficient proximity of relationship between the parties i.e. who are my neighbours?
c) (a) + (b) and it must be just and reasonable to impose such a duty – **Caparo**.

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14 **Dept of the Environment v Thomas Bates & Sons Ltd** [1990] 2 ALL ER 943.

15 **Marc Rich v Bishops-rock Marine Co Ltd (The Nicholas H)** 1995.

GENERAL TORTIOUS LIABILITY IN SPORTS LAW

Introduction : There have been a number of high profile cases recently where sportsmen have complained that "dirty" tactics on the field have ended their professional careers. This inevitably involves consideration of the law of torts, in particular negligence and trespass to the person.

Question: What are the three elements of negligence? Please explain them.

Negligence

Applying the tort of negligence to the field of sport involves asking the usual three questions i.e. duty of care, what was the appropriate standard of care and did the act complained of cause the injury in question. The standard of care in sporting terms can vary according to the nature of the relationship in question. In this lecture, we will look at the care owed on the field of play. The liability owed to spectators will be dealt with at a later date.

The foundational case in this area is obviously **Donoghue v Stevenson,**[16] which stated that a duty was owed to your neighbour in law. In a sporting context the plaintiff would have to prove:

a) that the other player owed him a duty to take care not to injure him in the course of play
b) that the defendant's play was of such a degree of negligence that they duty was breached
c) the plaintiff suffered a reasonably foreseeable injury and loss as a result of that injury.

To apply this in practical terms the plaintiff faces a number of problems: how bad a game must the other person play before his actions could be termed to be negligent? What is the standard of care against which a player should be measured? What is the role of consent, particularly in contact sports?

In the case of **Rootes v Shelton,**[17] Kitto J stated that non-compliance with the rules of the game were one consideration to be taken in to account when trying to assess reasonableness but it was only one. Thus he was saying that there was a more generalised duty of care.

In **Condon v Basi,**[18] the plaintiff was playing football in a local league match. His leg was broken during the course of a tackle. His claim for negligence succeeded. The court believed the player had certainly committed a dangerous foul which showed a reckless disregard for the plaintiff's safety and fell far below the standards, which should be expected for the game. The ratio of this case is complicated. The Master of the Rolls identified two possible approaches to this type of situation:

a) Apply **Donoghue v Stevenson**. The test would be applied no matter which sport the parties were involved in. The only relevant circumstances to take in to account would be the different degrees of force required for each sport
b) A more generalised duty of care. . Players impliedly consent to take risks, which would otherwise be a breach of the duty of care.

This decision has led to some confusion. They appeared to be stating that players in higher leagues owed a higher standard of care than players in lower leagues. This obviously is in conflict with the decision in **Nettleship v Weston.**

Question: What was the ratio of **Nettleship v Weston**?

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16 **Donoghue v Stevenson** [1932] AC 562
17 **Rootes v Shelton** [1968] ALR 33
18 **Condon v Basi** [1985] 1 WLR 8

This particular suggestion was criticised in the case of: **Elliot v Saunders.**[19] During the course of a first division football game the plaintiff and defendant both collided when they were challenging for a loose ball. The defendant's foot bounced off the top of the ball and came in to contact with the knee of the plaintiff. The resulting injury meant that the plaintiff was unable to continue his career as a professional footballer. The plaintiff argued that the defendant had deliberately broken the rules of the game by going for his legs rather than the ball.

The court held that the defendant had not breached his duty. He had merely been attempting to make a legitimate challenge. The judge also sated that the correct test to be used in negligence was that stated in Rootes v Shelton rather than stated in Condon v Basi. The plaintiff's claim was accordingly dismissed.

So Drake J was stating that instead of there being a variable standard, the general duty of care should be used. Then one should enquire in to the particular circumstances of the incident, the rules of the game etc. This approach was subsequently followed in the case of:

McCord v Cornforth & Swansea City.[20] Brian McCord broke his leg during the course of a football game against a Swansea City. Again, they both challenged for a loose ball when John Cornforth slide one leg over the ball, which the judge said was "a error which was inconsistent with his taking reasonable care towards his opponent". He concluded that this was a tackle where the player's usual skills had deserted him.

