



Service des formations professionnalisées

MASTER 1

International and European Law

UE6 Tort Law
(Cours de M. OTTO)

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Session 1

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Answer questions 1 – 4. Each question carries a maximum of five points. The total maximum is 20 points.

1. Answer all questions I. – V. There is one (and exactly only one) single best answer per question. No points will be deducted for wrong answers. Any question which is answered with more than one answer will be marked as wrong.

I. Which of the following statements best describes the attitudes of the courts in 14th century England?

- a. The writ of Trespass contained the requirement *vi et armis* which in the cases of *Rattlesdene v Grunestone* and *The Farrier's Case* were required only fictitiously by the court.
- b. The writ of Trespass contained the requirement *vi et armis* which in the case of *Rattlesdene v Grunestone* was and *The Farrier's Case* was not required only fictitiously by the court.
- c. The writ of Trespass contained the requirement *vi et armis* which in the cases of *Rattlesdene v Grunestone* was not and *The Farrier's Case* was required only fictitiously by the court.
- d. The writ of Trespass contained the requirement *vi et armis* which in the cases of *Rattlesdene v Grunestone* and *The Farrier's Case* were not required only fictitiously by the court.

II. The 19th century case of *Heaven v Pender* concerns...

- a. the breaking of ropes which held up a staging.
- b. underwear ("Long Johns") contaminated with chemicals.
- c. the breaking down of a horse-drawn coach.
- d. a partly decomposed snail in a bottle of ginger beer.

III. In *Donghue v Stevenson* (1932), one judge dissented. What was his name?

- a. Lord Atkin
- b. Lord Buckmaster
- c. Lord Denning
- d. Lord McMillan

IV. In *Winterbottom v Wright* (1842), the judges were in agreement that a claim for compensation of damages could not succeed. What was their common argument?

- a. They wanted to prevent the plaintiff from choosing between damages for tort and damages for breach of contract in order to prevent him from obtaining actual damages as well as damages for loss of earnings.
- b. They thought that the plaintiff who had a contractual claim should not be entitled to a claim in tort as well.
- c. Seeing as the plaintiff's claim was essentially one in tort, he should not additionally be entitled to a contractual claim.
- d. None of the above.

V. Which of the following statements concerning "The Modern Tort Crisis" is **untrue (=false)**?

- a. Tort law is well suited to fulfil compensation objectives.
- b. Tort law has overstretched itself in effort to do something it cannot do.
- c. Tort law has extended losses to where they should not fall.
- d. None of the above.

2. Glanville Williams describes “the Aims of the Law of Tort” (1951). Which are they and how can they be described? To which his conclusion does Williams come?
3. The Law of Tort is an illustration of the Common Law at work – with all its advantages and disadvantages. Discuss.
4. Read Lord Denning’s judgment in *Spartan Steel*. (The **words printed in bold** are explained at the end of the text) and answer the following questions:
 - I. (2 points) What do you think is the difference between consequential economic loss and pure economic loss? Please explain
 - a. using *Spartan Steel* as illustration and
 - b. abstractly.
 - II. (3 points) There is an old idea that the law of tort should be determined by a moral view of the demands of social responsibility which has been challenged by the theory that the law of tort should be determined by its function as a loss-distributing device. Might the results of the two views diverge in the facts of *Spartan Steel*?

LORD DENNING MR.

The plaintiffs, Spartan Steel & Alloys Ltd, have a factory in Birmingham where they manufacture stainless steel. The factory obtains its electricity by a direct cable for a power station of the **Midlands Electricity Board**.

In June 1969 contractors called Martin & Co (Contractors) Ltd, the defendants, were doing work on a road about a quarter of a mile away. They were going to dig up the road with a big **power-driven excavating shovel**. They made enquiries about the place of the cables, mains and so forth, under the road. They were given plans showing them. But unfortunately their men did not take reasonable care. The shovel damaged the cable which supplied electricity to the plaintiffs' works. The electricity board shut down the power whilst they mended the cable.

