"Torts: Long History and Fruitful Future"
Keynote address delivered by Kemal Bokhary* on 13 May 2022
at an online Law Conference on
Tort Law Reform in Asia and Beyond
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https://webapp3.law.cuhk.edu.hk>conf

1. Comparative law is a highly beneficial thing. There are many ways in which to pursue it. An international conference is one way. It is probably the best way.

2. Every Common Law jurisdiction has developed its own Common Law. But the Common Law of England is, as Mr Justice Story said in *United States v Wonson* [1], "the grand reservoir of all our jurisprudence"[2]. So our shared history in the law of tort begins in the 12th century with the advent of the tort of detinue, one of the oldest actions at Common Law. The first reported tort decision appears to be that of the Court of King's Bench in *The Case of Thorns*[3] in the 15th century. There the plaintiff succeeded in the tort of trespass *quare clausum fregit* against a neighbour who had trampled on the plaintiff's crops while collecting thorns which the neighbour had cut but which had fallen on the plaintiff's land.

3. Defining your terms is a desirable start. But a common failing of definitions is that of being accurate without being particularly illuminating. Consider this statement: "Those civil rights of action

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[1] 28 F Cas 745 (1812)

[2] Ibid at p 750

[3] *Hulle v Orynge* (1466) Year Books, Michaelmas, 6 Edward IV, folio 7a placitum 18

which are available for the recovery of unliquidated damages by persons who have sustained injury or loss, and where there is no actual injury or loss, some of their rights protected by law have been violated by acts or omissions, statements of others in breach of a duty or contravention of a right imposed or conferred by law rather than by agreement, are rights of action in tort." [4]

4. This attempted definition of tort, which is not free from the common failing to which I referred, appears in the tort volume of *Halsbury's Laws of Hong Kong*. Since I chair the Editorial Advisory Board of that series, I accept responsibility.

5. When delivering his celebrated lectures on the Common Law, the future Mr Justice Holmes openly accepted that tort law can do no more than lay down "rules for determining the conduct which will be followed by liability if it is followed by harm"[5]

6. None of this is to say that lawyers do not understand each other when they say "tort". We do. But that is not enough. The rule of law requires that the law be intelligible to the general public.[6] Saint Thomas More said in *Utopia* (1516) that "[i]f laws are not clear, they are useless."[7] Perfect clarity is a utopian ideal. In the real world, we aim for at least reasonable clarity.

7. Suppose a member of the general public asks "What is a tort?" We could answer by way of illustration. That might be done along these lines: "Well, there are many different torts. If, for example, while you were crossing the road, a motorist carelessly ran you

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[4] 47 *Halsbury's Laws of Hong Kong* 2nd 2020 at p 187 para 380.001

[5] *Holmes' Common Law* (Little, Brown & Co, 1881) at p 79

[6] Lord Scott of Foscote, "Damages: An Area of Incoherence?", *University of Hong Kong Common Law Lecture Series 2007-2007* 1 at p 1

[7] Page 197 of the version edited by G M Logan, R M Adams and C H Miller, and published by Cambridge University Press in 1995

down and injured you, you could sue him in the tort of negligence for compensation (which his insurers would pay). Or suppose your neighbour keeps making noise in his home depriving you of peace and quiet in yours. Then you could sue him in the tort of nuisance for an order stopping him and an award of compensation. If, to take another example, a newspaper published, or an internet service provider uploaded, untrue things harming your good name, then you might be in a position to sue them in the tort of defamation for compensation and an order preventing repetition."

8. Having told our questioner that, we might add something like this: "Those are just some examples. Other examples are the specific economic torts of conspiracy, intimidation, injurious falsehood, deceit, interference with contractual relations, unfair competition, passing-off and unwarranted disclosure of confidential information. Their names will give you a clue as to their nature. These specific economic torts, or some of them, come under the umbrella of a general economic tort of interference with business by unlawful means."

9. By now, the questioner will have a general idea of what tort is about.

10. Law needs continuity and updating. Thus the case of *O (a child) v Rhodes* [8] set the present scope of the tort, originating in the 19th century, of intentionally causing physical or psychological harm.

11. There have of course been flaws in tort at Common Law. The two worst were, I think, (i) the rule that contributory negligence barred claims in negligence and (ii) the doctrine of common employment. Both have long been abolished by legislation.

[8] [2016] AC 219

12. Of judicial developments in tort law, I consider the one in *Donoghue v Stevenson* [9] the best. The development of a tort of "misuse of private information" [10] to protect personal privacy merits an honourable mention. So do developments on vicarious liability, providing tort victims with recourse against persons who are able to satisfy awards and can justly be required to do so.

13. Twenty years ago in the *Ritz-Carlton Hotel* case[11], we applied "close connection" as a basic criterion for imposing vicarious liability. The United Kingdom Supreme Court also applies that criterion. - most recently two years ago in the *Morrisons Supermarkets* case[12]. Leaving aside vicarious liability, a parent company may be found to have so intervened in the management of its subsidiary's operations as to have assumed a duty of care towards those harmed by negligence in the carrying out of those operations. The United Kingdom Supreme Court said so in the recent case of *Lungowe v Vedanta Resources plc* [13].

