COURSE: CERTIFICATE IN CREDIT MANAGEMENT

SUBJECT: LAW MODULE 4

UNIT

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Introduction

The law of tort is a fundamental area of Irish law and, in addition to being a 'core' subject in any course in law, a clear understanding of its principles is required for any course in business today. You may be surprised to find that Tort law is primarily a Common Law area. That is, its rules have been developed through the decisions of the courts rather than being laid down by statute. Therefore, case law is the single most important element of Tort, as it is only through examining the details of cases together with the outcome that we can have any idea as to what actually constitutes a tort in law in the first place. There is now a significant amount of statutory legislation in this area, however, many statutes have been enacted to support or to add weight to a rule or principle already established in Common Law.

Landmark cases are very important, so it is essential that you understand the principles in these cases as the same issues will arise over and over again. In any scenario, you must look to the cases to see if any of the points apply. These real cases are very good ways to learn about the complexities of tort, and we can also benefit from the various decisions made as we can be sure that all the facts of each case have been well and truly considered by experts in this field. But as a student of law, it is also important that you have an opportunity to consider the facts of a case, to interpret those facts and to decide on what the possible outcome might be. In your second assignment you will have an opportunity to do this.

There are a number of different areas in Tort Law, in fact it is a vast area of law, but regrettably, we will only have time to cover two areas in this course. The two areas that we will focus on are Negligence and Defamation. First of all, negligence is the most important area of Tort Law, and as credit professionals, we need to have some understanding of what the term 'duty of care' means in everyday business. Do we have a duty of care to our customers? Do they have a duty of care to us? And if so, what are the consequences if that duty is breached by either party?

Negligence also encompasses the important areas of product liability, occupier's liability and employers' liability, all of particular importance to anyone in business. In this section we also take a look at professional negligence and vicarious liability - the former being concerned with the duty of care owed to a client by any professional, and the latter which is concerned with liability which arises out of instructions given to others. If we are working in a recognised profession in the first instance, or if we are managers giving instructions in the second, then this area of law is of great importance to us.

In this section we also examine negligent misstatement and take a closer look at its relevance in the area of issuing or depending on credit references. If you are a member of a credit circle or industry group, or if you regularly issue credit references, then this section is very relevant to you. Similarly, if you depend on credit references in your line of work, it is important to know the legal status of any such reference.

This section is completed with a review of the various defences available in an action for any type of negligence.

Defamation is equally important, particularly as it is concerned solely with communication. In credit management, communication is our core function. Being involved in credit means that not a day goes by when we are not in communication of one form or another with customers and others. So we will benefit from an examination of this area of tort and should be able to recognise situations which arise on a daily basis which could give rise to allegations if we are not careful. We have a common law duty to act as a 'reasonable' person – i.e. a hypothetical careful person. Although many of the cases specifically involving credit that have come before the courts have so far involved banks or financial institutions, it is only a matter of time before this is extended into the area of trade credit. There have been many situations in everyday commercial trading which would have given rise to an action but the victim was compensated and so these cases did not make it to court.

In any scenario in Tort Law you are given certain facts. You must decide what areas in Tort the facts are pointing to, bearing in mind that one situation could imply any number of torts. However, as we are only covering two, then you only need to find the relevance to those two, even though there may be other torts indicated, such as deceit or nuisance for example. The list of recognised interests and rights protected by tort law is not exhaustive – we could have a new tort tomorrow if someone is successful in bringing a case for a 'wrong' done to him. Similarly, the list of recognised professionals is also not exhaustive, and so any occupation requiring a skill that another might rely on could be regarded as a professional in the eyes of the law, whether or not that person thinks so.

In the scenario given, i.e. in your second assignment, you only need to look for evidence of the tort of negligence or defamation, but remember there are different forms of negligence, such as professional negligence or negligent misstatement. When reviewing any case involving negligence you should always prove general negligence first, then examine the facts to determine whether a more specific form of negligence applies. You may also come across other possible torts and it is perfectly ok to mention this, but you will not lose marks for not doing so.

If you find this area of law particularly interesting, you will find a lot more detail in a book specifically on Irish Tort Law. Such a book will always include details of all relevant cases, probably the best way to learn about Tort. Also, you can pick out the important cases if you look up the Table of Cases at the start and highlight the ones that are featured in several places – these are usually the important ones. Other areas of interest in tort law include the economic torts, such as conspiracy, inducing a breach of contract, intimidation and interference with trade by unlawful means, in addition to deceit, malicious falsehood and passing off. The interesting thing about tort law is that it can, and usually does, involve ordinary everyday people in ordinary everyday situations. Some people, like Ms Donoghue, who in 1932 innocently drank a bottle of ginger beer, never dreamt that her name would go down in the history books of law because her case set a precedent and thereby represented a major milestone in the history of tort law.

Due to the short duration of the course, we can only cover some of the important points and a small sample of cases. It is outside the scope of this course to include all relevant cases, or to go into detail on each of the sample cases chosen. But as advised

above, further details are available from a number of sources on all the cases and points mentioned if anyone has a particular interest in any one case or point.
This module merely represents an introduction to tort law, with a closer examination of two of the most important torts.

The books that I have relied upon in the preparation of these notes are:

Irish Law of Torts – McMahon & Binchy, published by Butterworths.
Contains all you may ever need to know about tort law and regarded by many as the 'bible' of tort in Ireland. Contains comprehensive review of cases, judicial precedents, ratio decidendi, obiter etc, and very interesting commentary.

Principles of Irish Law – Brian Doolan, published by Gill & McMillan
Still the best book on Irish law available on the market. Contains excellent summary of Tort, including background and introduction to five of the principal torts.

THE LAW OF TORTS

History and Background: The Nature of Tortious Liability

The word 'tort' is found in the French language and means 'wrong'. At one time it was used in the English language as another word for wrong, but after its use in everyday language was discontinued, it continued to be used in law. In the early days, the only recognised torts were trespass and trespass on the case. These were directed at serious breaches of the peace and liability was imposed without any regard to fault. It was actionable ***per se***, requiring no proof of actual damage.

In modern times, however, the focus has switched. Now focus is on the intent or fault (negligence) of the wrongdoer, and the old common law action of trespass has given way to more modern tort actions, examples of which are battery, assault, false imprisonment, trespass to land, negligence, deceit, nuisance, defamation. Actual loss is not essential for a cause of action to arise in tort. The old torts of trespass and libel are actionable *per se*, however, with modern torts such as negligence, some actual loss must have occurred.

Because man is a social animal he pursues his interests in a social context. Inevitably, this pursuit brings him into contact with other persons pursuing their own interests. This contact will often result in conflict because people's interests are different. Some like peace and quiet while others prefer a more vibrant social life. In many cases, it is not just the interests of the two parties that have to be taken into account, but also the social aspect of their actions. This conflict is not a new social phenomenon, but in the past century, because of increased urbanisation, growth in population, greater and more sophisticated technology and a deeper sensitivity, conflicts between people in society have increased in number and have become more complex in nature. As society changes, so too does the catalogue of interests which deserves protection and recognition at any given time. Consequently, conflicts in society now require more careful and more frequent resolution.

While some interests have long been recognised, there are other interests which have had to struggle for recognition and are only very recently being acknowledged. The problem with newly recognised interests is that there are no precedents and therefore there will be a transitional period during which a body of case law can be established to assist in decision making. Inevitably there will be some degree of uncertainty and lack of uniformity during this transitional period.

What one man has to say in public may upset another man's sensitivities; one man's dog may wander into his neighbour's garden; one man's house may obstruct another man's view or sunlight. In all such cases, the law has to decide whether the particular activity or situation is to be allowed or not. The law of torts is therefore very much concerned with adjusting conflicting interests. In general, the plaintiff is interested in the security and protection of his interests while the defendant's interests are more about freedom of action and freedom of speech. The role of the courts is to attempt to strike a balance between the parties in the first instance, but they will also take into

account the ‘common good’ – i.e. public interest. Therefore, they may also look at the affect of the action on society in general. As a result, a person cannot take an action against someone carrying out an activity which is for the common good. For example, if you moved into a house next door to a farm, you cannot subsequently take an action against your neighbour for starting up his tractor at first light, even if it keeps you awake and is therefore infringing your fundamental right to peace and quiet. The activities of the farmer serve the common good and are therefore protected by law.

Not all actions which result in damage are actionable. To be actionable some right recognised and protected by law must be breached. Where harm results without the violation of a recognised legal right, or *damnum sine injuria* (i.e. legal injury without actual harm), the injured party is left without a legal remedy. An example of this is a trader ruined by the legitimate competition of rivals, or a business relying on passing trade where the local authorities have re-routed roads.

In general, the intention to do or to refrain from doing the tortious act is necessary before liability can attach. The intention to injure is not necessary; the intention to do the act which causes the injury is. For example, where one person uses defamatory words against another, the intention to utter the words must be proved though there may have been no intention to cause embarrassment, hurt or scandal. So, the utterance of defamatory words in sleep would not be actionable because the appropriate intention is absent.

In tort law a good motive does not excuse a wrongful act and malice does not make a lawful act unlawful. In general, it doesn’t matter why the person commits a tort – there is no such thing as a valid reason. For example, a person may be trying to train his dog, or a person may be practising on a musical instrument in preparation for an exam. In either case, they may be committing nuisance, but the reason in both cases is irrelevant.

To be successful in an action in tort, the wronged party must prove that the loss was caused by the wrongdoer’s unlawful act.

Most definitions will refer to the ‘unreasonable interference with the interests of others’. So basically any act which results in this could be regarded as a tort. The law of the land must then decide on where liability lies. This is the essence of tort law – to decide if a tort exists in the first place and if so, to determine who is to blame. The law therefore protects the person, reputation and property of the individual.

Definition:

> A tort is a civil wrong (other than a breach of contract) for which the normal remedy is an action for unliquidated damages, ie the amount of damage claimed is not a fixed sum. The amount of damages is to be assessed by a court.

Tort Law and Criminal Law

Tort law differs from criminal law in that it is primarily concerned with private disputes between individuals, whereas criminal law has a greater public dimension.

Tort is mainly concerned with the provision of compensation whereas criminal law is concerned with the regulation of conduct and the maintenance of social order and, to this end, with the imposition of penalties. Nevertheless, there can be an overlap between the two areas and the same set of facts can constitute both a tort and a crime e.g. a drunken driver who kills a pedestrian may be prosecuted for manslaughter or dangerous driving causing death, while also being sued for negligence. In the former scenario, the parties would be the DPP on behalf of the State v the Accused, while in the latter the parties would be the Plaintiff (person taking the action) v the Defendant (person defending the action).

Tort Law and Contract Law

The same set of facts may give rise to ***both*** contractual and tortious liability. Liability in both is civil as opposed to criminal e.g. the dentist or doctor who does his job badly may at one and the same time be liable for negligence and for breach of contract. In tort the breach of duty is fixed by law, in contract it is fixed by the parties themselves. In tort, duties are owed to people in general, whereas in contract duties are only owed to the parties in the contract. The primary goal in tort is to compensate for harm suffered. The primary goal in contract is to enforce terms (i.e. promises). Finally, in tort damages are unliquidated, however in contract damages are more commonly fixed by the parties to the contract.

