

1

The Role of Modern Tort Law

WHAT IS A TORT?

- §1.1 A tort is a wrongful act or omission for which compensation or other remedy can be awarded to C (the claimant, or the person aggrieved) against D (the defendant, or tortfeasor). The corpus of Tort law, in general, excludes wrongs which are remediable as a breach of contract (albeit that some claims may give rise to concurrent liability in contract and in Tort), a crime (albeit that occasionally a tort may also be a crime), an equitable cause of action, or a restitutionary cause of action.

The word ‘tort’ is derived from the Old French *tortus*, meaning ‘twisted’ or ‘crooked’, and from the medieval Latin *tortum*, meaning ‘wrong’ or ‘injustice’.¹ Hence, the definition above aptly conveys that a great many causes of action fit under the Tort law ‘umbrella’.

The corollary is that any shared or common characteristics among the torts – apart from the fact that all are claims for which damages are obtainable in a civil court – are nigh on impossible to identify. Indeed, it is a motley bunch of causes of action which fall within English Tort law!

The Range of Modern Torts in English Law

- §1.2 There are at least thirty-three different torts which are recognised in English law.

The following table provides an alphabetical list of those torts which, so far as the author’s searches can ascertain, are currently recognised in the English jurisdiction. Each tort is either defined (with reference to a relatively recent authority in which the tort is discussed) or is referred to detailed analysis elsewhere in this book.

¹ *Oxford Dictionary of English* (2nd edn, revised, Oxford University Press, 2006) 1862. See too: *Oxford Dictionary of Law* (6th edn, Oxford University Press, 2006) 537; J Penner, *The Law Student’s Dictionary* (Oxford University Press, 2008) 292.

2 The Role of Modern Tort Law

	The tort	Nutshell definition (or chapter treatment)
1	Abuse of judicial process	Originating in <i>Grainger v Hill</i> (1838), ^a the tort requires that: D brings legal process principally for an improper, collateral, or ulterior purpose; and the improper use to which the process was applied causes C damage (see, e.g., <i>Land Securities plc v Fladgate Fielder (a firm)</i> ^b and <i>Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd</i> ^c).
2	Assault	See Chapter 14, and the definition at §14.3 and §14.9.
3	Battery	See Chapter 14, and the definition at §14.3 and §14.4.
4	Breach of statutory duty	See 'Breach of Statutory Duty' (online chapter) and the definition at §SD.1.
5	Causing loss by unlawful means	The tort requires that: D interferes with the liberty of others; D's interference was intentional; D's interference was via unlawful means; and the interference with others (e.g., customers) causes C damage (see, e.g., <i>OBG Ltd v Allan</i> ; <i>Douglas v Hello! Ltd</i> ^d). The unlawful means does not require any actual threat on D's part, thereby distinguishing the tort from that of intimidation; and there is no need for a contract between C and the other party, thereby distinguishing the tort from inducing breach of contract and Interference with contractual relations.
6	Champerty	The tort (now abolished as a tort in England, although it can still render a contract void as being contrary to public policy) requires that: D supports C's legal action in which D has no legitimate concern, without just cause or excuse; and D contracts for a share of the proceeds of C's action or for some other pecuniary benefit if the action succeeds (see, e.g., <i>R (Factortame Ltd) v Sec of State for Transport, Local Govt and the Regions (No 8)</i> ^e).
7	Conspiracy to injure	The tort requires: an agreement between two or more persons (Ds, the conspirators) to commit an act or omission with the intent of causing damage to C's trade or reputation; D's act or omission is <i>either</i> unlawful in nature (known as unlawful means conspiracy) <i>or</i> lawful in nature but where D had the sole or predominant purpose of injuring C (known as lawful means conspiracy); and C suffers damage as a result of the conspirators' act or omission. The tort does not enable recovery for injury to C's reputation or injury to feelings, but is primarily directed to the recovery of financial loss

^a (1838) 4 Bing (NC) 212.