14. Judicial developments in tort are sometimes by turns of 180 degrees. Having created an advocates' immunity on public policy grounds in *Rondel v Worsley* [14], the House of Lords removed it 33 years later in *Arthur J S Hall & Co v Simons*[15] as no longer in the public interest. Sometimes the courts extend the law. At other

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[9] [1932] AC 562

[10] Per Lord Nicholls of Birkenhead in *Campbell v MGN Ltd* [2004] 2 AC 457 at para 14

[11] *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* (2002) 5 HKCFAR 569

[12] *WM Morrisons Supermarkets plc v Various Claimants* [2020] AC 989

[13] [2020] AC 1045

[14] [1969] 1 AC 192

[15] [2002]1 AC 625

times, for instance in *Royal Bank of Scotland v JP SPC 4* [16] decided by the Privy Council yesterday, they decline to do so.

15. Appeasement, justice, deterrence and compensation were identified by Professor Glanville Williams as tort law's purposes.[17] Great judges have spoken in great cases[18] of the vindicatory and deterrent dimensions of tort damages.

16. As Sir William Blackstone's discussion of private wrongs[19] shows, the history of tort at Common Law spans a long and broad swathe. More than 300 years before the *Trail Smelter* awards[20] on environmental protection under international law, the Court of King's Bench had held in *Aldred's Case* [21] that a person adversely affected by the offensive smell of his neighbour's pigsty could sue in the tort of nuisance at Common Law. Professor F H Lawson has detected the influence of customary law, Roman law and natural law on the development of delictal responsibility, which is the Civil Law equivalent of tortious liability at Common Law.[22] Whatever the system, this area of the law is holistic and fertile.

17. Tort law often serves more than one purpose at the same time. Milton contended in *Aeropagitica* [23] for "liberty to know, to utter

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[16] [2022] UPKPC 18. From the Isle of Man of which jurisdiction First Deemster Doyle has taught me much

[17] "The Aims of the Law of Tort" (1951) 4 Current Legal Problems 137

[18] Chief Justice Pratt (later Lord Chancellor Camden) in the trespass case of *Wilkes v Wood* (1763) Loft 1 at p 18; Lord Wilberforce in the defamation case of *Broome v Cassell* [1972] AC 1027 at p 1114; Lord Steyn in the deceit case of *Smith New Court Securities v Citibank* [1997] AC 254; and Lord Nicholls of Birkenhead in the misfeasance in public office case of *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at para 65

[19] *Blackstone's Commentaries* (Clarendon Press, M DCC LXVIII) Book III

[20] (1938,1941) RIAA ii 1905

[21] (1610) 9 Co Rep 57b

[22] F H Lawson, "Notes on the History of Tort in the Civil Law" (1940) 22 Journal of Comparative Legislation and International Law 136

[23] Printed by Matthew Simmons and Thomas Paine in 1644

and to argue freely according to conscience". In *Cheng v Tse*[24], we improved the balance between the right to reputation and those iconic liberties [25]. We reconfigured the defence of fair comment so that honesty of belief is the touchstone. Consequently, the defence is not defeated by actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation. [26]

18 James Fitzjames Stephen (later Mr Justice Stephen) said that "analysis without history is blind".[27] Determining the law's present state may involve examining its previous state.[28] "In order to know what [the law] is, Mr Justice Holmes said, "we must know what it has been, and what it tends to become".[29] I would add that the law's past and present informs its future.

19. I thank you for your patience and our hosts for this opportunity to address you, which I esteem a honour. With your permission, I thank them on your, as well as on my own, behalf for organizing this event so wonderfully well. We are a diverse group. Awareness of diversity is, as Dean Wolff has pointed out [30], conducive to synergy. We have now met remotely. Let us hope to meet in person someday soon.

20. We have looked at history. That is not living in the past. A philosopher said that although life can only be understood

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[24] *Cheng v Tse* (2000) 3 HKCFAR 339

[25] Milton wrote n *Areopagitica* of "liberty to know, to utter and to argue freely according to conscience"

[26] Dealt with in Kemal Bokhary: *Human Rights: Source, Content and Enforcement* (Sweet & Maxwell, 2015) at paras 7.006 and 11.027-11.029

[27] "The Edinburgh Review" cxiv 481

[28] A notable instance of this is Chief Baron Palles's judgment in *Stephenson v Weir* (1878) 4 LR IR 389

[29] *The Common Law* above at p 1

[30] Lutz-Christian Wolff: *The Art of Law Teaching* (Springer, 2020) at para 10.6

backwards, it must be lived forwards.[31] So, too, the law. I hope to leave the law better than I found it. Beyond that, I entrust further improvements to others - above all to my grandchildren.

[31] *Soren Kierkegaard's Journals*, Vol IV (circa 1843)