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WHAT IS A TORT?

A tort is a form of civil wrong.¹ So in order to understand what a tort is, one must first understand what a civil wrong is.

THE NATURE OF A CIVIL WRONG²

Someone will commit a civil wrong if he or she breaches a legal duty owed to another. This needs some explanation.

Legal duty

Someone will have a legal duty to act in a particular way if he is required by law to act in that way.³ How can we tell what the law requires us to do? Well, we look to *statutes* enacted by Parliament and *cases* decided by the courts to tell us what the law requires us to do.

Under our legal system, A will have a legal duty to do *x* if: (a) a statute that was enacted by Parliament and not subsequently repealed says that A has a legal duty to do *x*; or (b) previous decisions of the courts that have not been subsequently overruled and are not likely to be overruled explicitly or implicitly say that A has a legal duty to do *x*.

If A has a legal duty to do *x* because (a) is true then we say that A has a *statutory duty* to do *x*. If A has a legal duty to do *x* because (b) is true then we say that A has a *judge-made duty* to do *x*. In order to make this book easier to read, we will from now on refer to legal duties simply as 'duties'.

Duty owed to another

Duties may be divided up into duties that are owed to other people and duties that are owed to no one in particular. A given duty is owed to someone else if it was imposed for the benefit of that someone else. A given duty is owed to no

¹ The word 'tort' derives from the Latin *tortus* which means 'twisted, crooked, contorted, distorted' (Lewis & Short, *Latin Dictionary*).

² See Birks 1995.

³ Cf. M&D, 19: "Duty" means a prohibition of a certain kind of behaviour in a given kind of situation.' This is right. However, M&D goes on to say on the same page that if the law says 'you ought not to injure a person by a careless act, [this] means that the law recognises that there *could* be liability [if you injure that person carelessly]'. This is wrong. The fact that someone will incur some kind of liability if he does *x* does not necessarily mean that he is prohibited from doing *x*. Someone who drives into central London will incur a liability to pay a congestion charge: but he is of course not prohibited from driving into central London.

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one in particular if it was not imposed for the benefit of a particular individual but was imposed for the benefit of the community as a whole or for the benefit of some section of the community.

So, for example, under s 6 of the Police Act 1996 '[e]very] police authority . . . shall secure the maintenance of an efficient and effective police force for its area'. That duty is not owed to anyone in particular: it is imposed on each police authority for the benefit of the community served by that police authority. In contrast, if you take two given individuals, A and B, A will have a duty under the Protection from Harassment Act 1997 not to 'pursue a course of conduct – (a) which amounts to harassment of [B]; and (b) which he knows or ought to know amounts to harassment of [B]'. This duty of A's is owed to B – it is imposed on A for the benefit of a particular individual: B. As has already been said, someone will commit a *civil wrong* if he breaches a duty owed to another. Someone who breaches a duty owed to no one in particular may be said to have committed a *public wrong*.

One of the marks of a duty that is owed to another is that it may be waived by that other.⁴ A duty which is owed to no one in particular cannot be waived by a particular individual. This follows as a matter of logic from what has already been said as to the nature of duties owed to others and duties owed to no one in particular. Suppose, for example, that John has a duty to do *x* and that duty is owed to Mary. Given that John's duty to do *x* was imposed on him for Mary's benefit, there does not seem much point in the law's requiring John to do *x* if Mary makes it clear that she is happy for John not to do *x* – unless, of course, Mary is in no position to form rational wishes as to how she wants to be treated by others because she is, for example, too immature or not in her right mind or ill-informed. So, as John's duty to do *x* is owed to Mary, Mary may release John from that duty so long, of course, as she is in her right mind, aware of the full implications of what she is doing and mature enough to decide for herself whether or not she wants John to do *x*. And, obviously, if Mary does release John from that duty, John will do no wrong to Mary if he does not do *x*. A Latin tag expresses this point – *volenti non fit injuria*: no wrong will be done to the willing.

On the other hand, suppose that Gary has a duty to do *x* and that duty is owed to no one in particular because it was imposed on Gary for the benefit of the whole community. In such a case, no particular individual will have the power to release Gary from this duty – as the duty in question was imposed on Gary for the benefit of the whole community, Gary can only be released from that duty if the whole community, acting through its representatives, indicates that it wishes Gary to be released from that duty.

