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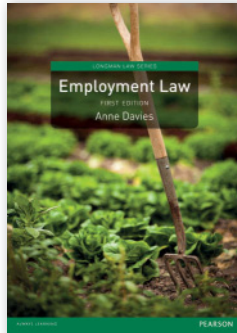
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Nicholas J. McBride and Roderick Bagshaw

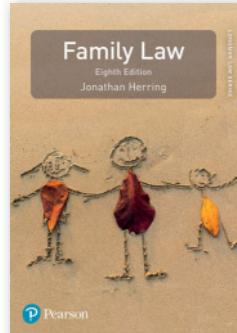
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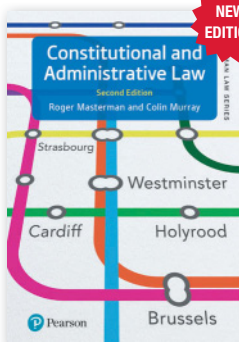
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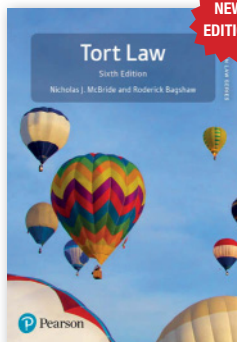


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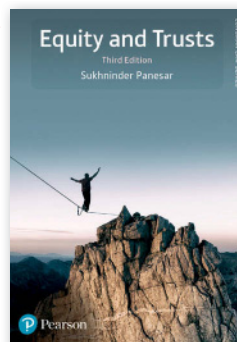
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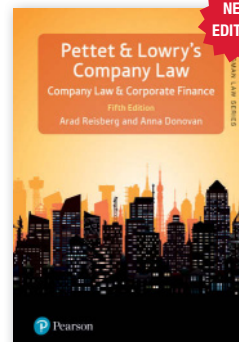


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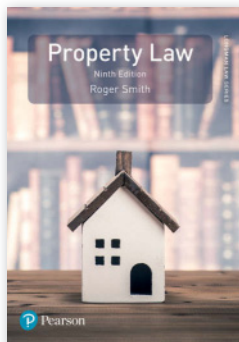


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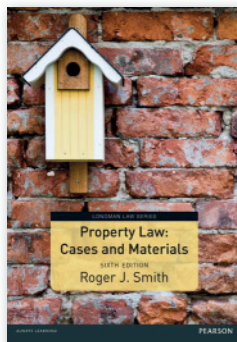


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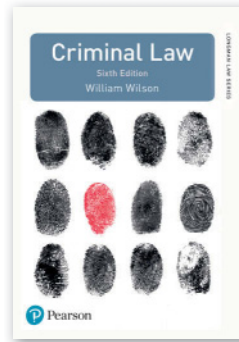
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Tort Law

Sixth edition

Nicholas J. McBride

Fellow of Pembroke College, Cambridge

and

Roderick Bagshaw

Fellow of Magdalen College, Oxford



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To
Liz, Corin and Arthur
and
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Text