^b [2009] EWCA Civ 1402, [2010] 1 Ch 467. Although there was much debate as to whether such a tort existed in England ('the last reported successful action in this jurisdiction for the tort abuse of process was either about 140 or 170 years ago': at [41]), all CA members affirmed that it existed in limited form.

^c [2013] UKPC 17, [2014] 1 AC 366.

^d [2007] UKHL 21, [2008] 1 AC 1, [6]–[8], [45]–[64] (Lord Hoffmann).

^e [2002] EWCA Civ 932, [2003] QB 381, [32] (Lord Phillips MR). See too: s 14(1), (2) of the Criminal Law Act 1967 (discussed in Mulheron and Cashman, 'Third-Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312, 318–19; *Code of Conduct for Litigation Funders* (Jan 2014), and amended further in 2018)).

^f [2008] UKHL 19, [2008] 1 AC 1174.

3 What is a Tort?

	The tort	Nutshell definition (or chapter treatment)
		(see, e.g., <i>Total Network SL v HMRC</i> ^g and <i>Aerostar Maintenance v Wilson</i> ^g). Conspirators can join the agreement at different times (per <i>QBE Management Services (UK) Ltd v Dymoke</i> ^h).
8	Conversion (aka trover, its ancient description)	The tort requires that: D's dealings with goods (e.g., depriving C of their possession) were inconsistent with C's rights, where C owned, possessed, or was entitled to immediate possession of the goods; D's conduct was intentional and not accidental; and D's conduct was sufficient to exclude C from being able to use and/or possess the goods (see, e.g., <i>Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)</i> ⁱ and <i>Glenbrook Capital LP v Hamilton</i> ^j).
9	Defamation	See Chapter 15, and the definition at §15.1 and §15.2.
10	Deceit (aka fraudulent misrepresentation)	The tort requires: a false (fraudulent) representation by D, which D either knows to be untrue or is recklessly indifferent as to whether it is true; D intended that C should act in reliance on the false representation; C, in fact, relied on the representation; and C suffered loss (see, e.g., <i>VTB Capital plc v Nutritek Intl Corp</i> ^k and <i>Derry v Peek</i> ^l).
11	False imprisonment	See Chapter 14 and the definition at §14.13.
12	Harassment	This is a statutory tort, created by the Protection from Harassment Act 1997. See 'The Statutory Tort of Harassment' (online chapter) and the definition at SHA.1.
13	Inducing (or procuring) breach of contract (aka the tort in <i>Lumley v Gye</i> ^m)	The tort requires that: X commits an actionable breach of his contract with the other contracting party, C; D's conduct procured X to commit that breach of contract; D intended to induce X to breach his contract with C, or was recklessly indifferent (i.e., 'turned a blind eye') as to whether it was breached; D knew or foresaw that the conduct which was being induced would result in a breach of X and C's contract; and C suffered loss (see, e.g., <i>OBG Ltd v Allan</i> ; <i>Douglas v Hello! Ltd</i> ⁿ).
14	Intentional infliction of mental distress or physical harm (aka the rule in <i>Wilkinson v Downton</i> ^o)	See 'The Rule in <i>Wilkinson v Downton</i> ' (online chapter) and the definition at SWD.1.

^g [2010] EWHC 2032 (Ch).

^h [2012] EWHC 80 (QB) [198].

ⁱ Also encompassed, statutorily, in the Torts (Interference with Goods) Act 1977, s 1(a).

^j [2002] UKHL 19, [2002] 2 AC 883, especially [37]–[44] (Lord Nicholls).

^k [2014] EWHC 2297 (Comm). See too: *Kimathi v FCO* [2018] EWHC 1169 (QB) [38].

^l [2012] EWCA Civ 808.

^m (1889) LR 14 App Cas 337 (HL).

ⁿ (1853) 2 E&B 216.

^o [1897] 2 QB 57.

^p [2007] UKHL 21, [2008] 1 AC 1, [3]–[5], [39]–[44] (Lord Hoffmann).

^q [2005] EWCA Civ 106, [2005] QB 762, and not discussed in detail on appeal, *ibid*.