There is an important exception to the rule that a duty that is owed to another may be waived by that other. This is the case where A owes B a duty which requires him to stop B doing something that she knows is dangerous. So suppose

⁴ This might account for why – if A has a duty to do *x* which was imposed on him for B's benefit – we say that A's duty to do *x* is *owed* to B. As B may waive A's duty to do *x*, we mentally associate A's duty to do *x* with a debt *owed* to B; the idea being that just as B may waive a debt that is owed to her, so she can waive A's duty to do *x*.

that Beth wants to sniff some glue – she knows that sniffing glue is dangerous but she is willing to take the risk in order to experience the temporary high that results from sniffing glue. Accordingly, she attempts to buy some glue from Paul’s shop. Suppose further that Paul has a duty not to sell Beth any glue because it is obvious that she wants to buy it for the purposes of sniffing it. The law will have imposed this duty on Paul in a paternalistic attempt to save Beth from herself – so Paul’s duty is imposed on him for Beth’s benefit and will therefore be owed to Beth. Beth will not be able to waive this duty, though she would obviously like to do so. The law’s intentions in imposing a duty on Paul not to sell glue to Beth would be frustrated if Beth were free to waive that duty. Beth would inevitably waive the duty and Paul would then be free to sell her the glue, which is not what the law wants.

So if A owes B a duty to stop B doing something that she knows is dangerous, then B will not be able to waive that duty of A’s. It is quite unusual for one person to owe another this kind of duty: if B wants to do something that she knows is dangerous, the law will generally allow her to get on with it and will not impose duties on other people to stop her doing what she wants to do. However, it has become increasingly common for someone who has knowingly put herself in harm’s way and suffered some kind of loss as a result to try and sue for compensation for that loss on the ground that someone else owed her a duty to stop her endangering herself. The courts have generally been hostile to such claims, only allowing that such a duty might have been owed in cases where the person who put herself in harm’s way was incapable of thinking rationally because she was too immature or because she was not in her right mind.⁵

So it has been accepted that if a prisoner is a clear suicide risk, the prison authorities will owe him a duty to take steps to stop him committing suicide.⁶ It has also been held that a petrol station manager will owe a child a duty not to sell him petrol if it is obvious that he wants to buy the petrol to get high by sniffing it.⁷ And it has been accepted that a school will owe a child on a school skiing trip a duty to take reasonable steps to stop him skiing off-piste – and this is so even if the child is aware of the risks involved in skiing off-piste.⁸ In contrast, a claim that the police owed a criminal a duty to stop him jumping out of a high window in an attempt to escape police custody was rejected by two judges out of three in the Court of Appeal.⁹ Similarly, in *Tomlinson v Congleton BC*¹⁰ the House of

⁵ See *Tomlinson v Congleton BC* [2004] 1 AC 46, at [46] (per Lord Hoffmann): ‘A duty to protect . . . self-inflicted harm exists only in cases where there is . . . some lack of capacity, such as the inability of children to recognise danger . . . or the despair of prisoners which may lead them to inflict injury on themselves . . .’

⁶ *Reeves v Commissioner of Police of the Metropolis* [2000] AC 360.

⁷ *E (a child) v Souls Garages Ltd*, *The Times*, 23 January 2001.

⁸ *Chittock v Woodbridge School* [2002] ELR 735 (although no breach of the duty was established in this case).

⁹ *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218 (the House of Lords refused leave to appeal: [2002] 1 WLR 1552).

¹⁰ [2004] 1 AC 46. The claimant in that case disregarded notices warning him that it was dangerous to swim in a lake controlled by the defendant council. The claimant suffered an injury as a result of diving into the lake and sued the defendant council for compensation, claiming that it had owed him a duty to stop him swimming in the lake. His claim was rejected (though the Court of Appeal had ruled 2:1 in his favour).