When looking at what is reasonable, other jurisdictions have also considered the playing culture of the game. What minor infractions of the rules are accepted by the players themselves? For instance in the Australian case of: **McNamara v Duncan.**[21] The court held that striking a player during the course of a football game was not acceptable. It was contrary to the rules of the game and deliberate.

So far, the playing culture has not been properly developed in English law.

Question: What type of behaviour / contact would you think that a rugby player consents to. What type of behaviour do you think a rugby player would find unacceptable?

THE DUTY OF CARE AND SCHOOLS AND COLLEGES

Introduction : Sport is not just played professionally. People are usually introduced to sport by their schools, practice sport in local authority or private sports grounds and may continue to play at college. Such organisations have witnessed an increase in litigation, particularly in the area of negligence. Questions have arisen regarding the level of supervision Schoolteachers, sports instructors should provide and what about field trips? There are obvious problems regarding the unfit using private gyms.

Schools : Physical education is an important part of the school curriculum. Today, PE is a core subject in the national curriculum.[22] This order requires schools to target risk assessment, decide in advance what activities/practices could constitute a problem and monitor risks. This is done at the end of each Key Stage, which is ordered according to age. So Schools must ensure that the sport concerned is right for that particular age group. The schools have to ensure that the sports teacher is properly trained, can use equipment safely, understand the rules of the game etc. However, teachers of PE do not have to hold a specific qualification.

Question : If things go wrong during a school PE lesson, who would be vicariously liable? Note that the standard of care to be adopted in this situation is that of the reasonable, prudent parent. Discuss what this means.

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19 **Elliot v Saunders** (1994). Unreported.

20 **McCord v Cornforth & Swansea City** (Unreported) 1996.

21 **McNamara v Duncan** [1971] 26 ALR 584.

22 see Order 1995 (SI 1995/60.

Training and supervision : Teachers are required to offer basic training and supervision in the sport in question in order to ensure that the student performs safely.[23] However, the matter of failure to train or instruct is not so straightforward where the pupil was involved in a sport where physical contract is permitted. On which, see **Van Oppen v The Clerk to the Trustees of the Bedford Charity (Harper Trust)**.[24]

Parents, naturally expect that their children will be properly supervised when playing sport. But what if pupils are playing at brake time? See **Langham v Governors of Wellingborough School and Fryer.**[25]

To what standard should the supervision be carried out? See **Gibbs v Barking Corporation.**[26] Compare the above case with **Wright v Cheshire CC.**[27] So what was the different between these two cases? The decision in Wright was said to be based on the experience of a practice that had served well in the past. Today, teachers should ensure that they keep to the requirements of the 1995 order.

Insurance - See **Van Oppen v The Clerk to the Trustees of the Bedford Charity (Harper Trust)**

Field trips - Many schools offer trips which take children away from home for a few days of excitement. Some offer sporting type activities such as camping, walking and canoeing. Parents might trust schoolteachers to look after their children but can they feel so confident about the Company or organisation that will be providing the activity.

The most famous example of this has to be the Lyme Bay drowning of 4 children. Improperly trained instructors took out the children in dangerous conditions. [28]

Parliament now regulates this particular section of the activities market via the **Activity Centres (Young Persons' Safety) Act 1995**. This act provides for the regulation of both activity centres and the providers themselves. Delegated legislation brought in under the Act (**The Adventure Activities (Licensing) Designation order 1996 (SI 1996/771)** states that Tourism Statutes Ltd are the licensing authority responsible for providing adventure holiday facilities. Delegated legislation was also introduced to cover the providers themselves and provide guidance regarding how to go about their business (**Adventure Activities licensing Regulations 1996 (SI 1996/772).** It is now a criminal offence for a person to provide adventure holidays for money if they do not have a licence.

Local authorities - Local authorities are also large providers of sporting facilities. Claims could arise in a number of circumstances but usually the areas of law involved are the common law tort of negligence or occupiers liability.