The factory was at that time working continuously for 24 hours all round the clock. The electric power was shut off at 7.40 pm on 12 June 1969, and was off for 14 1/2 hours until it was restored at 10.00 am on 13 June 1969. This was all through the night and a couple of hours more. But, as this factory was doing night work, it suffered loss. At the time when the power was shut off, there was an **arc furnace** in which metal was being melted in order to be converted into **ingots**. Electric power was needed throughout in order to maintain the temperature and melt the metal. When the power failed, there was a danger that the metal might solidify in the furnace and do damage to **the lining of the furnace**. So the plaintiffs used oxygen to melt the material and poured it from a tap out of the furnace. But this meant that the melted material was of much less value. The physical damage was assessed at £368. In addition, if that particular **melt** had been properly completed, the plaintiffs would have made a profit on it of £400. Furthermore, during those 14 1/2 hours, when the power was cut off, the plaintiffs would have been able to put four more melts through the furnace; and, by being unable to do so, they lost a profit of £1,767.

The plaintiffs claim all those sums as damages against the defendants for negligence. No evidence was given at the trial, because the defendants admitted that they had been negligent. The contest was solely on the amount of damages. The defendants admit that they are liable for the £368 physical damages. They did not greatly dispute that they are also liable for the £400 loss of profit on the first melt, because that was truly consequential on the physical damages. But they deny that they are liable for the £1,767 for the other four melts. They say that was economic loss for which they are not liable. The judge rejected their contention and held them liable for all the loss. The defendants appeal to this court.

At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable--saying that they are, or are not, too remote--they do it as matter of policy so as to limit the liability of the defendant.

In many of the cases where economic loss has been held not to be recoverable, it has been put on the ground that the defendant was under no *duty* to the plaintiff. Thus where a person is injured in a road accident by the negligence of another, the negligent driver owes a duty to the injured man himself, but he owes no duty to the servant of the injured man; nor to anyone else who suffers loss

because he had a contract with the injured man; nor indeed to anyone who only suffers economic loss on account of the accident. Likewise, when property is damaged by the negligence of another, the negligent **tortfeasor** owes a duty to the owner or possessor of the **chattel**, but not to one who suffers loss only because he had a contract entitling him to use the chattel or giving him a right to receive it at some later.

In other cases, however, the defendant seems clearly to have been under a duty to the plaintiff, but the economic loss has not been recovered because it is too remote. Take the illustration given by Blackburn J in *Cattle v Stockton Waterworks Co*: when water escapes from a reservoir and floods a coalmine where many men are working; those who had their tools or clothes destroyed could recover, but those who only lost their **wages** could not. Similarly, when the defendants' ship negligently sank a ship which was being towed by a **tug**, the owner of the tug lost his **remuneration**, but he could not recover it from the negligent ship although the same duty (of navigation with reasonable care) was owed to both tug and **tow**. In such cases if the plaintiff or his property had been physically injured, he would have recovered; but, as he only suffered economic loss, he is held not entitled to recover. This is, I should think, because the loss is regarded by the law as too remote.

On the other hand, in the cases where economic loss by itself has been held to be recoverable, it is plain that there was a duty to the plaintiff and the loss was not too remote. Such as when one ship negligently runs down another ship, and damages it, with the result that the cargo has to be discharged and reloaded. The negligent ship was already under a duty to the cargo-owners; and they can recover the cost of discharging and reloading it, as it is not too remote. Likewise, when a banker negligently gives a reference **to one who acts on it**, the duty is plain and the damage is not too remote.

The more I think about these cases, the more difficult I find it to put each into its proper **pigeon-hole**. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so **elusive**. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.

So I turn to the relationship in the present case. It is of common occurrence. The parties concerned are the electricity board who are under a statutory duty to maintain supplies of electricity in their district; the inhabitants of the district, including this factory, who are entitled by statute to a continuous supply of electricity for their use; and the contractors who dig up the road. Similar relationships occur with other **statutory bodies**, such as gas and water undertakings. The cable may be damaged by the negligence of the **statutory undertaker**, or by the negligence of the contractor, or by accident without any negligence by anyone; and the power may have to be cut off whilst the cable is repaired. Or the power may be cut off owing to a short-circuit in the power house; and so forth. If the cutting off of the supply causes economic loss to the consumers, should it as matter of policy be recoverable? And against whom?