Case: *Finlay v Murtagh (1979)*

This case involved an action against a solicitor for not prosecuting a claim within the period allowed by the Statute of Limitations, and the question was raised as to whether the action was based in contract or in tort. The essential difference to the client (plaintiff), is that if it was based in tort he would have been entitled to a jury trial. In the course of his judgment, Henchy J made the following statement:

"*It has to be conceded that for over a hundred years there has been a divergence of judicial opinion as to whether a client who has engaged a solicitor to act for him, and who claims that the solicitor failed to show due professional care and skill, may sue in tort, or whether he is confined to an action in contract.....*
..... It is undeniable that the client is entitled to sue in contract for breach of that implied term. But it does not follow that, because there is privity of contract between them, and because the client may sue the solicitor for breach of the contract, he is debarred from suing also for the tort of negligence.......
.....it is clear that, whether a contractual relationship exists or not, once the circumstances are such that the defendant undertakes to show professional care and skill towards a person who may be expected to rely on such care and skill, and in fact does so rely, then that person may sue the defendant in the tort of negligence for failure to show such care and skill......... If on the one side there is a proximity of relationship creating a general duty, and on the other, a reliance on that duty, it matters not whether the parties are bound together in contract.... for it is the general relationship, and not any particular manifestation such as a contract, that gives rise to the tortiuous liability in such a case."

See also ***Hedley Byrne & Co. Ltd v Heller & Partners Ltd (1964) –*** *details p25*

Function of the Law of Torts

A tort is more easily explained by its function. Its purpose is to prevent one individual from hurting another individual, whether in respect of their property, persons, or reputation and to provide a basis for compensation for infringements. Tort law concerns itself with the balancing of conflicting interests between individuals e.g. one man's right to publish an article may interfere with another man's right to his good name or one man's right to practice his drums on his property may interfere with another man's peaceful enjoyment of his property. When a court wants to prohibit a certain activity, it will call it a tort or a wrong. In effect, the law of torts comprises of a list of acts or omissions (failure to do something) which the courts consider should be prohibited and penalised.

Generally, to constitute a tort there must be an infringement of the Plaintiff's legal rights by the defendant and damage suffered by the Plaintiff as a result.

The function of modern tort law is the protection of interests, for example:
- Defamation protects good name
- Nuisance protects use and enjoyment of land
- Battery protects bodily integrity.

The goals of modern tort law can be summarised as:
- Compensation for injuries to interests
- Loss distribution for injuries
- Punishment of wrongdoers
- Deterrence against future injuries and retaliation.

Modern tort liability can be divided into three main areas:
- Intentional torts – example: assault & battery
- Fault-based torts – example: negligence
- Strict liability – example: libel

The two areas of Tort which we will look at are:
1. Negligence
2. Defamation

1. NEGLIGENCE

Historical Background

Prior to the development of the tort of negligence, a plaintiff had to establish provisions of the appropriate writ. The two writs used were;

(a) Trespass, and
(b) Trespass on the case

The writ of trespass applied to cases where there was direct and immediate harm, and was used with strict liability – i.e. actionable *per se,* requiring no proof.

The writ of trespass on the case applied to cases where there was indirect harm and was used with fault-based liability. This writ was the forerunner to negligence, and therefore negligence is not actionable *per se*.

Although liability in negligence has existed for centuries, the concept of duty is a more modern phenomenon. Generally, negligence was used to describe 'inadventure or indifference' by a person and liability existed only within contractual relationships involving people who held themselves out to the public as being competent, such as doctors or solicitors. If a case fell outside the recognised relationship, then there was no liability.

The industrial, technological and social changes which followed the industrial revolution however lead to many changes in our legal system, and particularly so in the case of tort law. Because it is directly concerned with conflict between people, negligence soon emerged as the most important area of tort law. The landmark case in the history of negligence is ***Donoghue v Stevenson (1932),*** and to this day, this case is still regarded as the most important. It established a number of points in law, but the most important are probably that: (i) it destroyed the privity of contract requirement. (ii) it introduced a new category of duty and (iii) it addressed the problematic issue of to whom a duty of care is owed by the establishment of the 'neighbour principle'. From this time on, liability could attach ***outside*** contractual relationships, and a duty of care could be present between two parties without having to have a special relationship, thereby representing a major turning point for the tort of negligence, or as some might say, 'opening the floodgates'.

The 'neighbour principle' continues in use to this day, although there are some more modern alternative tests. In reviewing case law relating to negligence, you will find cases where a two-stage test is used to establish duty of care, known as the Ann's Test, and also a more modern three-stage test. The important thing to remember is, if the case arose between 1932 and 1978, it is the 'neighbour principle' that was used to establish duty of care. The three-stage test was established in 1990 and the two-stage test was overruled, but many judges still rely on the original neighbour principle.

Essential Elements of Negligence

A person suing (the Plaintiff), to succeed in a negligence action against the party being sued (the defendant), must prove four things:

a) The defendant must owe a **duty of care** (a legally recognised obligation requiring the defendant to conform to a certain standard of behaviour for the protection of others) to the Plaintiff.
b) The defendant must have **breached** that duty of care.
c) The plaintiff must have **suffered damage**.
d) The breach of duty by the defendant must have **caused** the damage suffered by the Plaintiff (causal link).

All of the above elements, that is, duty, breach, damage and causation, must be satisfied in order for the tort of negligence to be successfully proved.

(a) Legal Duty of Care:

To whom is the duty of care owed? The corner-stone case (*locus classicus*) in the law of negligence remains:

Donoghue v Stevenson (1932)

The plaintiff and friend went to a cafe where ***the friend*** ordered a bottle of ginger beer for the plaintiff. The drink, which had been manufactured by the defendant, was supplied in an opaque glass bottle, which made it impossible to see the contents. The plaintiff consumed part of the beer. When she poured the remainder of the beer into a glass, she was confronted by the decomposed remains of a snail. She claimed that this sight and the ginger beer which she had already drunk, rendered her ill and she sued the manufacturer of the ginger beer for damages.

The plaintiff's problem was that there was no contract between the plaintiff and the manufacturer. Therefore, she could not sue him under contract law. Instead, she had to sue him in tort by establishing negligence. But firstly she had to prove that the defendant owed her a duty of care.

The formula which the House of Lords drew up to establish the existence of a duty of care became known as **"the neighbour principle",** namely a duty of care is owed to your neighbour. Your neighbour was defined as including *" all persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question"*. (extract from statement made by Lord Atkin)

This has become a landmark case for a number of reasons; most notably that it destroyed the concept of 'privity of contract'. In other words, it permanently removed the fallacy that since there was no contract between the plaintiff and the defendant there could be no liability in tort between the parties. It also altered the concept of 'duty' in law. The 'neighbour principle' became the benchmark for determining to whom a duty of care is owed, and as a result of this case, duty has been widely extended. In this case it was held that the ***ultimate consumer*** has a good tort action against the manufacturer, even though there is ***no contract*** between them.

The most common form of **duty of care** owed is that of road users not to injure other road users. You do not know the other drivers personally, you do not have any

relationship with the majority of them, and you are unlikely to be a party to a contract with the majority, but you still have a common law duty of care to every other driver on the road, just as every other driver has the same duty of care to you.

Donoghue v Stevenson was accepted into Irish law by ***Kirby v Burke (1944).*** Gavin Duffy J indicated that Donoghue alone would not be sufficiently convincing authority, however, he accepted the neighbour principle as it conformed to the views expressed by the American jurist Oliver Wendell Holmes.

Recent Developments

Duty is defined as a legally recognised relationship between the parties, and there are two types of duties owed:

1) General duty to act as a reasonable person
2) Special duty imposed by statute or case law, where special duties may be in addition to or in place of general duty.

Different tests have been advanced since *Donoghue* for determining whether a duty of care existed between the parties.

- Two-stage test – established in ***Anns v Merton London Borough Council (1978).*** The Irish decision in ***Ward v McMaster (1989)*** was influenced by *Anns*. But this test was overruled and virtually replaced by a new test.
- Three-stage test – established in ***Caparo Industries v Dickman (1990)***. This test was endorsed by the Irish Supreme Court in ***Glencar Explorations v Mayo County Council (2002)***. The Supreme Court in *Glencar* has re-interpreted *Ward v McMaster* in line with the decision of the House of Lords in *Caparo.* The three 'stages' of the test are:
  1) Proximity of the parties
  2) Foreseeability of the damage
  3) Imposition of a duty must be fair and reasonable in the circumstances

This is now the most commonly used test in modern tort law, and although it is almost identical to the *Anns'* Test, the *Caparo* approach employs less 'plaintiff friendly' language. The *Anns*' test was criticised for being overprotective of professionals and also giving too much power to the judge hearing a case. The *Anns* test was finally overruled in ***Murphy v Brentwood DC (1990)*** and replaced by the three-stage test.

Special Duty

There are some relationships where a special relationship is readily implied and therefore a special duty exists. The principal and most well known examples are doctor/patient, professional/client, employer/employee, parent/child. Special duty is covered in more detail under the appropriate area of negligence, which includes professional negligence, vicarious liability and employers' liability.

(b) The Standard of Care:

Once a plaintiff has established the existence of a duty of care, the next step is to prove a breach of that duty.

The normal standard of care expected of an individual in relation to his actions is to take reasonable care to avoid foreseeable harm. In order to establish a breach of this standard, the plaintiff has to prove that the defendant failed to act as a **"reasonable man"** (hypothetical careful person) would have acted in the circumstances. In other words the plaintiff has to consider the questions:

1. Did the defendant ***do*** something, which a reasonable man would ***not*** have done?
2. Did the defendant ***omit*** to do something, which a reasonable man ***would*** have done?

Clearly, the standard which the defendant is being compared to is an **objective** standard.

The reasonable man will be expected to know facts of common experience such as the basic laws of nature and physics, the normal incidents of weather and the inquisitive nature of young children.

Case: <u>Sullivan V Creed (1904)</u>

The defendant left a loaded gun standing inside a fence on his lands beside a gap from which a private path led over the defendant's lands from the public road to the defendant's house. The defendant's son, aged approx. 15 years old, coming through the gap on his was home, found the gun. Not realising the gun was loaded, he pointed it in play at the plaintiff, who was on the road. The gun went off and the plaintiff was injured.

Held – the defendant was liable to the plaintiff for the injury sustained by him. The defendant had failed to act as a reasonable man would have done in the same circumstances.