4 The Role of Modern Tort Law

	The tort	Nutshell definition (or chapter treatment)
15	Interference with another's contractual relations	The tort requires that: D prevented or hindered X's performance of his contract with the other contracting party, C; D procured X to prevent/hinder the performance of his contract with C; D intended to induce X to hinder/prevent his contract with C, or was recklessly indifferent as to whether or not it was so; and C suffered loss (see, e.g., <i>OBG Ltd v Allan</i> ; <i>Douglas v Hello! Ltd</i> [†]). D can be liable even without the contracting party, X, actually committing an actionable breach of contract (distinguishing the tort from inducing breach of contract).
16	Intimidation	The tort requires: a threat made by D to do something unlawful or 'illegitimate'; which can take the form of <i>either</i> a threat to C that, unless C acts in a certain way, D will act impermissibly against C <i>or</i> a threat to X that, unless X acts in a certain way towards C, D will act impermissibly towards X; D's threat was intended to coerce C to take, or refrain from taking, some course of action; the threat did coerce C to take that action; and C suffered loss (see, e.g., <i>Berezovsky v Abramovich</i>).
17	Libel	See Chapter 15 and the definition at §15.2.
18	Maintenance	The tort (now abolished as a tort in England, although it can still render a contract void as being contrary to public policy) requires that: D 'supports litigation, in which he has no legitimate concern, without just cause or excuse' (see, e.g., <i>R (Factortame Ltd) v Sec of State for Transport, Local Govt and the Regions (No 8)</i> [‡]), and involves the notion of 'improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim' (see, e.g., <i>Trepca Mines Ltd (No 2)</i>).
19	Malicious falsehood (aka injurious falsehood)	The tort requires that: D published false allegations about C; <i>either</i> knowing them to be false <i>or</i> being indifferent as to their truth or falsity; D published the information with malice; and C suffered loss (per <i>Friend v Civil Aviation Authy</i> [§] and <i>Cornwall Gardens Ltd v RO Garrard & Co Ltd</i> [¶]). It is not necessary that C suffers any loss of reputation; the tort is focused primarily upon C's economic or commercial interests (e.g., where D dishonestly tells C's customers that C has ceased trading (per <i>Gregory v Portsmouth CC</i>). The tort may sometimes duplicate the tort of defamation (per <i>Reachlocal UK Ltd v Bennett</i> ^{††}).

[†] [2011] EWCA Civ 153, [2011] 1 WLR 2290, [5]. Earlier: [2010] EWHC 647 (Comm) [128].

[‡] [2002] EWCA Civ 932, [2003] QB 381, [32] (Lord Phillips MR). See too: s 14(1), (2) of the Criminal Law Act 1967 (discussed in Mulheron and Cashman, 'Third-Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312, 318–19).

[§] [1963] Ch 199 (CA) 219.

[¶] [2005] EWHC 201 (QB) [235] (Eady J).

^{||} [2001] EWCA Civ 699, [2002] 1 WLR 713.

^{††} [2000] UKHL 3, [2000] AC 419.

^{†††} [2014] EWHC 3405 (QB) [65].