Extract on page 19 from *Van Colle v Chief Constable of Hertfordshire* [2009] 1 A.C. 225, at [58]; Extract on page 50 from *Iqbal v Prison Officers Association* [2010] QB 732, at [72]; Extract on page 50 from *Re F* [1990] 2 AC 1, 72; Extract on page 55 from *Re F* [1990] 2 AC 1, 72; Extract on page 70 from *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, at [22]; Extract on page 70 from *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, at [29]; Extract on page 92 from *Tomlinson* [2004] 1 AC 46, at [46]; Extract on page 103–104 from *Donoghue v Stevenson* [1932] AC 562, 580; Extract on page 138 from *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] AC 80, at 107 (per Lord Scarman). Extract on page 139 from *Hinz v Berry* [1970] 2 QB 40, 42; Extract on page 142 from *McLoughlin v O'Brian* [1981] 1 QB 599, 624 (per Griffiths LJ), quoted in Nolan 2004, 20; Extract on page 144 from the House of Lords' decision in *The Aliakmon* (1986), [2011] QB 86, at [132]; Extract on page 146 from *Hunter v Canary Wharf* [1997] AC 655, 676 (per Pill LJ); Extract on page 153 from *Spartan Steel & Co Ltd v Martin* [1973] 1 QB 27, 38–39; Extract on page 160 from *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 183; Extract on page 160 from *Yuen Kun Yeu v Attorney-General for Hong Kong* [1988] 1 AC 175, 197; Extract on page 163 from *Arthur J S Hall v Simons* [2002] 1 AC 615 (not followed by the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12); Extract on page 163 from *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520; Extract on page 164 from *Vowles v Evans* [2003] 1 WLR 1607 (noted, Elvin 2003a); Extract on page 164 from *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; Extract on page 182 from *Ministry of Housing v Sharp* [1970] 2 QB 223, 268; Extract on page 183 from *Cattle v The Stockton Waterworks Company* (1875) LR QB 453, 457; Extract on page 189 from *Stovin v Wise*, [1996] AC 923, 943; Extract on page 194 from *Capital & Counties plc v Hampshire County Council* [1997] QB 1004; Extract on page 195 from *Anns v Merton London Borough Council* [1978] AC 728; Extract on page 195 from *Jacqueline Hill*, [1989] 1 AC 53, 63; Extract on page 197 from *Lord Browne-Wilkinson*, [1995] 2 AC 633, 749; Extract on page 206 from *Kent v Griffiths* [2001] QB 36, at [47]; Extract on page 213 from *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 364; Extract on page 233 from *Nettleship v Weston* [1971] 2 QB 691, 699; Extract on page 233 from *Nettleship v Weston* [1971] 2 QB 691, 700; Extract on page 234 from *Nettleship v Weston*, [1971] 2 QB 691, 707; Extract on page 235 from *Wilsher v Essex Area Health Authority* [1987] 1 QB 730, 749; Extract on page 238 from *Goldman v Hargrave* [1967] AC 645, 663 (per Lord Wilberforce); Extract on page 241 from *Miller v Jackson*, [1977] 1 QB 966, 981–2; Extract on page 241 from *Miller v Jackson*, [1977] 1 QB 966, 985 (per Geoffrey Lane LJ); Extract on page 243 from *McNair*

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Preface to the sixth edition

The Preface to the fifth edition of this text expressed the hope that tort law was in for a period of relative quietude in terms of future developments, as most of the important questions relating to the law of tort had seemed to be answered (whether well or badly is another matter) and it was hard to see any appetite for reopening those questions. While followers of this text will generally have found it reliable in its predictions – both in relation to how the courts will decide concrete cases, and as to the future development of tort law – we must confess to having missed the mark with this one.

The past couple of years have seen the UK Supreme Court resurrect the tort in *Wilkinson v Downton* from the grave in which Lord Hoffmann sought to bury it (*O (a child) v Rhodes* (2015)), expand the law on vicarious liability in such a violent and unexplained manner that it is now extremely difficult to state what limits exist on that form of liability (*Mohamud v Morrison Supermarkets plc* (2016), *Armes v Nottinghamshire County Council* (2017)), recognise a new tort of maliciously instituting civil proceedings against another (*Willers v Joyce* (2016)), and attempt in an unprecedented manner to rewrite the entire law on when a defendant to a civil claim will be able to raise a defence of illegality to the claimant's claim in a case that had nothing to do with tort law (*Patel v Mirza* (2016)). We have also seen, in *ABC v St George's Healthcare NHS Trust* (2017), the Court of Appeal ignore the UKSC's very clear decision in *Michael v Chief Constable of South Wales Police* (2015) as to what approach the courts should adopt in cases where a public body is sued for failing to save someone from harm; while in *Wilkes v DePuy International Ltd* (2016), Hickinbottom J muddied the waters as to when a product will be regarded as being defective under the Consumer Protection Act 1987 by ruling that such an inquiry should not be affected by any categorisation of the kind of defect the product is supposed to be suffering from and should instead rest on a consideration of all the circumstances 'no more and no less' (though it is hard to see what 'more' the courts could take into account).