A number of more specific indicators have been identified in an effort to elaborate more particularly what is or is not reasonable in the particular circumstances:

(a) ***The probability of the accident*** – the greater the likelihood of harm to the plaintiff, the more probable it is that the court will regard it as unreasonable for the defendant to engage in the risky conduct or to fail to take steps to avoid the threatened injury e.g. the presence of children in dangerous situations.
(b) ***The gravity of the threatened injury*** – where the potential injury is great, the creation of even a slight risk may constitute negligence.
(c) ***The social utility of the defendant's conduct*** – where it has a high social utility, it will be regarded with more indulgence than where it has little or none e.g. a person attempting to save the life of another person may drive with less care than a Sunday driver.

(d) ***The cost of eliminating the risk*** – a slight risk may be run if the cost of remedying it is unreasonably high.

In ***Kirby v Burke (1944)***, Gavan Duffy, J. Stated:

"...the foundation of liability at common law for tort is blameworthiness as determined by the existing average standards of the community; a man fails at his peril to conform to these standards. Therefore, while loss from accident generally lies where it falls, a defendant cannot plead accident if, treated as a man of ordinary intelligence and foresight, he ought to have foreseen the danger which caused injury to his plaintiff."

It can be deduced from this statement that the standard of care is dependant on the general standard in the community – and this may change over time, and may also be different in different communities. It is also dependant on any person in the community acting as a 'reasonable' person would act. In practice, the law has made allowances on many occasions for the particular capabilities or capacities of the person whose conduct is under scrutiny, but in general, the reasonable man is taken to represent the 'average' man in a particular community at a particular point in time.

The standard of care is therefore something that is subject to change – there are no hard and fast rules and each case will be judged on its own merit. There are, so far, no Irish cases regarding the position of a disabled person or any such person who might be considered significantly different to the average.

(c) Damage, Injury or Loss

Damage is an essential ingredient in tort of negligence. If there is no damage suffered by the plaintiff, then no tort of negligence has been committed e.g. a motorist owes a duty of care to other road users. That duty will be broken if he drives under the influence of drink at 100 miles an hour. However, until such time as the car causes damage, either to property or persons, the tort of negligence has not been committed.

If a tort results in unexpected kinds of damage, or various extents of damage, ***forseeability*** is the test used to establish whether that damage is recoverable. A tortfeasor (the wrongdoer) is liable for all the damage caused by his actions which could have been ***reasonably foreseeable*** as a consequence:

Case: *The Wagonmound (No.1) (1961)*

The defendants negligently allowed fuel oil to escape from their ship. It spread a thin film across the waters of the harbour in which the ship was moored. The oil needed to be raised to a very high temperature before it could be ignited. The oil caught fire, probably as a result of sparks from welding igniting waste materials floating on the water, and the plaintiff's wharf was damaged by fire.

Held – the defendant was not liable for the damage caused by fire, as it was not reasonably foreseeable that a fire would start in such circumstances.

(d) <u>Causation:</u>

It is insufficient for the plaintiff to establish a duty of care, breach of that duty and damage in order to prove negligence. The plaintiff must further establish a causal link between the defendant's act and the damage suffered by the plaintiff. This means that the act of the defendant must be linked in a factual or scientific way to the injury of the plaintiff if the defendant is to be considered as being potentially liable. This involves a factual investigation. Before the courts will hold the defendant liable in law to the plaintiff they must be satisfied that the defendant ***legally*** caused the damage to the plaintiff.

A test frequently used to establish causation is the **"*but for test*"**. This test involves showing that the damage would not have occurred "but for" the defendant's act or omission. Conversely, if the event or effect would have occurred without the act in question, then the act cannot be deemed to be a cause. This was the position in the following case:

Kenny v O' Rourke (1972)

The plaintiff was a painter who fell off a ladder provided by the defendant. The ladder was defective. But the plaintiff in evidence said the reason he fell off was because he had unbalanced himself by over-reaching and not because of the defect in the ladder. Accordingly, the defect in the ladder was not the cause of the accident and the defendant escaped liability.

Difficulties may arise where there was more than one cause of the plaintiff's damage e.g. where the plaintiff is a passenger in a car being driven at night, too quickly and collides with another car which is being driven without lights. In that instance, both drivers have caused the accident. The "but for" test is useless here. In such cases, the best approach is to ask if the defendant's conduct is **a material element and a substantial factor** in causing the plaintiff's damage.

In the above example, both drivers have contributed to the plaintiff's damage. They are known as **concurrent wrongdoers**. Accordingly, both drivers could be sued either separately or together. Under the ***Civil Liability Act 1961***, each would be liable to the plaintiff in respect of the whole of the damages, subject to the rule that the plaintiff cannot recover more than the total amount of the damages he has suffered.

There are also situations arising where the defendant in some way contributed to his or her own injury. This arises in situations where the plaintiff and the defendant both contribute to cause the harm of which the plaintiff complains. The ***Civil Liability Act 1961*** provides that where a party suffers damage partly through his or her own fault and partly through the fault of another, that party may still recover compensation, but the amount of compensation will be reduced by the contribution factor. This is one of the defences on which many defendants rely, and the onus of establishing ***contributory negligence*** lies with the defendant. This is covered in more detail under 'Defences to the Tort of Negligence' at the end of this section.

Product Liability:

It is clear from the decision in ***Donoghue v Stevenson*** that the manufacturer of a product owes a duty of care towards those who may foreseeably be injured or damaged by the product.

While the manufacturer owes a duty of care to the ultimate consumer, the burden of proof is on the plaintiff to show that the manufacturer breached that duty and caused damage to the plaintiff.

The principle on which liability was based in ***Donoghue v Stevenson*** was limited by the restriction that there should be "no reasonable possibility of intermediate examination". Thus, it has been held that the defendant was not liable where the plaintiff was actually aware of the danger and disregarded it or where an examination was so carelessly carried out as not to reveal the defect.

Liability for Defective Products Act 1991**:** The position of the consumer has been strengthened by this Act. It imposes liability on a producer for damage caused by a defect in his product regardless of whether the producer was negligent or not. Under the Act, the consumer, in order to succeed, would only be required to prove that the damage or injury was caused as a result of the faulty product.

Section 6: provides a number of defences to the producer:

(a) That the producer did not put the product in circulation.
(b) That it is probable that the defect which caused the damage did not exist at the time the product was put in circulation.
(c) That the product was not manufactured for commercial purposes or in the course of business.
(d) That the product concerned is due to the compliance by the product with any requirement imposed by or under any enactment or required by the law of the EU.
(e) That the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.
(f) In the case of the manufacturer of a component or the producer of raw material, that the defect is caused entirely by the design of the product in which the component has been fitted or the raw material has been incorporated or to the instructions given by the manufacturer of the product.

All liability under the Act expires ten years from the date the product was put into circulation, unless proceedings have already been instituted. The Act does not replace the common law remedies in the tort of negligence which would still be available.

Occupier's Liability:

Occupiers' Liability Act 1995**:** has altered the position at common law in a radical way. It reduces the extent of occupiers' obligations to trespassers and 'recreational users' (a new concept) of the premises.

The Act defines an occupier as a person exercising control over the state of the premises.

Under the 1995 Act, persons who come onto another person's premises are divided into three categories:

(a) Visitors
(b) Trespassers
(c) Recreational Users

Visitor: a visitor is an entrant, other than a recreational user, who is present on the premises at the invitation of, or with the permission of the occupier, as of right, or by virtue of an express or implied term in a contract. The occupier owes a duty of care to ensure that a visitor does not suffer injury or damage by reason of any danger existing on the premises. Nevertheless, visitors have a duty to take reasonable care for their own safety.

Recreational User: a recreational user enters the premises for the purpose of engaging in a recreational activity without a charge, whether this is with or without the occupier's permission or at the occupiers' implied invitation e.g. hunting, exploring caves or hiking. In respect of a danger existing on premises, **an occupier owes towards recreational users of the premises a duty not to injure them intentionally or act with a reckless disregard for them**. This is a significant reduction in occupier's potential liabilities.

Trespasser: The Act defines a trespasser as an entrant other than a visitor or a recreational user. In respect of a danger on the premises, an occupier owes a trespasser the same duty owed to a recreational user. In relation to persons entering the premises for the purposes of committing or intending to commit a crime, occupiers can now act recklessly. Recent proposed changes to legislation in this area failed to be passed, but it is generally accepted that legislation is in need of updating.

Case: Ross v Curtis (1989)

A shop owner who discharged a shotgun over an intruder's head was held not liable where he claimed the injury to the intruder was accidental.

Employers' Liability:

Employers owe a duty of care to their employees. The extent of that duty is a duty to take reasonable care for the employee's safety in all the circumstances. The courts

have constantly stressed, however, that the employer's duty is not an unlimited one and that the "employer is not an insurer".

The courts have tended to analyse the duty under four general headings:

(1) the provision of competent staff
(2) the provision of a safe place of work
(3) the provision of proper equipment
(4) the provision of a safe system of work

(1) The Provision of Competent Staff:

The duty which an employer owes to his employees is to use due care to select proper and competent fellow employees. Before an employer will be liable for having failed to provide competent staff, it must be shown that the employer had reason to be aware of their incompetence. This may be proved by specific knowledge of their incapacity, but it can also be established by proof of a negligent system of "no questions asked". Moreover, where an employer discovers that an employee is incompetent some time after engaging the employee, and them continues to employ the employee on work that the employer now knows is beyond the employee's capacity, the employer will be liable if injury results.

(2) The Provision of a Safe Place of Work:

The employer must ensure that a reasonable safe place of work is provided and maintained for the benefit of the employee. It is not sufficient for the employer to show that the employee was aware of the danger on the premises. However, "to make accidents impossible would often be to make work impossible".

The extent to which an employer must protect an employee from injury on premises not under the employer's direct control is somewhat less certain. Whilst the fact that the premises are not under his control does not constitute an automatic ground for exemption from responsibility, it is an important factor which the Court will take into account:

Case: *Mulcare v Southern Health Board (1988)*

A 'home help' person employed by the defendant injured her ankle on an uneven floor in a dilapidated house of an elderly woman whom she had visited for several years. She alleged that the defendant was negligent in failing to have surveyed the house.

Held – the floor, though short of ideal, was not unsafe. The plaintiff had not fallen there in the previous seven years and the premises were not so unsafe as to require the defendant to oblige the elderly lady to carry out improvements or lose the services of the home help.

(c) The Provision of Proper Equipment:

The employer has the duty to take reasonable care to provide proper appliances and to maintain them in a proper condition:

Case: ***Deegan v Langan (1966)***

Liability was imposed on an employer who supplied his employee, a carpenter, with nails of a type which the employer knew tended to disintegrate when struck by a hammer. One such nail disintegrated causing damage to the employee’s eye.

As well as been liable for the supply of dangerous equipment, an employer may be liable for the failure to provide equipment essential to the safety of the employee or the failure to maintain equipment in a safe condition:

Case: ***English v Anglo Irish Meat Products (1988)***

The plaintiff was employee in the defendant’s meat factory. He was injured when boning meat. The knife which he held in his right hand, struck the inner portion of his left arm just below his elbow. The glove which the plaintiff wore extended above the wrist with a plastic guard attached which extended up the arm to within a few inches of the elbow. It appeared that protective equipment going as far as the elbow was available and in use in the trade.