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Lords unanimously *rejected* an argument that if a council knows or ought to know that some adults are knowingly endangering themselves on council property – by, for example, swimming in a lake or climbing trees on land controlled by the council – the council will owe those adults a duty to stop them endangering themselves. It may also be noted that in Australia it has been held that a casino will not owe an inveterate gambler a duty not to allow him to lose his money at its tables.¹¹

THE NATURE OF A TORT

A tort is only *a form* of civil wrong – not all civil wrongs amount to torts. In order to understand when someone who commits a civil wrong will commit a tort, it is convenient to distinguish between cases where someone commits a civil wrong by breaching a judge-made duty owed to another and cases where someone commits a civil wrong by breaching a statutory duty owed to another.

Judge-made duties

Someone will commit a tort in breaching a judge-made duty owed to another if, and only if, the judge-made duty in question was *a non-contractual, common law duty owed to another to do something other than pay money to another*. This needs a bit of explanation.

The idea of a common law duty

Judge-made duties are commonly divided up into *common law duties* and *equitable duties*. The distinction goes back to the time when in England there were two distinct types of courts: Courts of Law (or Common Law) and Courts of Equity. The Courts of Equity acted as a corrective to the Courts of Law, granting remedies that were unavailable in the Courts of Law when it would be just and equitable to do so or setting aside remedies that were granted in the Courts of Law when it would be just and equitable to do so. This cut both ways. A claimant seeking a legal remedy for some grievance of his who had had no luck in the Courts of Law could try and see if the more generous Courts of Equity would help him. A defendant who had lost in a Court of Law and had a remedy granted against him could ask a Court of Equity to see if they would grant an order requiring his adversary not to take advantage of that remedy.

Of course, this is all history now. By the end of the nineteenth century, the two sets of courts were ‘fused’ with the result that all cases were heard by one set of courts. However, at the time when there was still a distinction between Courts of Law and Courts of Equity, a duty which someone had because the decisions of the Courts of Law said that he had that duty was known as a *common law duty* and a duty which someone had solely because the decisions of the Courts of Equity said that he had that duty was called an *equitable duty*.

¹¹ *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 (discussed, Cane 2001b). For an account of the (similarly negative) position of American law in this area, see Wolfe 1995.

So, for example, suppose that before the Courts of Law and the Courts of Equity were fused, Tom was given a parcel of land – Blackacre – to hold ‘on trust’ for Sarah. Suppose further that Tom asked a lawyer what duties he had in managing Blackacre. The lawyer would have told Tom that he had a common law duty to ensure that he did not use Blackacre in a way that unreasonably interfered with his neighbours’ use and enjoyment of their land – that is, he would have told Tom that according to the decisions of the Courts of Law he had a duty not to use Blackacre in a way that unreasonably interfered with his neighbours’ use and enjoyment of their land. The lawyer would also have told Tom that he had an equitable duty to manage Blackacre in Sarah’s best interests – that is, he would have told Tom that according to the decisions of the Courts of Equity (but not the Courts of Law) he had a duty to manage Blackacre in Sarah’s best interests.

Nowadays, despite the fusion of the Courts of Law and Courts of Equity, we continue to divide up our judge-made duties according to whether they are common law duties or equitable duties. Those judge-made duties that were called equitable duties pre-fusion are still called equitable duties today. Likewise, those judge-made duties that were called common law duties pre-fusion are still called common law duties today. So if someone holds a piece of land on trust for someone else we still say nowadays that the owner of that land has a common law duty not to use it in a way that unreasonably interferes with his neighbours’ use and enjoyment of their land and an equitable duty to manage the land in the best interests of whoever he holds it on trust for. What about a judge-made duty that came into existence after the fusion of the Courts of Law and Courts of Equity? Do we call that duty a common law duty or an equitable duty? How do we decide what to call it? The answer is: we tend to look at the form of the judge-made duty in question. If it is similar in content to a lot of other judge-made duties that we currently classify as being common law duties then we will tend to classify this duty as being a common law duty as well. Similarly, if it is similar in content to a lot of other judge-made duties that we currently classify as being equitable duties, we will tend to say that the duty at hand is an equitable duty as well. It is mainly a matter of impression.