The first consideration is the position of the statutory undertakers. If the board do not keep up the voltage or pressure of electricity, gas or water--or, likewise, if they shut it off for repairs--and thereby cause economic loss to their consumers, they are not liable in damages, not even if the cause of it is due to their own negligence. The only remedy (which is hardly ever pursued) is to **prosecute the board before the justices**. Such is the result of many cases, starting with a water board; going on to a gas board; and then to an electricity company: In those cases the courts,

looking at the legislative enactments, held that Parliament did not intend to expose the board to liability for damages to the inhabitants en masse. No distinction was made between economic loss and physical damage; and taken at their face value the reasoning would mean that the board was not liable for physical damage either. But there is another group of cases which go to show that, if the board, by their negligence in the conduct of their supply, cause direct physical damage to person or property, the cases seem to show that they are liable. But one thing is clear, the board have never been held liable for economic loss only. If such be the policy of the legislature in regard to electricity boards, it would seem right for the common law to adopt a similar policy in regard to contractors. If the electricity boards are not liable for economic loss due to negligence which results in the cutting off of the supply, nor should a contractor be liable.

The second consideration is the nature of the **hazard**, namely, the cutting of the supply of electricity. This is a hazard which we all run. It may be due to a **short circuit**, to a flash of lightning, to a tree falling on the wires, to an accidental cutting of the cable, or even to the negligence of someone or other. And when it does happen, it affects a multitude of persons; not as a rule by way of physical damage to them or their property, but by putting them to inconvenience, and sometimes to economic loss. The supply is usually restored in a few hours, so the economic loss is not very large. Such a hazard is regarded by most people as a thing they must put up with--without seeking compensation from anyone. Some there are who install a stand-by system. Others seek refuge by taking out an insurance policy against breakdown in the supply. But most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage.

The third consideration is this. If claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false. A machine might not have been in use anyway, but it would be easy to put it down to the cut in supply. It would be **well-nigh** impossible to check the claims. If there was economic loss on one day, did the applicant do his best to **mitigate** it by working harder next day? And so forth. Rather than expose claimants to such temptation and defendants to such hard labour--on comparatively small claims--it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage.

The fourth consideration is that, in such a hazard as this, the risk of economic loss should be suffered by the whole community who suffer the losses--usually many but comparatively small losses--rather than on the one pair of shoulders, that is, on the contractor on whom the total of them, all added together, might be very heavy.

The fifth consideration is that the law provides for deserving cases. If the defendant is guilty of negligence which cuts off the electricity supply and causes actual physical damage to person or property, that physical damage can be recovered, and also any economic loss truly consequential on the material damage. Such cases will be comparatively few. They will be readily capable of proof and will be easily checked. They should be and are admitted.

These considerations lead me to the conclusion that the plaintiffs should recover for the physical damage to the one melt (£368), and the loss of profit on that melt consequent thereon (£400); but not for the loss of profit on the four melts (£1,767), because that was economic loss independent of the physical damage. I would, therefore, allow the appeal and reduce the damages to £768.

Midlands Electricity Board	A power supplier (a body which sells electricity to consumers and businesses)
power-driven excavating shovel	A big digger used on building sites
arc furnace	A large hot oven used to melt metal
ingots	a piece of metal that has been made into a shape suitable to store, transport and process.
the lining of the furnace	The inner wall of a furnace
melt	the product of an metal-production process
tortfeasor	Someone who commits a civil wrong
chattel	an individual item of moveable property
wages	Money employees receive from their employers for their work
tug	A small powerful boat used (mainly in port) to pull big ships.
remuneration	Money paid for a service
tow	The ship pulled by a tug
to act on something	To do something because one did rely on a statement
pigeon-hole	here: Classification
elusive	Hard to understand or define
statutory body	A legal entity established by the law
statutory undertaker	Somebody who is by law required to provide a service
to prosecute someone before the justices	To bring forward criminal charges
hazard	Danger
short circuit	When electricity takes a direct and unintended path
well-nigh	nearly
to mitigate	to reduce