Held – the defendant was liable on the basis that there were alternative and better safeguards already in use in the industry which would have given greater protection to the workers in the defendant’s meat factory and that the nature of the risk involved demanded that as much protection as possible should be given for the hand, wrist and forearm of the person employed on the work of boning.

(d) The Provision of a Safe System of Work:

The employer must provide a safe system of work for his employees. ‘Safe’ means ‘as safe as is reasonably possible in the circumstances’.

Case: ***Guckian v Cully (1972)***

The plaintiff worked as a baker in the defendant’s bakery. The system for removing dough from the side of the mixer was for the employee to stand up on a stool and remove the dough with his fingers. The plaintiff asked the defendant could he use a wooden stick to do so, but the defendant refused to allow this as there was a danger that a piece of wood might be cut off by the cutter and be baked into the loaves. The plaintiff finger was subsequently caught in the mixer and damaged.

Held – there was an unsafe system of work in place which the plaintiff had brought to the attention of the defendant.

If an employee is required to lift excessive weights in the course of his or her work, the system of work will be held to be an unsafe one. Parallel to the employer's obligation to protect the employees from injury by lifting weights that are excessive is the obligation to train them in the proper way to lift weights that they are likely to encounter in their employment. The subject of lifting weights is more properly covered by legislation. The statutory code is more favourable to the plaintiff than the common law action for negligence.

Statutory Protection:

Protection for employees in the course of their employment is provided in the **Safety, Health and Welfare at Work Act 1989** and the **Safety, Health and Welfare at Work (General Application) Regulations 1993**.

More details pertaining to matters of employment specifically are to be found in the area of employment law.

Vicarious Liability:

In certain situations a person may be held liable for the tortious acts of others. A person may be held to be liable by authorising another, either expressly or impliedly, to commit an action which causes injury or damage to a third party. Liability which arises in this way is called **vicarious liability** because it arises indirectly.

When seeking to impose liability in this manner, it is important to establish a relationship of control. Vicarious liability will usually arise in a situation of employer/employee but may occur in any situation where control exists, such as a parent and child. For example, if a child opens a car door, thereby knocking a cyclist from his bicycle, the parent will be held liable for the child's actions. But liability in such cases tends to be in relation to very young children who should be constantly supervised. The courts in practice do not tend to hold parents liable where older children are involved. The most common occurrence of vicarious liability is found in the employer/employee situation.

Employer's Liability:

Generally, an employer is vicariously liable for the torts of an employee committed in the course of employment.

An employer is not liable for the acts of an independent contractor. It is important to distinguish between an "employee" and an "independent contractor". An employee is employed under **a contract <u>of</u> service** and is under the control of the employer, as he is an integral part of the business.

An independent contractor is under **a contract <u>for</u> services** and has complete discretion as to the mode and method of work. Again, the key element is control.

In the Course of Employment:

Liability will not attach to an employer unless the negligent employee was acting ***in the course of his employment****:*

Case: ***<u>Duffy v Orr (1941)</u>***

A butcher and meat salesman was employed to accompany his employer on delivery rounds. On one occasion, unknown to his employer, he took the delivery van and injured the plaintiff.

Held – the employee was acting outside the course of his employment.

In general, the courts seem to have decided that if an employee has deviated slightly from his employment, the employer will still be liable for his actions, whereas a major departure will mean that the employee is no longer acting within the scope of his employment.

In ***Hough v Irish Base Metals Ltd (1967***) the employer was held ***not*** to be responsible for the actions of the employee on this occasion. The plaintiff's case was based on lack of adequate supervision of employees as constituting unsafe systems. The employee (plaintiff) was injured when jumping away from a gas fire which had been placed near him for a 'bit of devilment' by another employee.

However, in ***Kennedy v Taltech Engineering Co. Ltd (1989)*** – an employer ***was responsible*** for injuries to an employee caused by a prank played by a ***supervisor***.

<u>Professional Negligence</u>:

Professional persons, such as doctors, dentists or solicitors, owe a duty of care to their patients/clients. The distinctive feature of professional negligence is the account which the courts take of customary practice. If a member of a profession can show that he or she has adhered to customary practice of his or her profession, generally no breach of duty will be found. However, if it can be shown that the customary practice is itself inherently defective, so much so that it should not have been blindly followed, the person may be found to be guilty of professional negligence.

A doctor is not considered to have failed in his or her duty towards a patient on mere proof that the patient's condition has not improved or has, in fact, deteriorated. The essential test is whether the doctor has behaved reasonably. Thus, conduct falling short of perfection does not amount to negligence:

Case: ***<u>Dunne v National Maternity Hospital (1989)</u>***

Supreme Court – a medical practitioner must follow 'general and approved' practice. If he deviates from such a practice, negligence will not be established unless it is also proved that the course that he did take was one which no medical practitioner of like

specialisation and skill would have followed had he been taking ordinary care required by a person of his qualification.

Standard of Care for Professionals

The general rule is that a person holding themselves out to the public as being skilled must have the standard of care customarily exercised by the members of that profession. There is no clear definition of what is regarded as a profession. Cases coming before the courts have established that certain occupations fall into this category, such as doctors, dentists, solicitors, accountants, auditors etc., while nursing has been found not to be a profession for professional negligence purposes. On the other hand, an occupation not commonly regarded as a profession, i.e. a mechanic, was held to be a profession because mechanics exercise and profess special skills which the ordinary public relies on.

There are numerous cases where solicitors and medical practitioners have been found negligent, so these professions are clearly regarded as professional for negligence. Some other occupations have taken a much slower route. There are many cases where the action fails, but this cannot be taken to mean that the profession is not recognised in law, only that negligence was not found in those particular cases.

The key to determining if a special relationship exists is to examine the facts of the case to determine whether a duty of care is owed by the defendant to the plaintiff (claimant). If there is no special duty, then there may be a general duty and in some cases both.

Some Examples:
O'Donovan v Cork County Council (1967): Medical practitioner – recognised professional.
Kelly v St Laurance's Hospital (1989): Nursing care not professional for negligence.
Hughes v JJ Power Ltd ((1988): Mechanics recognised as professionals for negligence.
Golden Vale Co-Operative Creameries Ltd v Barrett (1987): Accountants found negligent.
Chariot Inns Ltd v Assicurazioni Generali SPA (1981): Insurance brokers found negligent.

A medical practitioner (professional) owes a general duty of care to his patients (clients or customers) to exercise the skills of a reasonable medical practitioner (professional), as in the above case.

Auditors can owe a duty, under the ***Hedley Byrne*** principle (see case below), not only to the shareholders of the audited company, but also to prospective investors, but their foreseeability must be very real and immediate before the courts will be disposed to impose a duty of care on the auditors in regard to them. The property and financial markets boom of the 1980s in the UK led to a large number of cases involving surveyors or accountants, and in the Caparo case mentioned earlier, the House of Lords restated the principles involved for both special relationships and reasonable reliance.

The House of Lords:

- Preferred an incremental approach to duty of care
- Rejected a general test based on reasonable foresight, and led to a later request for leave to amend the statement of claim in ***Morgan Crucible plc v Hill Samuel Bank Ltd (1991);***
- Stated that a duty will apply where:
    i. The advice is required for a purpose, either specified in detail or described in general terms to the defendant;
    ii. The purpose is made known, actually or by inference, to the advisor at the time the advice is given;
    iii. The advisor knows, actually or inferentially, that the advice will be communicated to the person relying on it to use for the known purpose;
    iv. The advice will be acted upon without further independent advice;
    v. The person relying on the advice acts on it to their detriment.

Many cases failed, which might seem to suggest that it is almost impossible to impose a duty of care outside relationships 'equivalent to contract', but this is not always the case, as in many cases a much broader view is taken.

Another important case that established a special duty is the Hedley Byrne case, and this is reviewed in detail in relation to the tort of negligent misstatement which follows.

Principles in establishing the Standard of Care for Professionals

Experts and professionals are not bound by the standards of a reasonable man but those of a reasonable practitioner of that particular skill or profession. Thus, if you are engaged in an industry or market sector where there is a standard code of practice, as in Accountancy Bodies for example, then this test may apply. The test also applies to advice and information (any profession), diagnosis (medical profession), and in each case, trainees must show the same degree of skill as experienced professionals. Thus, the test applies even if the defendant does not have full professional qualifications.

The list of professionals who have been involved in court action is not intended to be an exhaustive list of professionals who are deemed to owe a duty of care to their clients. And even if the defendant is not a professional in the strict sense, liability can still attach under the general standard of care using the 'proximity' or 'neighbour' principle referred to earlier.

Is credit management a profession in the legal sense? The answer is that it *could* be. If someone relies on your skill in a professional way and subsequently suffers damage, injury or loss as a direct result of relying on your skill, then it is possible that there could be liability in tort. It is also likely that you will have entered into a contractual relationship with your customers. Consequently, it is possible that there may be concurrent liability i.e. liability in contract ***and*** liability in tort. However, for a case in tort to arise, it is not necessary for a contractual relationship to exist. The history of cases involving professional negligence however still tend to be the commonly recognised professions, but as there is no clear definition in law and there is no exhaustive list, then any occupation could be categorised as professional, depending on the circumstances.

It is fair to say that there is no occupation that can be absolutely ruled out, so everyone should exercise reasonable care in their work not to cause any harm or injury to any other person, or to act in any way recklessly, regardless of what their occupation actually is.

Professional negligence became such a common occurrence in situations where advice was given and taken that it led to a new tort called negligent misstatement, established in the Hedley Byrne case below.

Negligent Misstatements

Prior to the establishment of this tort following the ruling in ***Hedley Byrne***, any action was taken under the tort of deceit (fraud) or 'injurious falsehood'. The same principles of negligence also apply to this tort, but with the added element of having to prove the existence of a special relationship and therefore a special duty, as for professional negligence. Plaintiffs will normally be satisfied with proving negligence as it is an easier task than having to prove fraud. However, if it is too difficult to prove the existence of a special relationship, then the plaintiff may take action under deceit as no such formal requirement exists in the case of deceit. Any situation where there is liability in negligence for economic loss, unaccompanied by injury to the person or property, is understandably uncertain.

In this area of law, tort provides remedies for physical loss and damage, but judges are reluctant to allow recovery for a pure economic loss since it is considered to be more appropriate to contract law. However, there is now a sufficient variety of cases where plaintiffs have been successful in proving this tort, and therefore it is less uncertain than in the past when there were very few cases, and the majority of plaintiffs had failed.

Before establishing the existence of a negligent misstatement, the plaintiff must first establish that a special relationship exists between him or her and the defendant, and as such, the defendant therefore owed the plaintiff a special duty of care. The principles of establishing duty of care are the same as for professional negligence, so all of the same criteria applies. But in regard to negligent misstatement, there are a few more points to be taken into account. For example, it is commonly accepted that the plaintiff need not actually have solicited the information from the defendant, provided the defendant ought to have foreseen that it would be relied upon by the plaintiff.

