



## Video 1: Exploration

Introduction:

When should a person who causes harm have to pay you for that harm? Imagine that someone bumps into you, causing you to drop the shopping you are carrying, cracking eggs and breaking some bottles.

- ? While in practice you might not want to litigate, what should the legal position be?
- ? What is it that means that that person should pay the cost of the damaged shopping?

If you would like to think about these issues a little this is a good place to start. However, it's important that you start right. First, shape your own ideas, before the temptation to agree with everything you read about this issue really becomes too much. Only then look to the videos and other sources. You don't want to decide now, before you have the facts, but nor do you want how the facts or opinions are put before you at the beginning to decide how you think.

The questions in the worksheets are meant to get you to think about issues on your own, before diving in to see what other people think. It is very important to train your ability to see things when they are fresh. The first question is, when should a person who causes harm have to pay you for that harm? In other words, what are the reasons why we should pay for the harm we cause?

So, before we get back to our shopping, let's think about the area of law we find ourselves in. We call it "Tort". Tort comes from a French word for "wrong". You may also know it from the English word "torsion" for a twisting force, i.e. twisted and therefore wrong. The word's roots actually go all the way back to Latin, the word *tortus* meaning twisted or twining. Why do you think "twisted" comes to mean "wrong"? In common understanding, does "twisted", without saying more, suggest something that is correct? Or perhaps, does it suggest something in error? Have you heard the phrase "you're twisting my words"? What does it really mean?

Civil Obligations:

So, tort law is concerned with a particular group of civil obligations. Put most generally it is where one person causes harm to another in situations where the law says it was unacceptable. The most common example now is negligence: A owed a duty to take reasonable care to see that B is not injured in a foreseeable way by A's activities. This might not be a very helpful definition, but almost all attempts that have been made up to now to put the subject into a principled whole are with problems.

- ? An obvious example is where, through your negligence, you damage my bike. What other kinds of harm do you think the law of tort protects against?

Some argue that strictly speaking we should talk of the law of torts. This debate over a name represents different perspectives on how unified the different actions within tort law are; that is, can you call it one area, or the law of many different smaller areas? It is not particularly important right now, but you might like to think about it sometime: what makes any topic (legal or non-legal) unified, and what makes it separate and divided?



Tort is concerned with civil obligations, but it could also be thought of as civil *wrongs*. There are other kinds of wrongs and there are other kinds of civil obligations.

- a) First, many wrongs are prohibited by the criminal law. Very often the same events are both torts and crimes. A battery is both a tort and a crime. Theft in criminal law has an essentially parallel wrong in tort law. There are also many similar ideas in both areas of law: acting to defend yourself means you are not liable in criminal law or tort law, so long as you did so for reasons and in ways which the law accepts. We don't have space to talk about criminal law more now, but the relationship with tort can certainly be important.
- b) Second, there are other types of civil wrongs than tortious wrongs. The most useful example for us at the moment is contract law. Contracts are generally voluntary obligations we enter into and thus are obliged to carry out. Contract and tort often deal with similar issues or even the same ones, though at the same time, they can deal with very different ones. As a very large generalisation, in one lawyer's phrase, contract protects wealth while tort law protects health.
- c) Another part of the law of obligations is not necessarily about *wrongdoing* at all, though there might happen to be wrongdoing at the same time. Unjust enrichment generally means where one person, A, has been enriched, without good reason, at the expense of another, B, with the result that the B should normally be able to recover that enrichment from A.
- d) Finally, we might think about what we can get out of tort law. If someone injures you or damages your property, it would be great to be able to be healed or have your property made as good as new. Sadly, that's not directly possible. The closest we do is to value everything in monetary terms and award *damages* for the *damage* done. We sometimes award injunctions, an order prohibiting a person from doing something or requiring them to do something else, but these are relatively rare. What problems might we have when trying to put a price on everything?

Example:

Now that we have roughly worked out what tort law is, we can, at long last, get back to our shopping. You may remember the situation: someone bumps into you, causing you to drop the shopping you are carrying, cracking eggs and breaking some bottles. The question is, what reasons are there for why that person should pay for the damage done?

A reasonable starting point might be to check the alternative, which is that every time another person damages the shopping, that person must pay you for the shopping. The question is whether another person caused harm to you, right? That sounds reasonable, doesn't it? The bumper damaged the shopping so the bumper should pay. Should he? Let's just take a few examples.