Trespass to the person

Trespass to the person is composed of two elements:

- Assault- the fear of unlawful force by another
- Battery – the infliction of unlawful force by other.

Question: give some sporting examples of both assault and battery.

This is more likely to be an option in ill-tempered games where questions of criminal liability may also need to be considered.

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23 **Gannon v Rotherham MBC** [1991] Halsbury's Laws MR 91/653

24 **Van Oppen v The Clerk to the Trustees of the Bedford Charity (Harper Trust**) [1989] 1 ALL ER 273

25 **Langham v Governors of Wellingborough School and Fryer** (1932) 101 LK JB 513

26 **Gibbs v Barking Corporation** [1936] ALL ER 115

27 **Wright v Cheshire CC** [1952[2 ALL ER 784

28 **R v Kite and OLL Ltd 1994** The Independent 19 Dec and (1996) 2 Cr App R (s) 295 (CA).

CIVIL LAW OF TORT AND THE SPORTS FIELD.

By Brian Dowrick

INTRODUCTION

We will commence our study of the area with a general overview of the civil actions referred to as negligence and trespass to the person.

These actions fall under the 'umbrella' of a classification of actions known as tort. Tort loosely means 'wrong'. This tells us nothing of what torts are but there is no need for our purposes to debate at length what torts are. An important point to bear in mind at the start is that torts are not criminal actions. Here, the person bringing the action is referred to as the plaintiff. The person against whom the action is brought is known as the defendant. In civil law, defendants are not prosecuted. Commonly they are referred to as being sued. This means that the relevant commencement proceedings have been undertaken for the civil courts. Importantly, civil courts do not sentence defendants. The aim of the actions we are concerned with is to provide monetary compensation for the harm suffered. The objective of an action is to secure a civil remedy, principally damages.

Question : What other 'WRONGS' might fall under the heading of TORT?

NEGLIGENCE: COMPETITOR v COMPETITOR

The paradigm of negligent behaviour is **CARELESSNESS**. Negligence also describes the appropriate tort, but here, we will consider it as careless conduct. Whether the defendant intended (or desired the consequences) or was reckless (that is, conscious risk taking) to causing the harm in question is largely irrelevant for negligent conduct (compare this with trespass to the person).

The tort of negligence requires that the defendant;

A owes the plaintiff a duty not to cause him/her foreseeable injury, and;

B in behaving as he/she has done (by falling below the required standard of conduct), the defendant has broken (or breached as it is referred to) this duty.

Much of the law of negligence (the tort) is a complex interaction of legal principles and wider, contextual and policy matters. One of the issues for us to consider is, does a participant in a sport owe another this duty to take care where there is harm caused? It is an undoubted fact that where one person causes another physical harm by careless conduct, there is a strong basis for stating that this legal duty arises, but this does not mean that the person is automatically liable in negligence for the harm - what is important is whether the person (defendant) is in breach of this duty.

In this respect, a number of important points must be made:

1. Negligence relies upon measuring the defendant's behaviour against an appropriate standard - an ordinary prudent person.
2. To ascertain whether the defendant is in breach of the duty he/she owed, his/her conduct must be measured against the appropriate standard.
3. All that is required of the defendant is that he/she behave reasonably.
4. Different situations require different ways of behaving.
5. If the defendant is only required to behave reasonably, reasonable behaviour may be carried out in a variety of different ways and simple differences do not automatically lead to the conclusion that what the defendant did was wrong (or unreasonable). Reasonable people can reach different conclusions and one cannot say that one or all of them is unreasonable.
6. A sporting competitor is faced with different situations to a person who is, for example, walking down the street. So the appropriate way of behaving (our standard) cannot be measured by what people do in other situations - conduct in the flurry of competition is different from other forms of conduct where the situations may be calmer.

7. The rules by which the competitors play the sport are not conclusive as to the standard of care required - they are however, extremely persuasive.