This was the position in ***Wall v Hegarty (1980)***, where by reason of the negligence of the defendant solicitors in the execution of a will, the will was condemned. In this case, liability was imposed for the lost legacy on the basis of the broad 'neighbour principle' first recognised in *Donoghue v Stevenson*. In his ruling statement, Barrington J noted that the same principle would also justify recovery of expenses and that this latter item of loss could be recovered under ***Hedley Byrne*** principles because the will had not been correctly witnessed and this error had not been pointed out to the plaintiff.

A negligent false statement is actionable in law (not to be confused with publication of a false statement resulting in defamation). In order for an action to succeed there must first be a pre-existing relationship between the parties so that there is a possibility that one party may rely on the statements of the other. The party making the statement is under a legal obligation to take reasonable care to ensure that the information or advice given is accurate. This fact of law was established in the landmark case ***Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964),*** details of which are outlined further on.

To be regarded as a negligent misstatement, the statement made must first of all be false. This simply means that the statement is not true (in substance). Secondly, the person who made the statement must have been negligent in making it. That means that he did not exercise reasonable care, or sufficient care, or was otherwise reckless in making the statement.

In the light of this definition, it is quite possible that the issuing of credit references, or of relying on such references, represents some nature of risk for all parties concerned. This risk relates to the tort of negligence, in this case, professional negligence, and in particular to negligent misstatement.

To provide a credit reference means to issue a statement about a third party. Such a statement can be communicated in any manner, but the most common would probably be oral, by telephone or in person, or written, which can be communicated by post, fax, email or even by hand. Because a statement must be issued, it is possible that any such statement is capable of being false. Because the statement requires particular facts to be checked and verified in some way, it is also possible that any such statement is capable of also being incorrect or untrue, and, depending on the circumstances, such a statement could also be negligent. If the statement issued is both false ***and*** negligent, it amounts to a negligent misstatement in law.

We will now examine both forms of credit references, i.e. oral and written. We will also take into account the principles of defamation law, which is covered in detail in the next section. But as there is some overlap, we will deal with the issues of possible negligence and possible defamation together.

Oral References

In the area of credit, you need to be careful that you do not say anything to a third party about your customers which could be considered defamatory, for example, to comment in a negative way on the financial position of the customer to a third party, such as, that you think the company is in financial difficulties and is ‘probably insolvent’. If such a statement was made to another creditor or creditors, and this caused panic among them to the point that they stopped supplying the company causing the company to cease trading, then it is possible that this statement could be seen as being the cause of, or contributing to, the damage suffered by the customer. There are many reasons why a company may have short term financial difficulties, but they would be prevented from resolving this situation if creditors were to ‘collectively’ freeze them out.

When speaking to a third party about confidential matters, it is important to only ever speak of the facts and nothing else. When giving your opinion, you must qualify it in some way and ensure that the recipient clearly knows that it is just your opinion and not absolute fact. It is best to just comment on the facts. In other words, fair comment only. Similarly, if you pass a remark regarding a third party, you need to ask yourself the question: could you prove it was true if you had to, or, at the very least, that it was based on fact?

Written References

You are not obliged to give trade references, however, if you chose to do so because you want to be able to rely on this avenue yourself, then again, you must stick to the facts only. The best way to do this is just to tick the boxes that have a definite answer, such as: is the title the same? does the customer pay within the agreed terms? or how long have they had an account with you? Do not give a recommendation for a credit limit – you have no way of knowing what the customer can afford anyway. The fact that you may allow €100k does not mean they will be good for this amount with another creditor. Also, many of the standard trade reference request forms include a section for 'comments'. There is no need to complete this. The fact that a customer has had a credit account with you for a certain period of time is sufficient evidence that the account is being conducted satisfactorily. Nothing more is required. To be absolutely certain that any statements you issue cannot be wholly relied on, you should always include a disclaimer.

The same principle applies to the exchange of information between creditors. It is helpful if those you speak to are also members of a recognised professional body, such as the Irish Institute of Credit Management. At least then you can be sure that you have a shared interest, namely the protection of your company against the risk of bad or doubtful debt.

It is worth looking at one case in relation to credit references here. This is a famous case concerning 'economic' loss, and it established a precedent which has become commonly known as the 'Hedley Byrne principle', referred to above and also in relation to professional negligence and the existence of a special relationship.

Hedley Byrne & Co. Limited v Heller & Partners Limited (1964)

This case concerned a reference as to the creditworthiness of its customer given by one bank to another, where in giving the reference, the bank knew or ought to know that this information would be passed on to the plaintiff company, which was about to do business with the customer.

The reference was negligent (gave an incorrect indication) and as a result the plaintiff company suffered loss. In this particular case, the reference contained a disclaimer which the House of Lords held was sufficient to relieve the defendant bank of responsibility – had they not included this disclaimer the case would have succeeded – but the case is still important on account of the fact that the speeches delivered in the House of Lords were to the effect that there can be liability for negligent misstatement in cases where a party seeking information from the defendant relies on his special skill and trusts him to exercise due care.

Here are a couple of notable extracts:

Lord Morris:
" ... it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon that skill, a duty of care will arise........Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

Lord Devlin:
"...wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer........**there may well be others yet to be established"** (highlighted by the writer)

The law has developed more on the lines proposed by Lord Morris than on those favoured by Lord Devlin, but the essence of this case is that when advice is given by a person who is deemed to be an expert in a particular field, and this evidence is relied upon to the detriment of another, then the result is an occurrence of a tort, in this case, negligent misstatement.

This case established the fact that liability could arise from negligent misstatement and furthermore, that the parties do not necessarily have to enter into any contract, or have entered any contract at the time the statement was made. Thus it is not a contractual relationship but a relationship 'equivalent' to contract. Such a relationship implies rights and obligations on the parties.

So, if you were to provide a good reference for a customer who in fact had a seriously overdue account with you, and the creditor relied on this reference and extended credit, and the company subsequently went into voluntary liquidation and was found to be unable to pay its debts, then there is possibility that your reference ***could*** be regarded in law as a negligent misstatement, if you failed to prove that the statement was not false. If your payment record showed habitually late payments, or if there was a recent occurrence of an RD cheque, then it would be impossible to prove your statement that this customer was a good risk. It has been known for some unscrupulous business people to use this tactic to try to pass off bad payers to competitors in order to try to get them off their books. The only precautions you can take against this occurrence is to (a) not issue any credit references or (b) if issued, then use a disclaimer.

An Irish case of similar nature is also worth looking at.

Macken v Munster & Leinster Bank Ltd ((1959)

The manager of a branch of the defendant bank assured the plaintiff, a grocer, who was not a customer of the bank, that if he signed a promissory note for a third party

there would not be the slightest risk of the third party's default. In fact the third party was a fraudulent person who had engaged in a series of lies and who later defaulted. The plaintiff in the meantime had lent him money and given him credit in his shop, which the third party failed to repay.

The plaintiff sued for damages in respect of his potential liability under the promissory note, as well as for the credit he had advanced.

Held: The manager and the bank were in a special position vis-a-vis the plaintiff, namely that they were inviting or inducing him to enter into the contract to sign the promissory note and the manager knew that the plaintiff was to some extent relying on the information he was furnishing concerning the third party. The judge concluded that the bank manager had not taken due care. However, the plaintiff was not awarded damages in relation to the money he had afforded the fraudulent third party nor the credit he had extended to him, because, although the bank manager's assurances 'no doubt' had their influence, no connection in law had been established between them and the granting of credit *some time later*.

It should be noted however that this case, and this decision, took place four years before the *Hedley Byrne* 'breakthrough'. Secondly, the plaintiff may have recovered loss for credit extended if it had been done immediately following receipt of the reference. A credit reference therefore cannot be given for an indefinite period, and so must relate to the immediate period only. It can be deduced from the ruling in this case that the reference would only cover credit extended in the first instance, i.e. the first order only. After that, it is up to each creditor to protect its own interests.

Another question that needs to be asked, in the light of *Hedley Byrne* is, does the Macken case amount to a judicial recognition of a duty of care in negligence on the part of bankers (a creditor) volunteering advice as to the financial standing of a third party? It would appear that there is a strong argument to be made for an affirmative answer to this question, because it was stated that there *was* no liability in this particular case based on the facts, but it was not stated whether or not there *could* be.

Other relevant Irish cases:

Securities Trust Ltd v Hugh Moore & Alexander Ltd (1964) – this was the case in which the Hedley Byrne principle made its way into Irish law, and arose out of a printing error in the Articles of Association of the defendant company. The plaintiff failed because it was held that the defendant could not be held liable for an error addressed to the world at large.

Two years later, the principle was considered again in ***Bank of Ireland v Smith (1966).*** In this case it was decided that liability could only be imposed where there was a special relationship between the parties 'equivalent to contract'.
Stafford v Mahony, Smith & Palmer (1980) – Doyle J, on the authority of ***Securities Trust Ltd***, accepted that pre-contractual misrepresentation could give rise to liability for negligent misstatement.

In ***Esso Petroleum Co. Ltd v Mardon (1976),*** the English court of appeal had applied Hedley Byrne to a pre-contractual misrepresentation culminating in a contract to the

detriment of one of the contracting parties. An extract from the statement made by Lord Denning in this case is worth noting:
".... If a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently give unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages".

Irish courts in general will rely on a precedent set in an English court if there is no such precedent in an Irish case, however, it should be noted that such precedents are not binding, but they can be persuasive. At the time of this particular case, English courts seemed to be trying to prevent the extension of tort into areas where traditionally contract had reigned supreme, however, Irish courts in general appear to have resisted this temptation, as is evidenced in cases that followed, including:

McAnarney v Hanrahan (1994) – successful action for negligent misstatement
McSweeney v Bourke (1980) – This case involved a group of companies who engaged the defendant as a financial consultant to advise the group in respect of a possible takeover bid. The bid fell through for the group, however, the individuals themselves lost heavily on a subsequent investment. The case was dismissed because the defendant had advised the group of companies rather than the plaintiffs personally, and having discharged his duty of care to the group, he could not in the circumstances of the case be liable to the plaintiffs. Carroll J stated that:
"... the adviser has a primary duty of care to the client and there may or may not be a duty to third parties. If the advice is not given negligently in the first instance but is given with all due care, there is no breach of duty to the client.....a third party who knows of the advice and who carries out steps outlined in that advice (ultimately to his detriment) can not claim that the advice was negligent in relation to him."

Many cases based on negligent misstatement have been unsuccessful, the most common reason being that no special relationship existed between the parties. So the existence of a relationship is a key element to proving negligent misstatement.

Defences to the Tort of Negligence:

Once a plaintiff establishes negligence on the part of a defendant, a number of general defences are open to the defendant:

(1) Contributory Negligence:

The general rule in an action for tort is that, where the plaintiff is partly at fault, damages will be reduced in proportion to his fault.