In so far as it is possible to detect a trend underlying these developments, it may be captured by Lord Neuberger's remarkable address on 'Some Thoughts on Principles Governing the Law of Torts' – delivered to a conference in Singapore on 'Protecting Business and Economic Interests' on 19 August 2016 and available on the UK Supreme Court website – where Lord Neuberger (sadly now retired as President of the UK Supreme Court) expressed himself sceptical as to whether judges could or 'should decide tort cases by applying well established principles to the facts of those cases' and instead proposed a much larger role for judges' deciding tort cases 'by reference [to] what they see as the appropriate policy considerations as applied to those facts'. Such words may be seized upon as manna from heaven by students who would wish for nothing more than to be released from the necessity of studying the hundreds of pages making up this text and told instead that all tort cases can be resolved in accordance with the law by simply applying a range of a hundred or so policy factors to the facts of the case. Perhaps the future of tort law texts is to compete in compiling lists of such policy factors, together with cases

that are taken as demonstrating such factors at work. However, we reject such a vision of what a tort law text should look like, as well as Lord Neuberger's assertions that tort law is 'innately incoherent', that the law of tort provides 'unfertile ground for any clear, general underlying philosophy', that the 'analysis of tort cases, at least in the United Kingdom, appears to demonstrate a notable degree of disarray and a marked lack of reliable principle', that the fact that it is much easier to sue public bodies for a failure to act under the Human Rights Act 1998 than the common law of negligence is 'symptomatic of such issues being driven by policy considerations rather than any great principle' (on which, see McBride 2016a¹), and that there are no 'reliable principles by which allegations of professional negligence or of other torts are to be assessed'. Of course, there may be an element of self-fulfilling prophecy about Lord Neuberger's remarks: the more judges think along the above lines, the more it will come to be the case that it is correct to think along these lines. However, the core of sound principle that underlies the law of torts as an intelligible and distinct area of law remains, for the time being, discernible and we have tried, as in all previous editions, to provide students with a clear guide as to how to make sense of this area of law.

We have sought in this edition to ensure that the guidance provided by this text occupies significantly fewer pages than in the previous edition, so that the task of properly mastering tort law remains within the grasp of the average, hard-working student. The fifth edition comprised 38 chapters; whereas this edition comprises 32. In terms of page length, this edition is about ten per cent shorter than the previous one. However, we hope that readers of this edition will find that we have managed to do more with less: providing just as complete an account of the law of tort as the previous edition while fully explaining any and all recent developments in the law that have occurred since the last edition, including those mentioned above.

Nicholas J. McBride
Roderick Bagshaw

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¹ All citations of articles and papers in this text follow the Harvard system, where a complete citation for the article or paper cited can be found at the back of this text.

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Chapter 1

The basics

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Aims and objectives

Reading this chapter should enable you to:

- (1) Understand what a civil wrong is, and that a tort is a form of civil wrong.
- (2) Begin to understand what forms of behaviour will amount to torts.
- (3) Understand what remedies will be available when a tort has been committed.
- (4) Come to grips with various different views of what tort law is 'about'.
- (5) Distinguish tort law from other areas of law, such as criminal law or property law.
- (6) Understand what role insurance plays in tort claims and the way tort cases are decided.

1.1 The function of tort law

Tort law is one of the most fundamental legal subjects that you can study. This is because the function of tort law is to determine what legal rights¹ we have against other people, free of charge and without our having to make special arrangements for them, and what remedies will be available when those rights are violated.

In *Donoghue v Stevenson* (1932), Mrs Donoghue and a friend of hers went to a café in Paisley, Scotland. Donoghue's friend ordered an ice cream 'float' for Donoghue. Francis Minchella, the café owner, served Donoghue with a tumbler of ice cream and an opaque bottle of ginger beer. Minchella poured some of the beer over the ice cream to create the 'float' and left the bottle – now half full – on Donoghue's table. After Donoghue had eaten some of the 'float', she topped it up by pouring onto it some more ginger beer.

¹ From now on, whenever we use the word 'right', we mean by that a legal right, not a moral right.