Some case law suggests that in a sporting context, a competitor may be said to have broken the required standard where he/she acts with reckless disregard for the other's safety. In **Woldridge v Sumner**,[29] this was applied to a spectator's safety. The defendant was a competitor in a competition and it was alleged that he galloped his horse around a corner so fast that on turning the bend (having gone wide) the horse became uncontrollable and plunged along a line of shrubs bordering the course and struck the plaintiff who was standing nearby. The Court of Appeal held that the horseman was acting within the expected confines of competition and the spectator took some risk ordinarily incidental to the competition.

WHAT DO YOU UNDERSTAND BY THE TERM 'RECKLESS'?

We have already stated that recklessness is irrelevant for negligence - so might the court have envisaged recklessness as having a wider meaning than it was accepted at that time? Maybe the court in Harrison were concerned that injuries sustained in a sporting context would all too readily lead to the conclusion that the defendant breached the required standard - and by using the language it did it was attempting to suggest that the standard of conduct required must not be too low.

However, the use of such language to suggest this was unnecessary - to use recklessness only serves to confuse the issue. All that the (reasonable) sportsman is required to do is take such **reasonable care, as the circumstances require**. Thus, by allowing the court to consider the circumstances in which the behaviour in question took place will mean that there is an appropriate check on setting the standard too low.

This approach is borne out by the decision in **Condon v Basi**. The plaintiff was a footballer playing in a local Sunday league. The defendant tackled the plaintiff late and (9inches) high. The plaintiff sustained a broken leg - during the game the referee had sent the defendant off for the tackle but this is not relevant here. The plaintiff sued the defendant in negligence and the judge awarded him 4,900 pounds in compensation. The defendant appealed to the CA. In dismissing the appeal the CA indicated that:

1. a transgression of the rules of the game do not automatically lead to the conclusion that the defendant was in breach of the required standard of behaviour but the rules can be of help in determining the relevant standard - in other words they can help with the question of reasonableness of behaviour.
2. (in agreeing with the trial judge) the tackle was made in a reckless and dangerous manner not with malicious intent towards the plaintiff but in an 'excitable manner without thought of the consequences'.[30]
3. The requirements of the law are that a competitor must take all reasonable care as the *circumstances require.*

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[29] **Woldridge v Sumner** [1963] 2 QB 43 : Sellers LJ added at p52: (See Diplock LJ at page 66 – 68: and **Harrison v Vincent** [1982] RTR 8 - competitor's safety).

[30] NOTE: In relation to the 2nd point, use of the adjective '*reckless'* is unfortunate, but it is clear that conscious risk taking is irrelevant - note use of phrase 'without thought of the consequences' - which is indicative of negligence (though for criminal law purposes this is not necessarily so). Also, Sir John Donaldson indicated that the required standard of conduct is higher for a [premier] league player. Again this is unfortunate. What Sir John Donaldson may have had in mind is that the *evidence* of the conduct in question is of a greater weight to indicate the breach. Clearly the standard - reasonable in all the circumstances - is the same (and this view finds support in Elliott v Saunders (unreported) – COPY IN SHORT LOAN.
Also, the views of the players' as to what is acceptable conduct - for example rugby players might suggest that stamping on another player who is lying in front of the ball Is to be put up with is not determinative of the appropriate standard.
See also : **Michael Watson v British Boxing Board of Control** [2001] 2 WLR 1256.

TRESSPASS TO THE PERSON - ASSAULT & BATTERY: COMPETITOR v COMPETTITOR

Again, we are concerned with CIVIL liability. This tort, unlike negligence, does require the element of recklessness. Also, though intentional conduct would be relevant, in carrying out the act(s) a conscious willed movement (say of the arm) is all that is required. Recklessness may be relevant to the *act and the consequences* of the action(s) though for these purposes, some harm or bodily injury is not necessary - (compare criminal law - AOABH contrary to s47 OPA 1867) - though intentional or reckless harm normally go hand in hand, but the harm element is not a necessary ingredient (for example, an unwanted slap on the back can constitute a battery).