The law has been set on a modern footing with the enactment of the **Civil Liability Act 1961**. The Act sets out a system of apportionment of damages, whereby the plaintiff's damages are reduced having regard to the respective degrees of fault of the plaintiff and defendant.

Case*: O' Leary v O' Connell (1968) IR*

The defendant motorcyclist knocked down the plaintiff, who was walking across the road. As a result, the plaintiff suffered a broken leg.

Held – both parties were negligent in not keeping a proper lookout. The degree of fault was to be apportioned in the ratio of 85% to the defendant and 15% to the plaintiff, and damages to be awarded accordingly.

The provisions of the Civil Liability Act have been extended by the Civil Liability (Amendment) Act 1964, and also the Personal Injuries Assessment Board Act 2003 which established the Personal Injuries Assessment Board. The function of this Board is to reduce legal costs and other fees charged, particularly by experts, in cases involving personal injury. This allows for more consistency in assessing the extent of general damages to compensate for pain and suffering and special damages to cover loss of earnings, medical expenses or any other expenses incurred as a result of the injury.

(2) Res Ipsa Loquitur

Directly translated means ' the facts speak for themselves'. The onus of proving negligence, as in other torts, lies generally on the injured party. But in some cases the law presumes negligence because the wrongdoer has sole control of the cause of the incident and because the incident could not normally have happened without some element of carelessness. In such cases, the rule 'res ipsa loquitur' is applied.

Case: *Collen Bros v Scaffolding Ltd (1959)*

The principle of *res ipsa loquitur* applied in this case where a workman was thrown from a height of sixty feet to the ground. His injuries were visible and therefore did not need to be proven.

In ***Lindsay v Mid-Western Health Board (1993)***, this principle was also applied for the same reasons, however, in this case was displaced by the fact that the defendants showed that they had exercised all reasonable care.

In theory this can be a good defence, however, in practice it can be displaced if the defendant can prove that he or she took reasonable care to prevent any such loss or damage.

(3) Consent of the Plaintiff (Volenti non Fit Injuria):

Directly translated means voluntary assumption of risk.
Those who undertake to run the risk created by the defendant cannot subsequently complain, if, while doing so, they are injured. The burden of showing that the plaintiff agreed to waive his legal rights before the act is on the defendant. Mere knowledge of the risk does not necessarily imply consent. The defendant must show that the plaintiff appreciated the physical risk and consented to run that risk to the extent of surrendering legal rights.

Case: ***Regan v Irish Automobile Club (1990)***

The plaintiff was injured when struck by a racing car while officiating as a flag marshal at a motor race. She had signed a form prior to the race relieving the motor club from "liability for accidents however caused" in exchange for an insurance policy.

Held – the plaintiff was not entitled to pursue the action. She had waived her rights against the defendant for a valuable consideration, while appreciating the risks involved.

The courts now make an exception in the case of rescuers. Thus, the courts have had little difficulty in recognising the claim of policemen and doctors but also a person who helps in rescue operations after a train wreck, car crash, or who goes to the assistance of a friend in danger of drowning.

(4) Inevitable Accident:

If ordinary and reasonable precautions were taken, any injury which has occurred is not actionable. In other words, the defendant need only show that no reasonable precaution would have prevented the occurrence of an accident.

Case: ***Stanley v Powell (1891)***

The defendant fired his gun at a pheasant but the bullet ricocheted off a tree and injured the plaintiff. The court found that since the accident could not have been avoided by taking ordinary and reasonable precautions, the defendant was held not to be liable in negligence.

(5) Necessity:

If a tortious act is performed in order to avoid a more serious incident, the tortfeasor shall not be liable.

Case: ***Cope v Sharpe (1912)***

A fire broke out on the plaintiff's land. The defendant, a gamekeeper on adjoining land, set fire to heather on the plaintiff's land in order to create a firebreak so as to prevent the fire spreading to his employer's land.

Held – necessity was a good defence, since there was a real threat of a fire and the defendant had acted reasonably.

(6) Statute of Limitations 1957:

A defendant can rely on the provisions of the Statute of Limitations 1957 as a technical defence. If an action is not commenced within an appropriate time period, it becomes statute-barred.

In actions for personal injuries arising out of negligence, nuisance and slander, the period allowed is three years. The **Statute of Limitations (Amendment) Act 1991** provides that the three-year limit period runs from the date of accrual of the cause of action or from the date of knowledge. No special limitation period is provided where the plaintiff dies, so such actions are subject to the ordinary limitation period set out in the Act.

Section 8 of the Act also establishes the rule that causes of action also survive against the deceased person's estate, and also provides for the survival of an action where the proposed defendant dies at the same time as the act which causes the injury, or between the act and the damage necessary to make the act actionable.

The time limit will also be extended if the plaintiff falls under the category of a legal disability. For example, in the case of a child, time only begins to run when the child reaches the age of eighteen.

2. <u>DEFAMATION</u>:

History and Background

The law in relation to the tort of Defamation has developed somewhat haphazardly over the years. It is much less certain than other areas of law which tend to have much clearer rules. This is probably because defamation is all about communication between members of society, and communications have changed quite dramatically in recent years. It is very difficult therefore for the law, which tends to develop at a much slower pace, to keep up with the changes.

There is also some confusion caused by the fact that opinion differs as to whether the damage should be the cause of the action and not the insult itself.

Originally, defamatory statements were dealt with in local courts. Ecclesiastical courts dealt with slander, and this was generally regarded as a sin which was punishable by penance. As the ecclesiastical courts lost power, slander began to appear in common law courts. It was felt that cases involving 'temporal' damage were to be heard in the common law courts, while those involving spiritual damage would be heard by the Church courts.

The courts began to punish political libel in the fourteenth century. Common law courts already had jurisdiction over slander, however, they did not gain jurisdiction over libel until the eighteenth century. The three areas of defamation that existed at this time were; criminal libel, tortious libel and slander. Until recently, the distinction between libel and slander survived.

In the case of libel, there was strict liability i.e. actionable ***per se***, and no fault was necessary. This did not apply to slander in general, however, there were some exceptions which resulted in slander ***per se***.

Over the years it was generally agreed that removal of the distinction between libel and slander would bring about an improvement in this area of tort law, as this would result in one clear tort, i.e. defamation. This culminated in the ***Defamation Act 2009***. The 2009 Act partially revises the law, so that the general law of defamation continues to apply, except where it was expressly altered by the Statute.

Definition of Defamation:

Defamation is the wrongful ***publication*** of a false ***statement*** about a person:

- Which tends to lower that person in the eyes of right-thinking members of society or
- Tends to hold that person up to hatred, ridicule or contempt, or cause that person to be shunned or avoided by right-thinking members of society.

A person may take an action for defamation in order to protect his good name. A defamatory publication or statement is one which is "calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule".

In addition to the Common Law protection afforded by judicial precedent, the Irish Constitution also provides that the State shall by its laws protect as best it can from unjust attack and, in the case of injustice done, vindicate the good name of every citizen. In Ireland therefore, the law of defamation is in part due to the fulfilment of that duty by the State.

Defamation is no longer divided into two primary torts – the 2009 Act provides for one tort only, i.e. the tort of Defamation.

Cases that arose prior to this legislation were distinguished between the two original torts, libel and slander, and were defined as follows:

Libel: such an action would arise where the defamatory matter is in a permanent form e.g. printed in a book or newspaper or recorded on film. Defamatory matter broadcast by radio or television also comes within the category of libel. Libel is actionable ***per se.*** It is considered that, because of the permanence of the written word, it is more likely to cause damage than defamation in an oral or transient form: it lasts longer. In fact, libel lasts forever (i.e. permanent).
Libel is also a criminal wrong. Criminal libel consists of a defamatory attack on a person which tends to, or is likely to, cause a breach of the peace.

Slander: such an action would arise where the defamatory matter is in a non-permanent form e.g. by speaking or by the use of sign language. In most slander actions, the plaintiff must prove special damage. To prove special damage, one must show some real loss, such as loss of business.
Slander is not a crime and is only actionable on proof of special damage. However, there are some exceptions to this rule.

Slander Actionable Per Se

The general rule is that slander is actionable only on proof of special damage – i.e. the person must have suffered loss. However, there are four exceptions to this rule:

1. Unchastity or Adultery – slanders which impute unchastity or adultery to any woman or girl. (originally Slander of Women Act 1891, now provided in Section 16, Defamation Act 1961)
2. Criminal Offence – slanders imputing a criminal offence punishable by death or imprisonment.
3. Fitness in Job – slanders affecting a person's official, professional or business reputation. (Section 19, Defamation Act 1961)
4. Contagious Disease – slanders imputing a contagious disease which tends to exclude the sufferer from society. (no exhaustive list – can change over time, e.g. most common cause of action today is AIDS)

In all of the above four cases, slander is actionable per se, without any requirement for proof of damage, or proof of fault on behalf of the defendant.

Under the 2009 Act, the two torts described above are to be collectively described as the tort of Defamation.

Who may sue and who can be sued for defamation?

- Only a living person is able to bring and maintain an action.
- Legal persons, such as a company or incorporated body may bring defamation actions.
- Local authorities in Ireland may bring an action for defamation.
- Trade Unions can sue in defamation, but cannot be sued in tort.

What is a Defamatory Statement?

A statement is considered defamatory if it tends to lower the plaintiff in the eyes of right-thinking members of society or if it tends to hold the plaintiff up to hatred, ridicule or contempt, or causes him to be shunned or avoided in society. This clearly indicates that to call a person a murderer, a thief, a forger, a swindler or a prostitute would be considered defamatory, because it is falsely accusing someone of a criminal offence. But where the statement does not relate to a crime, it depends on the facts of each case whether or not the statement is considered defamatory.

The Defamation Act 2009 defines a ***statement*** as:

(i) A statement made orally or in writing
(ii) Visual images, sounds, gestures and any other method of signifying meaning
(iii) A statement broadcast on the radio or television or published on the Internet
(iv) An electronic communication

The only way to ascertain if a statement might be defamatory is to review cases where a ruling has been given. The following case is an example.

Case*:* *<u>De Rossa v Independent Newspapers (1999)</u>*

The plaintiff recovered damages of £300,000 for an article which appeared in the defendant's publication. The jury found that the words complained of meant that the plaintiff was involved in or tolerated serious crime and that he personally supported anti-Semitism and violent Communist oppression.

Held – the words in the article were libellous (defamatory).

Other words have been tested in the courts over the years. Some plaintiffs have succeeded in proving that the use of certain words was defamatory while others have failed. The key is the context in which the words were used and whether or not they could be said to have lowered the reputation or destroyed the good name of the plaintiff in the eyes of the community.

Other sample cases include:
McInerney v Clareman Printing & Publishing Company (1903)
Bennett v Quane (1948)
Kennedy v Hearne (1988)

Publication:

Publication is the communication of the statement to a third party, by any means. The person who makes the statement, who prints, disseminates or repeats that statement is said to have published the statement if it is heard or read by a third party.