5 What is a Tort?

	The tort	Nutshell definition (or chapter treatment)
20	Malicious procurement of a search warrant	The tort requires: a successful application for a search warrant by D; a lack of reasonable and probable cause to make the application; <i>either</i> D knew that he had no power to apply for the warrant and that it would probably injure C, <i>or</i> D was recklessly indifferent as to whether that act would injure C; and C suffered loss or damage as a consequence of the issue or execution of the warrant (see, e.g., <i>Keegan v CC of Merseyside</i> ^y and <i>Crawford v Jenkins</i> ^z). The tort also extends to the malicious presentation of a bankruptcy petition or a winding-up petition.
21	Malicious prosecution (aka injurious prosecution)	The tort requires: <i>either</i> a criminal <i>or</i> a civil claim was brought by D against C; the proceedings ended in C's favour; the claim was brought by D without reasonable cause; D acted with malice in instituting the claim; C suffered loss or damage (e.g., damage to his reputation, if the matter is scandalous; damage to his person, if he is imprisoned; financial losses, if earnings (say) are lost as a result of the prosecution; or if he is put to charges and expenses) (see, e.g., <i>Willers v Joyce (Re: Gubay dec'd</i> ^{aa}) and <i>Gregory v Portsmouth CC</i> ^{bb}).
22	Misfeasance in public office	The tort requires that: D, a public officer, purported to exercise some power or authority; <i>either</i> D knew that his disregard of his duty would injure C <i>or</i> was recklessly indifferent to the consequences for C; D's exercise of power or authority was done with malice or dishonestly or 'in bad faith'; and C suffered loss (see, e.g., <i>Three Rivers DC v Governor of Bank of England</i> ^{cc} and <i>N v Sec of State for the Home Dept</i> ^{dd}).
23	Misuse of private information (Privacy)	See 'Privacy' (online chapter) and the definition at §PR.1.
24	Negligence	See Chapter 2 and the nutshell analysis at §2.1.
25	Negligent misstatement	See Chapter 4 and the definition at §4.3.

^y [2003] EWCA Civ 936, [2003] 1 WLR 2187, [13], citing: *Gibbs v Rea* [1998] AC 786 (HL). Subsequently applied in: *Fitzpatrick v Commr of Police* [2012] EWHC 12.

^z [2014] EWCA Civ 1035, [48].

^{aa} [2016] UKHL 43, [2018] AC 779, approving the existence of the tort of malicious prosecution of civil proceedings in English law (Lords Toulson, Kerr, Wilson, Clarke, and Lady Hale; with Lords Mance, Neuberger, Sumption, and Reed dissenting).

^{bb} [2000] UKHL 3, [2000] 1 AC 419 (endorsing the malicious prosecution of criminal proceedings as a long-standing tort in English law).

^{cc} [2000] UKHL 33, [2000] 2 WLR 1220.

^{dd} [2014] EWHC 3304 (QB).

6 The Role of Modern Tort Law

	The tort	Nutshell definition (or chapter treatment)
26	Passing-off	The tort requires that: D conducts his business on the basis that it misleads the public to believe that D's goods and/or services are those of C's business; at the time of the acts complained of, C had a significant reputation or goodwill; and D's acts gave rise to a false message which would be understood, by a not insignificant section of his market, that his goods have been endorsed, recommended or approved by C (see, e.g., <i>Irvine v Talksport Ltd</i> ^{ec} and <i>Cranford Community College v Cranford College Ltd</i> ^d). It is not necessary to prove that D intended to deceive; innocent passing-off is actionable as a tort.
27	Private nuisance	See Chapter 16 and the definition at §16.1.
28	Public nuisance	See 'Public Nuisance' (online chapter) and the definition at §PU.1.
29	<i>Rylands v Fletcher</i> , the rule in	See Chapter 17 and the definition at §17.1.
30	<i>Scienter</i> , action for	This tort is now replaced as described in 'Liability for Animals' (online chapter), and the text under §AN.1.
31	Slander	See Chapter 15 and the definition at §15.2.
32	Trespass to chattels	The tort requires: a direct and immediate interference by D with goods; where those goods were in the possession of C at the time of the interference; and where the act of interference can constitute touching, handling, damaging, or removing those goods; without C's permission or licence (see, e.g., <i>White v Withers LLP</i> ^{fg}).
33	Trespass to land	The tort requires: D entered land without permission, or remained on that land which was entered into with permission following the withdrawal of that permission, and a reasonable opportunity to leave the land has passed; the land was owned by, or in the exclusive possession of, C; and D's entry, or remaining there, was intentional, negligent or innocent (see, e.g., <i>Monsanto plc v Tilly</i> ^{hh}).

^{ec} [2002] EWCA Civ 423.

^{fd} [2014] EWHC 2999 (IPEC).

^{fg} [2009] EWCA Civ 1122, [2009] 3 FCR 435, [44]–[50].

^{hh} [1999] EWCA Civ 3044, [2000] Env LR 313.

There are some causes of action, ostensibly tortious,² which do not appear in the table and the reasons for their exclusion are noted next.