It should be clear from what has just been said that the distinction between common law duties and equitable duties is completely arbitrary. It comes down to historical accident whether we classify a particular judge-made duty as being a common law duty or an equitable duty. The law should therefore treat someone who breaches a common law duty and someone who breaches an equitable duty in exactly the same way. Sensibly, the law is starting to do so.¹² The result is that, increasingly, only writers of textbooks on tort law have any interest in answering the question – has this individual breached a common law duty or an equitable duty? More often, the answer to that question has little

¹² See *United Scientific Holdings v Burnley Borough Council* [1978] AC 904, 924G–925B; *Tinsley v Milligan* [1994] 1 AC 340, 371A–C; *Target Holdings v Redfern* [1996] AC 421, 432F–H; *Bristol and West BS v Mothew* [1998] Ch 1, 17; Burrows 2002b. However, differences in the treatment of breaches of equitable and common law duties remain. A description of the more important ones may be found in Davies 1993; see also Meagher, Heydon and Leeming 2002, 831–41.

significance to the law and therefore to legal practitioners. Only writers of textbooks on tort law need concern themselves with this question because, by definition, someone who merely breaches an equitable duty has not committed a tort and is therefore of no interest to someone writing a textbook on tort law.¹³ This limitation on the concept of a tort has one useful side effect. If the concept of a tort embraced some or all breaches of equitable duties then a book on the English law of tort – dealing as it does with questions such as: In what situations will someone commit a tort? and What remedies will be made available if someone has committed a tort? – would become unmanageably large to write or read.

Contractual and non-contractual common law duties

Common law duties can be divided up into *contractual duties* and *non-contractual duties*. If A has a common law duty to do *x*, that duty will be contractual in nature if it arose because he or she entered into a valid contract with someone else. On the other hand, A's duty to do *x* will be non-contractual in nature if it arose for some other reason. Someone who breaches a contractual common law duty owed to another commits a *breach of contract*. Someone who breaches a non-contractual common law duty owed to another will commit a *tort* – so long as the duty in question was not a duty to pay money to another.

Suppose Alan has entered into a valid contract with Lara. In such a case, Alan will owe Lara a common law duty to do what Lara reasonably believed Alan was undertaking to do when he entered into that contract.¹⁴ This duty of Alan's is contractual in nature: it has arisen because Alan entered into a valid contract with Lara. So if Alan breaches this duty, he will commit a breach of contract. Suppose, on the other hand, Alan is driving down the road in his car. In such a case, Alan will owe other users of the road a common law duty to take care not to drive the car dangerously. This duty of Alan's is non-contractual in nature. It has not arisen because Alan has entered into a valid contract with someone. Rather, it has arisen for some other reason – the fact that it is reasonably foreseeable that other users of the road will be exposed to an unreasonable risk of being harmed if Alan drives the car dangerously. If Alan breaches this duty he will commit a tort.

¹³ *Important note.* Edelman 2002a offers two arguments in favour of the view that we should say that the breach of an equitable duty owed to another (in other words, an equitable wrong) is a tort. His first argument is that a tort involves the breach of a duty owed to another – and therefore the concept of a tort encompasses equitable wrongs (which also involve the breach of a duty owed to another). This argument does not stand up: we would not say that rape is murder because both involve committing a crime. His second argument is that the law responds to an equitable wrong in exactly the same way as it does to someone's committing a tort. Again, this argument does not stand up. We would not say that rape is murder even if the law responded to a rape in exactly the same way as it does to someone's committing a murder. The latest (18th) edition of *Clerk and Lindsell on Torts* includes chapters on breach of fiduciary duty and breach of confidence (both equitable wrongs) but this is not because the editors of that book think that these equitable wrongs are torts (they expressly say that they are not: C&L, 8), but because some tort cases raise issues of breach of fiduciary duty and breach of confidence and it therefore makes sense for pragmatic reasons to deal with those topics in a book on tort law.

¹⁴ *Smith v Hughes* (1871) LR 6 QB 597; *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125, 128; *The Hannah Blumenthal* [1983] 1 AC 854, 915H–916A.