The 2009 Act provides that there is no publication if the defamatory statement is published to the person to whom it relates, and to a person other than the person to whom it relates in circumstances where (a) it was not intended that the statement would be published to the second-mentioned person and (b) it was not reasonably foreseeable that publication of the statement to the first-mentioned person would result in its being published to the second-mentioned person.

Publication may take various forms. It could be by word spoken face to face, an article in a magazine or newspaper, including photographs, a letter, words spoken in a telephone conversation or spoken in a public place. The list of forms of publication is not exhaustive.

The following case is an example of publication in a newspaper.

Case: ***Berry v The Irish Times (1973) IR***

The Irish Times was sued for printing a photograph of a placard containing a false statement.

Held – the act amounted to publication on the part of the Irish Times, even though it was not the author of the matter on the placard.

Broadly speaking, this means that everyone in the publication process is technically liable, such as reporters, sub-editors, editors, newspaper owners, printers and distributors. However, they are not held to be liable if they did not know about the defamatory nature of the publication, or if there was nothing in the publication or circumstances that gave the defamed person grounds to suspect the defamatory nature of the publication. This is known as innocent dissemination, and has been successfully applied to retailers and libraries. The onus is on the defendant to prove the exception. The exception however does not apply to the media in general and printers.

Other examples of publication in different forms include:
can be contained in a letter, *Hynes-O'Sullivan v O'Driscoll (1989)*; an enforcement notice, *Kennedy v Hearne (1988)*; an article in a magazine, *Quigley v Creation Ltd (1971)*; a photograph in a national newspaper, *Berry v Irish Times Ltd* (1973); by a verbal accusation in a public street, *Coleman v Kearns Ltd (1946).*

There are many more examples of publication to be found in other cases.

Third Party

Because communication must be to a third party, it does not arise where the communication is to the plaintiff himself through private letter or telephone or if the

plaintiff is called aside from company and out of earshot of others. To accuse a person wrongfully of being a thief, for example, will not injure the person's reputation or good name unless the statement is made to someone other than the person himself.

Speaking in a loud voice could be deemed to be publication if as a result a third party would be able to hear the words spoken. However, generally speaking, the person making an alleged defamatory statement will only be liable if he could have reasonably foreseen the particular publication. In other words, if the speaker was completely unaware that there were any other people within earshot and believed that he was having a private conversation with the other person, then there may be no liability.

The same principle applies to written or other physical forms of a statement. If publication can be foreseen, then liability will occur.
Circumstances where it is likely that publication to a third party can be foreseen include:

- Posting a defamatory statement to the wrong person
- Posting a defamatory statement to an employer at an address where there are staff employed who might open the post.
- Addressing a letter using the person's initials only when it is known that there is more than one person at the same address with the same initials.
- Making a defamatory statement on an envelope/postcard and posting it in the normal way.

Every act of repeating the statement is deemed to be a new publication. It is important to note that the original person making the statement is not liable for the statement later repeated by someone else. However, if the original person is aware that the statement is likely to be repeated, then he may in fact be liable if it is subsequently repeated. For example, if a statement is made in a television or radio broadcast, then there is every likelihood that it will be repeated. The original person could then be liable for further publications.

Some acts are not regarded as acts of publication, such as making a statement to a person about themselves. So if I voluntarily tell you that I have done something which, if I had said the same thing about someone else would be considered defamatory, would not be considered so in this case. Also, private conversations are not considered as acts of publication, such as a private telephone conversation between two people. A letter addressed to a person privately is also not considered an act of publication. It is always a good idea to address an envelope 'strictly private and confidential' when writing to the officer of a company about a sensitive matter. Some 'demand' letters could well fall into this category, depending on the particular circumstances, for example, the wording of the letter, the tone of the letter, the general contents, such as any accusations made in the letter, particularly if they are later found to be false.

If the person allegedly defamed shows the statement to a third party himself, then it is he himself who has published the statement and not the author of the statement. In a case where a man received a defamatory letter from his brother-in-law, the defendant was not held liable for the publication because it was the plaintiff himself who showed the 'private' letter to other people.

A statement made by a person to his/her spouse is not a publication, however, a publication made to another person's spouse is. In this area of law, man and wife are treated as one unit, so it is impossible for publication of a defamatory statement to take place between them.

Accidental publication will not generally result in liability. This applies to cases where the defendant is found not to be negligent regarding the communication of a false statement to a third party. Again, if the plaintiff communicates the false statement to a third party himself, then he is the publisher and not the defendant.

Reference to the Plaintiff:

The statement must refer to the plaintiff. Where the plaintiff is specifically named there is no difficulty. However, where he is not mentioned by name, then he has to prove that the statements refer to him. Identification of a person may be inferred from the surrounding circumstances. All the person must show is that anyone who knows him would know that the statement refers to him.

Case: *Sinclair v Gogarty (1937) IR*

The plaintiffs applied for an injunction to prevent distribution of a book in which they alleged they were defamed. They were not referred to by name but the book made reference to "two Jews in Sackville Street". Samuel Beckett swore an affidavit that he understood the reference to be to the plaintiffs. This was sufficient evidence that the plaintiffs were the persons referred to in the book and the injunction was granted.

It is important to note that, even if an article or publication uses a fictitious name, this will not stop a real person succeeding in showing that the article referred to him and was false. This is particularly relevant to the writing of autobiographies, where fictitious names are used to refer to the author's family and friends. There can be many occasions when people may be able to identify themselves in such circumstances, and if the statements made about them are found to be false, then they could have grounds for an action if the book was published, or alternatively could seek an injunction to prevent the publication or distribution of the book, as in the above case.

In the case of fictitious names being used, it has arisen that more than one person may succeed in showing that an article referred to him and was false.

Reference to a Class:

If a defamatory statement is made about a class of persons, then whether one of the class can sue depends on the size of the class and whether the plaintiff can point to facts which show that he or she was particularly referred to e.g. such general attacks as "all lawyers are liars" would normally be too general to permit any individual lawyer to sue. However, if the class of persons is limited, then it is possible to succeed in proving that a particular person was referred to. For example, if an article

published was found to be false and it referred to a female minister, but there were only two such ministers at that time, then it would be relatively easy to show that it referred to one of them.

Whether an individual in a group can successfully sue in such cases depends on whether a reasonable member of the public would conclude that the plaintiff himself was guilty of the alleged conduct.

In common law, identification of the plaintiff, whether intentionally or negligently published, was actionable. However, under Statutory Legislation, a defence is available for unintentional identification.

False Statement:

Defamation requires a false statement that is not an expression of opinion.
A statement is defined in the ***Defamation Act 2009*** as including any manner of communication. It can be oral, written or visual images, such as photographs, drawings, cartoons, films, music, satire etc.

Defamation can also be implied by an act, such as challenging a person suspected of shoplifting (***McEntee v Quinnsworth 1993***).

In a more recent case, a plaintiff was awarded €10,000 in damages for 'suffering the public embarrassment' of having her carrier bags searched. In this case, the plaintiff set off alarms as she left a busy Tesco supermarket because a security tag was not removed from a toothbrush she had just purchased.

Awarding Ms Kelly damages and costs, Judge McDonagh said the woman had been defamed as she left the Tesco store in Ballybrack on Christmas Eve 2005. Ms Kelly said many other shoppers had seen a security man signal her to wait at the door while her bags were searched and checked. He took a toothbrush and a receipt for her goods back to the checkout where a security tag was removed from the item before it was returned to her.

Ms Kelly told the court that she was subsequently stopped on the street by a stranger who sympathised with her for having been 'caught shoplifting on Christmas Eve'. Judge Mc Donagh, in making the award, said Tesco made a mistake on a day when the door alarm went off 15 times, and he called on the supermarket owners to mount security alarms at the end of checkout stations to stop this from happening again. '....that way they might avoid exposing customers to defamation or the public embarrassment of being stopped at the front door when an alarm is triggered.' (Dublin Circuit Court, April 2008).
In cases like the above, third party reaction is allowed in evidence.

False facts about a person can include inaccurate information or errors, such as typing errors, errors of omission etc. This includes printing the wrong photograph.

The statement or act must be defamatory in nature, causing others to avoid or shun the person, or cause them to form a negative or adverse view of the person's reputation. The use of bad language or 'name calling' may be offensive to another person, but it

is not defamatory in itself. The reasoning is that it has no effect on reputation because people generally will recognise it for what it is, for example, calling a woman a 'bitch'. However, to allege that someone is a criminal or has broken the law is defamatory, for example, accusing someone of being a thief. And although telling a lie is not a crime, to call someone a liar is defamatory. Whether or not adultery is a crime, to accuse any woman of being an adulterer is defamatory and actionable per se, because of absolute privilege in this instance.

Another case worth looking at involving false statement, because of our particular interest in pursuing payment, is:

Pyke v Hibernian Bank (1950)

Three of the plaintiff's cheques drawn by him ***within permitted overdraft limits***, were returned to payees by the bank marked: 'refer to drawer – present again' and 'return to drawer'. The judge awarded £400 for libel. He also awarded £1 for breach of contract, treating the case as 'concurrent' – i.e. liability in tort and in contract. In a subsequent appeal to the Supreme Court, it was stated:
"It seems that........either (a) there are no funds to meet the cheque or (b) the order for payment contained in the cheque has been countermanded since the cheque was given to the payee, and presumably, consideration was obtained thereof. Either of those views seems to me to be reasonably capable of a defamatory meaning quoad the drawer of the cheque as implying (a) that he is insolvent or (b) that he is guilty of a want of good faith towards the payee of the cheque."

This statement by a Supreme Court judge is very important to anyone who either accepts cheques in settlement of debts or issues cheques in payment of them. Even though more direct forms of payment are preferable in modern business, nevertheless, cheques are still used by a very high percentage of business enterprises. The reason for the reluctance to change in some cases is that a longer period of credit can be obtained when paying by cheque.

Innuendo

If a statement has two meanings, one innocent and one defamatory, the onus is on the plaintiff to prove that the statement has a second meaning that makes it defamatory to him. For example, if you were to quote from a customer's balance sheet, but only take a negative result and take it out of context. If the statement you made was, for example, that the company had negative working capital and was unlikely to be able to pay its creditors, this might give the impression that you inferred that the company was insolvent or in financial difficulties. But if the customer is still trading, then this is a criminal offence. So your statement might indirectly infer that the customer was committing an offence under the Companies Acts. If this was later found to be false, then an action could arise. And as the statement imputes a criminal offence, punishable by imprisonment, then this would be actionable ***per se.***

Irish People's Assurance Society v City of Dublin Assurance (1929)

In this case, figures from the Plaintiff's balance sheet, although true figures, were taken out of context, and as such, gave the appearance that the plaintiff was in poor financial condition. The Supreme Court held that to prove the accuracy of the figures would not succeed in establishing the defence of justification. The defendant must also prove that the plaintiff society was insolvent or insecure. Even though the figures themselves were accurate, (in this case, the extract showed a very large balance owed to the bank at the end of the financial period, indicating heavy indebtedness to the bank) they were so arranged as to give a false impression of the financial condition of the company. It was decided therefore that the company were entitled to recover damages for the injury to its credit.