² Not 'tortious', even though the claims may feel to be just that by the litigants and their lawyers! This inaccuracy occasionally turns up even in law reports, e.g., *Watkins v Home Office* [2006] UKHL 17, [32].

7 What is a Tort?

The 'non-tort'	Why it is excluded
Breach of confidence	Although sometimes called a tort (e.g., in <i>Venables v NGN Ltd</i> ^a), this cause of action was developed by the Courts of Chancery during the eighteenth and nineteenth centuries, and modern appellate decisions have referred to it (correctly) as an <i>equitable</i> cause of action (see, e.g., <i>Tchenguz v Imerman (Rev 4)</i> ^b and <i>Wainwright v Home Office</i> ^c).
Conversion of contractual rights	English law does not recognise a tort of conversion of contractual rights (e.g., where a receiver is invalidly appointed and wrongfully takes control of a company's, C's, contractual rights and business) – because there can be no conversion of intangible choses in action (per <i>OBG Ltd v Allan</i> ^d).
Detinue	This tort was abolished by the Torts (Interference with Goods) Act 1977. Detinue was proven where there was a wrongful detention of goods by the possessor of those goods, D, after C, their rightful owner, lawfully requested their return. The 1977 Act now governs that right of recovery ^e .
Wrongful interference with a body	English law does not currently recognise the tort of wrongful interference with a body (where D removes and retains organs from a child's body without knowledge or consent of the parent) (per <i>AB v Leeds Teaching Hosp NHS Trust</i> ^f).

^a [2001] EWHC QB 32, [2001] 2 WLR 1038, [7] (President Elizabeth Butler-Sloss). See also, e.g., *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [69] (Lord Phillips MR).

^b [2010] EWCA Civ 908, [2011] 2 WLR 592, [74] ('A claim based on confidentiality is an equitable claim. Accordingly, the normal equitable rules apply': Lord Neuberger MR, writing for the Court).

^c [2003] UKHL 53, [2004] 2 AC 406, [18] (an 'equitable action for breach of confidence': per Lord Bingham).

^d [2005] EWCA Civ 106, [2005] QB 762, [49]–[58].

^e See s 2(1), subject to the following saving provision in s 2(2): 'An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished).'

^f [2004] EWHC 644 (QB), [2005] 2 WLR 358, [161] (Gage J).

Finally, as a matter of terminology, some so-called torts are merely generic, or compendious, terms for a 'bunch' of individual torts.

This is not a tort <i>per se</i> but a generic term by which to describe other torts
Trespass to the person	... a series of common law torts whose purpose is to protect against violations of C's person, <i>viz</i> , assault; battery; and false imprisonment. See Chapter 14.
Wrongful interference with goods	... certain common law torts (<i>viz</i> , conversion and trespass to chattels) and statutory torts (to the extent that the Torts (Interference with Goods) Act 1977 preserves a cause of action which would have operated in detinue).

8 The Role of Modern Tort Law

Disparities among the Torts

§1.3 There are numerous disparities among the torts, such that a common or shared characteristic among them is virtually impossible to identify.

This section highlights *ten* disparities across the torts arising in English law.