It is important to note that contractual duties and non-contractual duties can overlap. Suppose, for example, that Karen pays Ian, a mini-cab driver, to take her to the airport. Once Karen is in Ian's cab, it is reasonably foreseeable that Karen will be exposed to an unreasonable risk of being injured if Ian drives the cab in a dangerous fashion. As a result, Ian will owe Karen a common law duty to take care not to drive the cab in a dangerous fashion.¹⁵ This duty will be non-contractual in nature. It does not arise because Ian and Karen have entered into a valid contract with each other. Rather, it arises because of the impact that Ian's driving the cab in a dangerous fashion may have on Karen's health. But when Karen gets into Ian's mini-cab, Ian and Karen will enter into a valid contract with each other and Karen will believe – and it will be reasonable for her to believe – that Ian is undertaking in that contract not only to take Karen to the airport but also to take care not to drive the cab in a dangerous fashion. As a result, when Karen gets into Ian's cab, Ian will owe Karen a *contractual* duty to take care not to drive the cab in a dangerous fashion. The upshot of all this is that when Karen gets into Ian's cab, Ian will owe Karen a contractual duty *and* a non-contractual common law duty to take care not to drive the cab in a dangerous fashion. So if Ian does, through lack of care, drive the cab in a dangerous fashion, he will commit both a breach of contract *and* a tort.

It is of considerable importance to the law to establish whether a person's conduct in a given case amounts to: (a) a breach of contract; *or* (b) a tort; *or* (c) a breach of contract *and* a tort. This is because the law treats people who break contracts very differently from the way it treats people who commit torts:

(1) *Exemplary damages*.¹⁶ The law does not allow exemplary damages – damages awarded in order to punish someone for the way he has behaved – to be awarded against someone who commits a breach of contract;¹⁷ but it does, in some cases, allow exemplary damages to be awarded against someone who commits a tort.¹⁸

(2) *Limitation*. The limitation period for obtaining a remedy against someone who commits a breach of contract runs from the moment the breach occurs;¹⁹ the limitation period for obtaining a remedy against someone who commits a tort generally runs from the moment the victim of that tort suffers 'damage' as a result of that tort being committed.²⁰

(3) *Remoteness*. Suppose Carl breaches a contract made with Nita and Nita suffers some kind of loss as a result. In this case, Nita will only be able to sue Carl for compensation for that loss if Carl knew or ought to have known, *at the time he entered into the contract* with Nita, that Nita was likely to suffer that

¹⁵ See below, p. 67.

¹⁶ Another, and in many ways preferable, term for exemplary damages is 'punitive damages'.

¹⁷ *Addis v Gramophone Co. Ltd* [1909] AC 488; *Perera v Vandiyar* [1953] 1 WLR 672; *Kenny v Preen* [1963] 1 QB 499. McBride 1995 criticises the law's refusal to allow exemplary damages to be awarded against someone who has deliberately committed a breach of contract.

¹⁸ See below, pp. 673–85.

¹⁹ Limitation Act 1980, s 5.

²⁰ See below, pp. 518–9.

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loss if he breached the contract in question. On the other hand, if Carl has committed a tort X in relation to Nita and Nita has suffered some kind of loss as a result, Nita will usually be able to sue Carl for compensation for that loss if it was reasonably foreseeable, *at the time Carl committed tort X*, that Nita would suffer that kind of loss as a result – and Nita may be able to recover compensation for that loss even if it was *not* reasonably foreseeable, at the time Carl committed tort X, that she would suffer that kind of loss as a result.²¹

Non-contractual common law duties to pay money to another

The breach of a non-contractual common law duty owed to another to pay money to someone else will *not* amount to a tort.

So, for example, suppose Eric has paid Dawn £500 by mistake. And let's suppose – as will usually be the case – that Dawn has a common law duty to pay the money back. This duty will be non-contractual in nature: Dawn won't have an duty to pay the money back because she contractually agreed to do so; she'll have a duty to pay the money back because she would be unjustly enriched if she kept it. Dawn will usually have a duty to pay the money back. But if Dawn fails to give the money back, she will not commit a tort.

Again, suppose that Wendy carelessly runs down Vijay in the street and Vijay sues her for damages, seeking to obtain compensation for the injuries he has suffered as a result of being run down. Suppose further that Vijay wins his case and judgment is entered against Wendy. In this case Wendy will owe Vijay a common law duty – obviously non-contractual in nature – to pay him the damages that she has been ordered to pay by the court. If she breaches this duty and does not pay up, she will not commit a tort.