- i. First, the bumper bumped only because he was pushed by an idiotic passer-by: the bumper was not in control of his body and only just avoided being hurt himself. That is, *the bumper was not in control of himself at the time, he was not acting voluntarily*. Should the bumper pay you for the damage?
- ii. Second, the bumper did indeed bump you, but only because you stepped out into the road without looking, and thus the fact that the bumper bumped was entirely your responsibility. That is, *you were the cause of the accident*. Should the bumper pay you for the damage?
- iii. Third, the bumper bumped only because he slipped on some black ice which was not reasonably visible; the bumper otherwise took



appropriate care while walking along. That is, *the bumper was acting reasonably and was not at fault in causing the harm*. Should the bumper pay you for the damage?

- iv. Fourth and finally, you were carrying the shopping to the check-out counter in a supermarket when the bumper bumped in order to buy it. That is, *you were not the owner of the shopping yet*. Should the bumper pay you for the damage? Or pay someone else?

From these examples we can see that there are certain questions we have to answer to decide whether someone who causes harm must pay for it. In any one situation, different questions might be in play. Tort law uses different specific torts to collect questions together. In our example, the tort in question was negligence, the most common tort. If our scenario was about telling lies about someone else in order to attack their reputation, the relevant tort would be defamation. If I punch someone, the tort is battery. There are many others. In a large number of torts, the four examples I just mentioned, we have to ask for at least the four things noted: a *voluntary action* which *causes*, through the *fault* of the other party, harm to *the person claiming*. Of course, there are a number of complications to this, and sometimes further or other requirements, including defences the defendant might raise, but this is a good start.

Negligence:

For the moment, we're going to look at negligence. The name of this tort shows that the type of fault involved is so important lawyers came to name the tort after it: the defendant's *negligence* caused the claimant to suffer damage that the law recognises and gives protection against. In fact, there is an earlier stage in the calculation in negligence in which the defendant was supposed to take care to see that he did not harm the claimant. We call this the *duty of care*. There are many such duties all the time.

- ? Can you think of the activities you do when you think the law requires you to take care of others? As a hint, essentially anything where you might reasonably foresee that you would cause personal injury or property damage to another! Do you do any such activities in your daily life? I do, and I'm pretty boring compared to what I imagine you all might get up to.

Let's go back to the definition of negligence, assuming for the moment that the defendant owed the claimant a duty to take reasonable care not to cause harm to the claimant. We might also assume that the defendant caused legally recognised harm to the claimant. The issue we now need to look at is *fault*. This is one of the main reasons English tort law decides that someone who has caused harm should pay for that harm: because that person was at fault for causing the harm. In the tort of negligence, we know that fault is itself called *negligence*. The issue now, and the last thing we're going to discuss, is what that standard, *negligence*, means.

- ? What do you think it means to describe someone as "negligent"?
- ? What are the other words you might use for that?
- ? Are there other levels of fault you might consider greater or less serious than *negligence*? Examples might be "gross negligence" or "a small slip".

In fact, English law decides whether someone is negligent by asking whether that person lived up to a standard of behaviour and care. If the defendant did not live up to that standard,



the defendant is negligent. If the defendant did live up to that standard, the defendant is not negligent. What, then, is that standard? It is the standard of the “reasonable person”: what would the reasonable person have done at that time and in those circumstances.

- ? On the one hand, this is relatively simple, right? You’re a reasonable person, so you’d ask yourself what you would have done, right? Well, it may be that you are just like this mythical ‘reasonable person’, but how can we be sure? In a real case, a judge will have to decide whether the defendant was negligent, and the defendant might have lived a completely different life to the judge. What is one man’s common sense might be another man’s total idiocy.

We therefore need a simple enough test to ask a judge to apply. English law has for centuries guided fact-finders in court on this deceptively simple question. One useful enunciation of these ideas, not a formula expressly recognised by the law in England, but a useful introduction, can be found in an American case. It is a decision of a very famous American judge, Judge Learned Hand and it has given rise to what has been called, the Learned Hand Formula. The case was *US v Carroll Towing* 159 F.2d 169, in 1947. What do you think of the case? (<https://h2o.law.harvard.edu/collages/2923>) That test said that the reasonable person calculates:

- i. The probability of harm
- ii. the gravity of the resulting injury
- iii. the burden of adequate precautions.

Underlying this test is an idea of what a reasonable person would foresee as the harm, how likely it is that harm would happen and how bad it would be if it happened. What harm is reasonably foreseeable? A reasonable person might act to prevent some harms but not others, so it will depend on the circumstances.

- ? Can you think of any circumstances which would make calculating what a reasonable person would do difficult?

Now that tort, negligence, and the standard of the reasonable person have been introduced, you are in a position to read the case of *Nettlehip v Weston*.

<http://www.bailii.org/ew/cases/EWCA/Civ/1971/6.html>