- i. **Actionable *per se* versus proof of damage.** Those torts which have as their principal aim the protection or vindication of C's rights are actionable without proof of damage. Trespasses to the person (assault, battery, and false imprisonment) and wrongful interferences with goods (trespass to chattels and conversion) fall into that category. However, for torts where compensation is the primary purpose, the tort will not be actionable unless there is some proof of compensable damage – negligence, the tort in *Wilkinson v Downton*, private nuisance, and the rule in *Rylands v Fletcher* are examples of the latter category.
- ii. **Strict liability versus fault.** For some torts, it is irrelevant if D was 'at fault' or whether D exercised reasonable (or even the utmost) care to avoid the harm to C. D will be strictly liable in Tort, regardless. These torts include the rule in *Rylands v Fletcher*, liability for defective products under the Consumer Protection Act 1987, defamation, and some cases of breach of statutory duty. For the majority of torts, however (e.g., negligence; trespasses to the person such as assault, battery, and false imprisonment; and private nuisance), some proof of fault or wrongdoing will be required.
- iii. **Intentional versus non-intentional conduct.** Some torts require proof of intentional conduct, which may include a reckless indifference on D's part (e.g., the rule in *Wilkinson v Downton* and trespasses to the persons generally fall within this category, although, exceptionally, negligent conduct may be sufficient for battery). For other torts, intentional conduct is not required. For example, in negligence and public or private nuisance, then careless, or even careful, conduct, respectively – which is not intended to harm C at all – is sufficient to make out the causes of action.
- iv. **The type of interests protected.** The main purpose of the tort of negligence is to protect against damage to the person, property, or economic interests of C. However, some causes of action protect different interests entirely. For example: defamation serves to protect the reputation of individuals or entities; trespasses to the person (assault, battery, and false imprisonment) and the rule in *Wilkinson v Downton* aim to protect personal bodily integrity; the torts such as passing-off, conspiracy to injure, intimidation, the rule in *Rylands v Fletcher*, and private nuisance primarily serve to protect C's economic or commercial interests; and the protection of C's interest in personal property is addressed by torts such as conversion and trespass to chattels.
- v. **C's personal culpability as a defence differs.** For some torts, the careless or wrongful conduct of C constitutes a (partial) defence to the tort (e.g., the defence of contributory negligence is available in a claim for negligence as a matter of statutory law, via the Law Reform (Contributory Negligence) Act 1945). For other torts, however, any culpability on C's part is not a defence – or, at least, it is very doubtful, on current authority, whether a defence can be made out (as, e.g., for assault and battery).
- vi. **Availability of remedies differs.** Remedies across the torts are not uniform either. For most torts, the appropriate remedy is that of damages (whether compensatory, aggravated, exemplary, or restitutionary – although the availability of these types of damages has not been confirmed across all torts). For limited torts, however (e.g., private nuisance or trespass to land), self-help

9 The Purposes of Tort Law

remedies are also available (i.e., abatement of the nuisance or ejection of the trespasser, respectively), permitting C to protect his rights without recourse to judicial determination.

- vii. **Some torts are crimes, but most are not.** Trespass to land is a tort, but is not usually a crime (unless exceptional circumstances apply, such as trespassing on diplomatic or consular premises), and hence, any sign, ‘*Trespassers will be prosecuted*’, is misleading if no criminal prosecution is possible.³ Some torts, however, are commonly crimes too (e.g., assault, battery, public nuisance, and dangerous driving arising from negligent conduct), which can give rise to prosecution of D by the State.
- viii. **Standing to sue.** Some torts restrict standing, by reference to C’s proprietary or possessory rights. For example, for private nuisance and the rule in *Rylands v Fletcher*, the claim is only capable of being brought if C has proprietary rights or exclusive occupation of the land upon which the interference occurred. For other torts, however (e.g., negligence, trespass to the person, the rule in *Wilkinson v Downton*), proprietary rights are irrelevant in establishing standing to sue.
- ix. **Source of the law.** Some torts are vested in, or defined by, statute, and hence, are properly considered to be statutory torts. For example, the tort of harassment arises from the Protection from Harassment Act 1997, and the law of occupiers’ liability, regarding liability towards lawful entrants or towards trespassers, is governed by the Occupiers’ Liability Act 1957 and the Occupiers’ Liability Act 1984, respectively. Most torts, however, can be sourced to judicial decision-making in case law.
- x. **Limitation periods.** The period in which C may maintain an action in Tort varies considerably. The general rule is that, by virtue of s 2 of the Limitation Act 1980, an action founded on a tort may not be brought after the expiration of six years from the date on which the cause of action accrued. However, that general rule is overridden by numerous other provisions, which impose different limitation periods for specific torts. Limitation periods are discussed in ‘The Beginning and End of Liability’ (an online chapter). For example, the variation can be briefly illustrated as follows: for an action for negligence, nuisance, or breach of statutory duty, which consists of, or includes, damages for personal injuries to C or to any person, the limitation period is three years; for defamation (whether libel or slander), the limitation period is only one year; and an action under the Protection from Harassment Act 1997 is permitted within six years. Many law reform commissions have criticised the lack of uniformity of limitation periods in Tort law. The Alberta Law Reform Institute, for example, remarked that ‘there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claim.’⁴ Nevertheless, differing limitation periods remain the reality for the English landscape.