Let's call a duty to do something other than pay money to another, a 'specific' duty; and a duty to pay money to another, a 'non-specific duty'. So the breach of a specific non-contractual common law duty owed to another will amount to a tort, while the breach of a non-specific non-contractual common law duty owed to another will not.

Statutory duties

When, if ever, will the breach of a statutory duty owed to another amount to a tort?

For example, if A is a public authority and B is any given member of the public, A will, broadly speaking, owe B a statutory duty under s 6 of the Human Rights Act 1998 not to violate any of B's 'human rights' as set out in the European Convention on Human Rights and the various Protocols to that Convention.²² If A breaches this duty, will A commit a tort? Again: if Mary visits Fred in his house, Fred will usually owe Mary a duty under the

²¹ See below, pp. 557–60.

²² The official title of the Convention referred to here is 'The European Convention for the Protection of Human Rights and Fundamental Freedoms'. However, in this book we will simply refer to this Convention as 'the European Convention on Human Rights' (ECHR for short).

Occupiers' Liability Act 1957 to take reasonable steps to see that she will be reasonably safe while she is in his house.²³ If Fred breaches this duty, will he commit a tort?

Most lawyers would say 'no' to the first question²⁴ but 'yes' to the second. But why? The most elegant answer, we feel, is that *the breach of a statutory duty owed to another will amount to a tort if the law will respond to the breach of that duty in the same way as it would respond to the breach of a specific non-contractual common law duty owed to another*. In other words, the breach of a statutory duty owed to another will amount to a tort if the rules that determine what remedies will be available when a specific non-contractual common law duty owed to another is breached will also apply to determine what remedies will be available when that statutory duty is breached. To save words, let's call these rules, *the tort remedy rules*.

So, the most important tort remedy rule says this: if A breaches a specific non-contractual, common law duty owed to B, B will be entitled – unless A has some kind of defence – to recover *compensatory damages* from A sufficient to compensate her for the actionable losses that A's breach has caused her to suffer. The same rule does *not* apply if A, a public authority, violates one of B's human rights in breach of the statutory duty that it owes B not to do so under s 6 of the Human Rights Act 1998. Section 8(1) of the 1998 Act merely provides that in 'relation to any act . . . of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. Section 8(3) goes on to say that:

[no] award of damages is to be made unless, taking account of all the circumstances of the case, including – (a) any other relief or remedy granted, or order made, in relation to the act in question . . . , and (b) the consequences of any decision . . . in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

Finally, s 8(4) provides that in 'determining . . . whether to award damages . . . the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under [the European Convention on Human Rights]'. Given these provisions, we cannot say that a public authority will commit a tort if it breaches the statutory duty it owes an individual under s 6 of the Human Rights Act 1998 not to violate his 'human rights' under the European Convention on Human Rights – the law's response to such a breach will not be governed by the same rules as the law's response to the breach of a non-contractual common law duty owed to another.

In contrast, it is well-established that the tort remedy rules *will* apply to determine what remedies will be available when an occupier of land breaches the duty he owes one of his visitors under the Occupiers' Liability Act 1957 to ensure that that visitor is reasonably safe for the purposes for which he or she

²³ Occupiers' Liability Act 1957, s 2(2).

²⁴ However, Stanton 2003 argues (at 3) that 'it seems almost certain' that a breach of duty under the 1998 Act 'will be regarded as a tort'.

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is on the occupier's land. So if Mary visits Fred's house and Fred breaches the duty he owes her under the 1957 Act to take reasonable steps to ensure that she is reasonably safe while she is in his house, Mary will be entitled to sue Fred, unless Fred has some kind of defence, for compensatory damages sufficient to compensate her for the actionable losses that Fred's breach caused her to suffer – just as she would be if Fred breached a specific non-contractual common law duty owed to Mary. In other words, the breach of an occupier's statutory duty under the Occupiers' Liability Act 1957 will be actionable in the same way as the breach of a non-contractual common law duty owed to another. Given this, we may say that an occupier who breaches this duty will commit a tort.