Assault & battery are technically different:

- **Assault** - act(s) which causes another to apprehend immediate unlawful force to his/her person
- **Battery -** the application of unlawful force to the person.

Effectively the difference could be illustrated as follows:

Harry is a hooker who, during a rugby match, is trapped at the bottom of a ruck. On looking up he sees the opposing hooker above him and the opponent swings his fist towards Harry's face. Just before contact with his face, another player's boot gets in between and the punch lands on the boot. However, a second punch is aimed at Harry's face and this one connects - breaking Harry's nose.

WHICH IS THE ASSUALT - WHICH IS THE BATTTERY?

Normally assault precedes the battery (as above) but this is not necessarily so - if Harry is kicked from behind - this can constitute a battery. **WHY IS THIS NOT AN ASSAULT**?

Unlawfulness is an important word here because if an act is done with justification - say self-defence - it is not unlawful and therefore cannot constitute an assault or battery. Certain contact is inevitable, especially in contact sports. The 'inevitable contact' is not unlawful (though this is a moot point) and neither is contact to which the plaintiff is said to consent - subject to some exceptions.

Finally, in the example above, say Harry's opponent had swung his boot at Harry but connected with some other person - all the while intending that Harry is the person to be hurt. Is this a battery?

The elements of the civil rights of action of assault, battery and false imprisonment.[31]

Long before the concept of civil rights was coined by the International Conventions on Human Rights the common law developed basic protection against violation of the person. Just as an Englishman's house was treated as his castle and the entry of strangers represented trespass in the absence of lawful entry so the body was treated as a temple, unlawful interference with the body amounted to trespass to the person. Trespass was one of the earliest torts to be developed by the common law.

Collins v Wilcock "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful forces on his person"….. See also Salmond J. No contact needs to be made.

Knowledge is a prerequisite of fear. **Pursell v Horne** – an unexpected blow from behind is not assault – though it would be a battery.

The possibility of contact is necessary – **Stephens v Myers** – threat in a church – warden intervened but since threat might have been carried out assault took place.

The fear must be reasonable – objective reasonable man test. A particularly timid person might have an unreasonable fear.

Ability to carry threat out not necessary provided victim reasonably fears it could be carried out – loaded guns cases – contrast **R v St George** (fact of loaded weapon immaterial) with **Blake v Barnard** where Lord Abinger though an unloaded weapon would not constitute assault (but probably wrong and only obiter) Thus **Osborne v Veitch** – half cocked gun = assault.

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[31] **Christie v Leachinsky** [1945]

Words alone not sufficient – **Tuberville v Savage**[32] – words may negate the threat. **Meade's Case** – words not an assault – compare **R v Wilson** – "Get out the knives" - an assault – but ratio not clear.

What is the effect of a threatening telephone call? Proximity and ability to carry out threat to kill not known but the threat could feel very real.

Collins v Wilcock "A battery is the infliction of unlawful force on another person" ….

Battery must be intentional – an unwanted kiss is sufficient – but jostling people in a crowd is sociable.[33] Also must be hostile – eg anger (The kiss ?)

Direct act needed – **Stanley v Powell** – bullet bounced off a tree – no battery. But intention to do something being aware someone in a crowd in danger sufficient – **Scott v Shepherd** – Squib – firecracker in market – semble missile at football ground.[34]

Collins v Wilcock "A false imprisonment is the unlawful imposition of constraint on another's freedom of movement from a particular place."

What is the relationship between civil and criminal rights of action of assault and battery ?

A battery can also be an offence under s18 & 20 Offences against the Person's Act namely an assault causing actual or grievous bodily harm.

Note that in the criminal offence the statute is actually referring to the battery, not to the assault since a touching of the body is needed and for the higher offence a serious injury to the body must be sustained. Compare the civil tort where battery does not require an injury – thus **Wilson v Pringle** – the unwanted kiss is a tort – but not a criminal offence. **Cole v Turner** – Holt CJ. Ask what they think about someone with Aids spitting at someone ? Civil yes – but criminal ? Questionable.