THE PURPOSES OF TORT LAW

- S1.4** There are *seven* judicially identified purposes of Tort law, the principal one of which is to provide compensation to C as a victim of the civil wrong committed by D against C, for the harm or damage suffered as a consequence of that civil wrong.

³ Noted, e.g., in *Oxford Dictionary of Law* (6th edn, Oxford University Press, 2006) 546.

⁴ *Limitations* (DP 4, 1986) [2.63]; also cited in: Irish LRC, *Limitation of Actions* (Rep 104, 2011) [2.02].

10 The Role of Modern Tort Law

The purposes outlined below may be singly, or (sometimes) concurrently, evident in any one piece of Tort litigation. In other cases, the purposes may clash and pull in different directions. However, in combination, they provide the basic reasoning as to why the subject has occupied an extremely important part of common law legal systems around the world.

- i. **Compensatory function.** The compensatory function of Tort law has frequently been judicially acknowledged. For example, in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) (Rev 1)*, Arden LJ remarked, '[t]he aim of the law of tort is to compensate for loss suffered';⁵ while in *Gregg v Scott*, Baroness Hale observed that '[t]ort law is not criminal law. The criminal law is there to punish and deter those who do not behave as they should. Tort law is there to compensate those who have been wronged, [although] some wrongs are actionable whether or not the claimant has been damaged'.⁶

However, that cannot be its only function. Indeed, in *Smith New Court v Citibank*,⁷ Lord Steyn observed that any view that 'the sole purpose of the law of tort generally ... should be to compensate the victims of civil wrongs' was 'far too narrow'. In that particular case (which concerned the tort of deceit), the deterrent function also had an important role to play (as discussed below).

The 'compensatory' function of Tort law must be qualified in two respects. First, it is usually (but not always) met by an award of compensatory damages – assessed so as to put the victim, C, in the position in which he was before the tort was committed by the tortfeasor, D (insofar as money can do so). However, other awards of damages, where appropriate for the tort in issue, will also satisfy the 'compensatory' function. These include: *restitutionary* damages (where the purpose of the award is to strip D of his profit or to cause the reversal of a benefit conferred by C); *user* damages (where the purpose of the award is to assess the fair value of a right of which D's tortious conduct has wrongly deprived C, even if C would not have sought to use that right and so incurred no loss); *aggravated* damages (where the purpose of the award is to compensate C where the tortious conduct of D, or the circumstances surrounding the commission of the tort, subjected C to humiliation, distress, or embarrassment); and even *nominal* damages (where C has not suffered any damage from the wrong committed by D, but nevertheless the award denotes that a legal right has been infringed).

Second, the victim of a tort is, invariably, *not* compensated for the entirety of his grievances. Some heads of damage are simply unavailable (e.g., damages for mere distress are not awardable in some torts); some have been abolished altogether (e.g., damages for loss of consortium – the right of one spouse to the company, assistance, and affection of the other – were abolished by the Administration of Justice Act 1982); and, for some heads of general damage, the quantum may be either stipulated by pre-set awards or capped by statute (as discussed in Chapter 11). Hence, full compensation is not necessarily the aim of Tort law.

- ii. **Deterrent function.** The fact that Tort law accommodates an award of exemplary damages – albeit in limited circumstances, and only where D's conduct deserves to be punished because it is egregious and worthy of condemnation – confirms that this strand of civil liability endorses a deterrent function.

⁵ [2008] EWCA Civ 1086, [2009] Ch 390, [2].

⁶ [2005] UKHL 2, [2005] 2 AC 176, [217].

⁷ [1997] AC 254 (HL) 279–80.