To take another example, under s 94(1) of the Employment Rights Act 1996 an employer will owe each of his employees a statutory duty not to dismiss that employee unfairly. If an employer breaches this duty will he commit a tort? The answer is 'no'.²⁵ The tort remedy rules will *not* apply to determine what remedies will be available when an employer breaches his statutory duty under the 1996 Act not to dismiss one of his employees unfairly. The rules which *do* apply to determine what remedies will be available when an employer dismisses one of his employees unfairly are set out in ss 111–132 of the 1996 Act and, while they are similar to the tort remedy rules, they are not the same.

It is, of course, for Parliament to determine what remedies will be available if a particular statutory duty owed to another is breached. Suppose we take a particular statutory duty owed to another and ask: will the tort remedy rules apply to determine what remedies will be available if that duty is breached? The answer will depend on what Parliament intended when it created the duty in question. If Parliament intended that the tort remedy rules should apply, then they will – and breach of the duty in question will amount to a tort. If Parliament intended that the tort remedy rules should not apply, then they will not – and breach of the duty in question will not amount to a tort.

Parliament sometimes makes it clear when it creates a statutory duty owed to another that it intends that the tort remedy rules should apply to determine what remedies will be available if that duty is breached. So, for example, when Parliament enacted the Sex Discrimination Act 1975 it created a raft of statutory duties owed to others not to discriminate against them on grounds of their sex. At the same time, it made it clear that the tort remedy rules should apply to determine what remedies will be available if one of those statutory duties is breached. Under s 66 of the 1975 Act, '[a] claim by any person . . . that another person . . . has committed an act of discrimination against [him or her] which is unlawful [under the Act] . . . may be made the subject of civil proceedings in like manner as any other claim in tort'.

Parliament will also sometimes make it clear when it creates a statutory duty owed to another that it does *not* intend that the tort remedy rules should apply to determine what remedies will be available if that duty is breached. As we have seen, this is the case with the Human Rights Act 1998 and the duty not to dismiss an employee unfairly under s 94(1) of the Employment Rights Act

²⁵ Stanton 2003, 4.

1996. Again, in s 2 of the Health and Safety at Work Act 1974, Parliament stipulated that an employer will owe each of his employees a 'duty . . . to ensure, so far as is reasonably practicable, the health, safety and welfare at work of [that employee]' while making clear at the same time that '[nothing in this Act] shall be construed . . . as conferring a right of action in any civil proceedings in respect of any failure to comply with [the] duty imposed by [s] 2'.²⁶

More often than not, though, when Parliament creates a statutory duty owed to another, it will not make it clear one way or the other whether it intends that the tort remedy rules should apply to determine what remedies will be available if that duty is breached. In such a case, it has to be *inferred* what Parliament's intention on this matter is.

Summary

A tort is a form of civil wrong – a breach of a legal duty owed to another. However, not all civil wrongs amount to torts. A will commit a tort if, and only if the duty that he breached was: (a) a specific non-contractual common law duty; *or* (b) a statutory duty *and* the law's response to that breach will be governed by the same rules that govern the law's response to the breach of a specific non-contractual, common law duty owed to another.²⁷ If A breaches any other kind of duty owed to another, he will not commit a tort. (See Diagram 1, overleaf.)

Is there a convenient term that we can use to describe a duty owed to another, breach of which will amount to a tort? Andrew Burrows uses the term 'tortious obligation' to describe this kind of duty.²⁸ The use of the word 'obligation' is unexceptionable – 'obligation' is just a fancy word for a duty that is owed to someone else. But 'tortious'? To say that a duty which is owed to someone else is a 'tortious obligation' is, literally, to say that it is a wrongful obligation – which is nonsense. But we have been unable to come up with anything better and so from now on we will use the term 'tortious' to describe any duty owed to another, the breach of which will amount to a tort.

So: someone will commit a tort if he breaches a tortious duty owed to another – and a duty owed to another will be tortious if: (a) that duty is a specific non-contractual common law duty; *or* (b) that duty is a statutory duty *and* the law will respond to the breach of that duty in the same way as it does to the breach of a specific non-contractual common law duty owed to another.

²⁶ Health and Safety at Work 1974, s 47(1)(a).