Rape is a very specific form of injury not requiring evidence of physical harm – though where this occurs it would aggravate the seriousness of the offence.

However, under Sections1-5 Public Order Act 1986 and the new amended Criminal Justice and Public Order Act now POA s5A – threats of violence are also criminal offences – therefore targeting the assault even where no battery occurs.

The police usually prosecute for criminal offences but a private prosecution is possible where the CPS refuse to take an action – eg **The Lawrence Case** where the 5 hoodlums were acquitted of murder. The CPS did not prosecute for lack of evidence. The parents brought an unsuccessful private prosecution.

Penalty for crime is punishment – fine payable to state not the victim or imprisonment (no compensation apart from Criminal Compensation Board)

Penalty for tort – is damages - i.e. money to the victim(not punitive)

The perpetrator may be subject to both a criminal prosecution and a civil claim for damages. Thus the **O.J.Simpson Trial** in the US.

Note that the burden of proof for the prosecution is "beyond all reasonable doubt" whereas the civil burden is "on balance of probabilities" which is easier to establish so sometimes a civil tort claim may succeed whereas the criminal prosecution may fail.

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32 **Tuberville v Savage** (1669)

33 See **Wilson v Pringle**.

34 see also **Fagan v Metropolitan Police Commissioner** – parking on PC's foot & refusing to move car once problem known.

Defences to trespass to the person.

Volenti non fit injuria – consent. Especially games, eg boxing & other contact sports – but not where it goes beyond the boundaries of consent – thus the frequent assaults in modern football and rugby games.

Hospital : No concept of informed consent. Consent must be actual – following full explanation of surgeons intentions, and risks involved in an operation.

But forceful medical care where unwanted – e.g. Jehova's Witnessess is very risky for doctors. Best to seek a Court Order giving permission to operate especially where blood transfusion involved. Patient has the right to choose to refuse treatment and die.. Problem area is parental refusal to give consent – or a refusal where the patient is in a coma and relatives refuse consent.

Self defence. Note that force must be commensurate with the threat – and graduated.

Conditions for ending a trespass. E.g. wait for aero plane to land – pay exist fee – pay for Denver Boot – or wheel clamp to be removed. Applicable mostly to false imprisonment or lien over goods. – Trespass to property other than land not covered in this section. But not carriers and garages can exercise a lien over goods. Trespass to goods is otherwise dealt with under the title of the Tort of Conversion of Goods.

WORKSHOP

Reading:

Sports Law – pp. 474 – 483, 492 - 499 & 511 - 518

Sport & the Law - relevant chapter (p 168 - 183).

Jones, Textbook on Torts 7TH Edition or 6th Ed, pp 15 - 26 & 402 - 408.

'The standard of care in sport' – Dovey, Journal of the Legal Executive, June 2000

Condon v Basi [1985] 2 All ER 453

Elliott v Saunders (1984), unreported (copy in short loan).

Watson v B.B.C [2001] 2 WLR 1256

Consider the following:

1. What is 'negligence'?
2. Might it be enough to describe negligence as 'careless behaviour'?
3. What is the aim of providing a person with damages in negligence? To deter the defendant? To punish the defendant? To compensate the plaintiff for the harm suffered?
4. Do you agree, that if a person suffers harm as a result of another's' actions, that person should be awarded compensation? In all cases? In a limited range of cases?
5. Do you agree that 'recklessness' in this context, as suggested by **Wooldridge v Sumner,** is a) not necessary, b) bad law? If so, why? If not, why not?
6. Do you agree that adopting an approach to negligence assessment that requires *differing standards of care* to be applied to say, premier league players and local park players is a good idea?
7. Why did the judge **in Elliott v Saunders** conclude that Saunders was not liable?
8. What are the 2 aspects of trespass to the person?
9. What is meant by 'unlawful force'?
10. Consider this: Alan is a footballer who has been badly tackled by Tommy - an opponent. After another hard tackle by Tommy, Alan feels he has been 'provoked' and punches Tommy. Is Alan's punch 'unlawful'?