²⁷ Cf. the definition of a tort offered by Judge Toulmin QC in *R v Secretary of State for Transport, ex p Factortame Ltd (No. 7)* [2001] 1 WLR 942, at [150]: 'I define a tort as a breach of a non-contractual duty which gives rise to a private law right to the party injured to recover compensatory damages at common law from the party causing the injury.' This definition suffers from a couple of difficulties that make it inferior to our definition: (a) it does not make it clear that a breach of duty will only amount to a tort if the duty breached is owed to another; (b) it is possible for someone to commit a tort without being held liable to pay anyone else compensatory damages.

²⁸ Burrows 1994, 3; also Waddams 2003, 44.

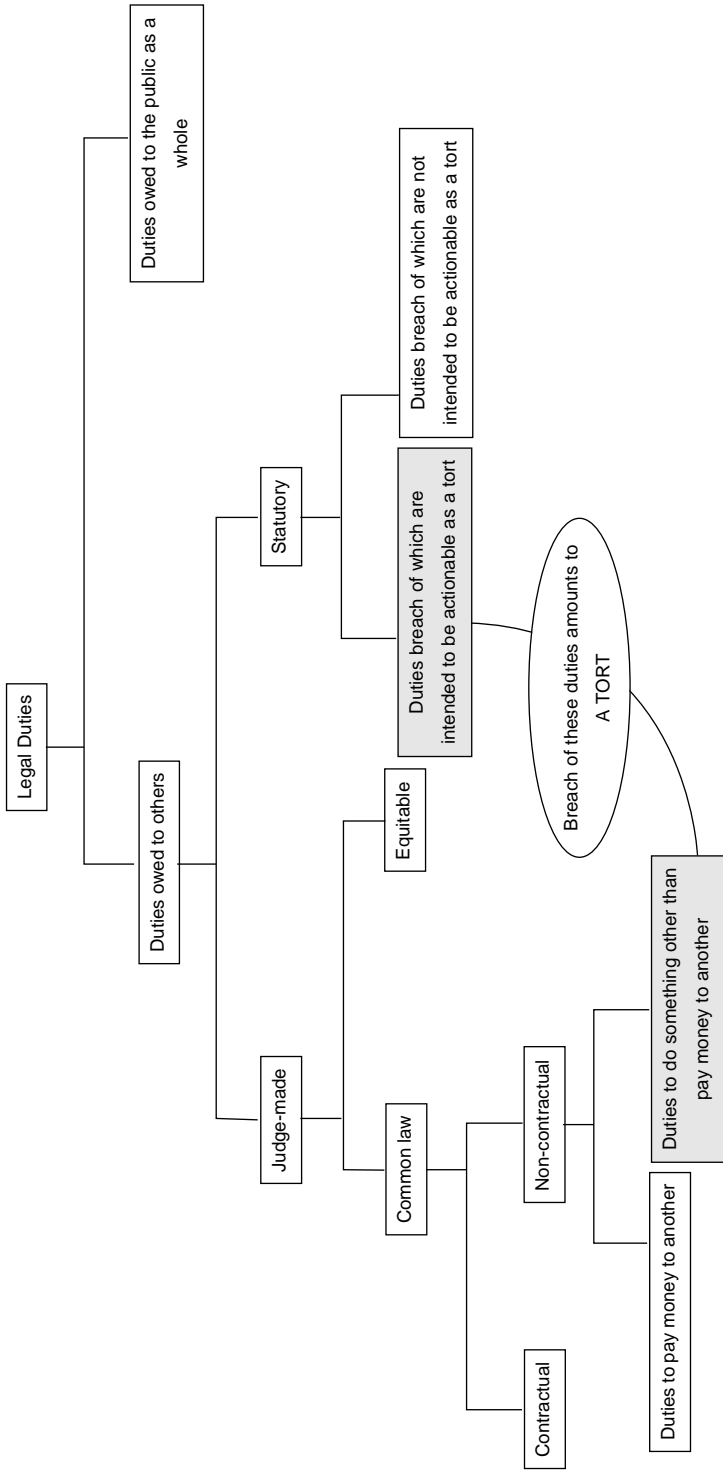


Diagram 1. What is a Tort?