Reputation

The statement must ruin or damage the plaintiff's good name or reputation. A statement which merely upsets another is not sufficient. Hence, if you advise a customer that you will no longer supply him or that you will discontinue service because he has not paid his account, then he may well be upset. But your statement, first of all, is true, and secondly will not ruin his good name or reputation as, if he is unable to pay his debts, then he will not have a good reputation to begin with! (It is actually the non-payment of his debts that will ruin his good name and reputation. It should also be noted that if this conversation took place during a private telephone call, then there has been no publication).

Thus, if a statement was made to or about someone who did not possess a good name or reputation to begin with, then his good name cannot be ruined.

Beverly Cooper Flynn v RTE, Charlie Bird and James Howard (2004)

In this case the defendants proved that an allegation that the plaintiff had advised a number of investors to take part in an investment which would enable them to evade tax was true. The fact that this allegation was true meant that the plaintiff's reputation was already tainted, and therefore, a further allegation which the defendants failed to prove did not destroy their defence. The plaintiff lost her claim of defamation.

In Ireland a plaintiff's bad reputation can still be used as a defence.

Defences to the Tort of Defamation:

The common defences available specifically in an action for defamation are:

(1) Consent
(2) Justification
(3) Privilege - Absolute or Qualified
(4) Fair Comment
(5) Apology
(6) Offer of Amends

(1) Consent: (volenti non fit iniuria)

If a person consented to the publication of defamatory statements about himself either under contract or if he agreed to waive his legal rights in respect of it, such as when a person grants an interview to a journalist revealing defamatory information about himself which is subsequently published, then the person is deemed to have consented to any such statement. He cannot subsequently claim that the statement was defamatory.

Reilly v Gill and Others (1946)
Green v Blake and Others ((1948)
O'Hanlon v ESB (1969)

(2) Justification:

This involves a pleading that the statement made is substantially true. Truth is an absolute defence. The law will not permit a person to recover damages for an apparent injury to a character which, in fact, that person does not possess. Where the defence is available it is a total defence and cannot be destroyed by either showing malice on the part of the defendant or that the defendant believed the statement to be false when he made it.
Justification does not require that every detail of the statement is true. If the statement is true in substance justification is a valid defence.

Beverly Cooper Flynn v RTE, Charlie Bird and James Howard (2004) – justification allowed. The defendants proved the truth of the most important allegation.
The Irish People's Assurance Society v The City of Dublin Assurance Company Limited (1929) – justification denied. The 'true' figures taken out of context gave the appearance that the plaintiff was in financial difficulties, consequently the impression created about the plaintiff was ***not*** true.

The defence of justification has been expanded in recent legislation. Where there are multiple allegations, the falsity of some allegations will be excused if the effect on the reputation caused by the publication is merited. Also, false minor allegations may be excused if the more serious allegation is proved to be true. (Example: Beverly Flynn)

The onus of proving justification is on the defendant(s).
Justification is not often used as a defence because, if the defence of justification fails, the court may award exemplary damages. Damages continue to accrue each time the statement is repeated throughout the entire trial – each repetition of a false statement is treated as a new publication.

Privilege:

The law, in certain cases, will grant immunity from liability in defamation. In such cases the law considers that the public interest in the freedom of speech is best served by guaranteeing uninhibited expression in certain circumstances. The privilege can be either **absolute** or **qualified**.

Absolute Privilege:

In certain situations, the defendant is fully protected in respect of any statements which he may make, irrespective of spite, ill-will or knowledge. Such communications have full immunity from liability in defamation. Consequently, such immunity must be clearly stated and identified in law. Some fall under the provisions of the Constitution, while others are provided under Common Law or Statute.

(1) Presidential Privilege under Article 13.8.1° of the Constitution.

(2) Parliamentary Privilege of statements made by members of the Oirechtas in either House. Article 15.13 This privilege does not extend to Tribunals.

(3) Judicial Privilege - Statements made during judicial proceedings whether by judges, counsel, witnesses, solicitors or parties (Common Law). This privilege has been extended to Coroners acting under the ***Coroners Act 1962.*** There are occasions when privilege of witnesses is not absolute. This privilege does not exist to benefit the witness, but for the administration of justice.

(4) State communications by the executive branch of government.

(5) Communications between spouses. Although communications between husband and wife are not actionable in defamation because there is no publication, the law confers immunity on the ground that communications made between husband and wife are absolutely privileged.

(6) The ***Defamation Act 2009*** provides that reports of court proceedings that are a fair and accurate report published in newspapers or other such publications are absolutely privileged. (can be published in Ireland or Northern Ireland). However, 'trifling' slips in daily newspapers do not qualify. It is also essential that the reported statement should have formed part of the proceedings. So newspaper reports tend to include some direct quote(s) from the judge or judges in the case.

Qualified Privilege:

In some circumstances, the law recognizes the right of a person to communicate freely provided it is not done **maliciously**: such occasions are considered to be occasions of **qualified privilege**. ***Malice*** therefore destroys qualified privilege. An example of qualified privilege would be where the media receive credible, though not completely proven, information from a reliable source and take reasonable steps to verify it, including asking the plaintiff for his or her own version of the story and publishing that version fairly and in mild language.

Furthermore, where an occasion is held to be privileged, the protection is not lost if it is read by a secretary or other employee, such as a typist.

Unlike absolute privilege, where the occasions where this applies can be recognized and enumerated, there are far too many occasions of qualified privilege to be able to identify them absolutely. In the case of qualified privilege, the list is not exhaustive.

The following are some examples of qualified privilege;

- Duty to speak – where the maker of a statement has a duty to speak or is obliged to protect an interest, this would normally result in qualified privilege. It has been stated that such communications are protected for the 'common good' ***(Kirkwood Hackett v Tierney (1952)).***
- Certain reports are privileged in a qualified way and are now given statutory recognition in Section 24 of the Defamation Act 1961. The reports so protected are two kinds; (1) statements privileged without explanation or contradiction and (2) statements privileged subject to explanation or contradiction. Examples of the first are fair and accurate reports of a house of the legislature of any foreign state, an international organization (or conference) of which Ireland is a member, the International Court of Justice or court proceedings in foreign courts. Also covered are, fair and accurate copies or extracts from a public register and notices or advertisements of courts in the State or in Northern Ireland. Thus, extracts and notices published in Stubbs Gazette or Experian Gazette fall under this category, provided they are accurate.
- Interest – certain statements made in protection of a recognized interest are privileged in a qualified way. E.g. the right a person has to defend himself or his property from unjust attack.

Statements made by trade protection societies, carrying on the business of supplying information, for reward, about the financial standing of businesses or persons engaged in business, have been held ***not*** to be privileged. ***McIntosh v Dunn (1908)***

(4) Fair Comment:

Fair comment means a statement of opinion based on facts. To be successful in this the defence would have to prove that the statement:

(1) Concerned a matter of public interest;
(2) Was fair in the sense of being honest and made in good faith, and;
(3) Was comment as opposed to fact but based on fact.

As for the defence of justification, malice also destroys the defence of fair comment.

Under Common Law, the defendant was required to prove that all the facts which the opinion or comment was based on were true.
Under Section 23 of the Defamation Act 1961, the defence will not fail simply because the facts which the opinion is based on are not true, but the opinion or comment must be fair.

It can be difficult to determine what is a fact and what is an opinion.
The European Court of Human Rights held that there is a difference between fact and opinion, namely:

- Facts are susceptible to scientific proof.
- Opinions are not susceptible to scientific proof.

The judge determines whether a matter is capable of being a statement of fact, but having done this, he must leave it to the jury to determine what is fact and what is

comment. The judge must also determine whether the matter commented on is of public interest and whether there is reasonable evidence of the fairness of the comment. If he decides that there is, then it is for the jury to decide whether the comment was in fact fair or not in the particular circumstances.

(5) Apology:

It is not a full defence to a defamation suit for the defendant to claim that he made or offered to make an apology to the plaintiff. However, statutory legislation provides that such an apology or offer to apologise shall be admissible as evidence in mitigation of damages.

An apology must be genuine: if it is not to the plaintiff's satisfaction or smarts of insincerity or is 'half-hearted', or 'mean spirited', it may be rejected by the court.

(6) Offer of Amends:

An offer of amends is an offer by the defendant to publish an apology to the plaintiff and an appropriate correction of the defamation. Such an offer of amends is only appropriate where there has been an unintentional (innocent) publication of a defamatory statement.

For example, where a publisher was not aware of the possibility that the plaintiff would be defamed because there was no knowledge either of identification or circumstances by which an innuendo would arise. However, the publisher's innocence is dependent on having exercised reasonable care.

An offer to publish a correction and a suitable apology in a manner reasonably suited to reaching the same recipients of the original publication may be a defence if, (a) it is accepted by the plaintiff, in which case further action will be barred. Or (b) if it is rejected by the plaintiff, it is allowed as a defence if the offer was made as soon as possible after the defendant became aware of the potential defamation. To leave a defamatory statement on the premises, after being made aware of its defamatory nature, is regarded as publication.

Non-Valid Defences:

- An offer by the defendant of an apology made before an action is commenced or as soon as possible after is not a defence. (it is however admissible in evidence)
- Use of quotation marks will not provide protection
- Using phrases of doubt, such as 'it is alleged' or 'it is rumoured' does not provide a valid defence in defamation.
- Evidence of the bad reputation of the plaintiff is not a valid defence in itself, but it may be used in evidence.

Damages for Defamation:

An action for damages in defamation of character will be decided upon **by judge and jury**. The trial will be held by jury and it is up to the jury to decide whether in fact the statement bore a defamatory meaning and to assess the amount of damages to be awarded.

Damages can be either compensatory, where the plaintiff is compensated for damage to his reputation, or damages can be awarded for emotional distress arising from the publication.

Injunctive relief is also available to the plaintiff, for example, an injunction may be granted to prevent the publication or distribution of a defamatory book, article etc., as in ***Sinclair v Gogarty***.

Tort and Credit Control

As a credit professional, your role is to protect the interests of your employer, but you must do this without infringing your customers' rights. The primary function of tort law is also the protection of rights and interests. You must therefore learn to strike a balance between the rights and interests of your employer on the one hand and the rights and interests of your customers on the other. A great level of skill is required to achieve this balance, and therefore the importance of the credit function being carried out in a professional manner cannot be overstated.

In carrying out this function on a daily basis, you have a duty of care both to your employer and to your customer, and in representing your employer you must ensure that you comply with any legislation, legal requirement or principle of law inherent in this function. You must not deviate from the remit of your employment and cannot engage in a 'frolic' of your own choice in relation to any aspect of your employment. So, much as you might like to, you cannot inflict harm on your customers (bodily or otherwise!), no matter how much abuse you have to take from ***them.***

However, you must also remember that your employer and your customers have a duty of care to you, and they must also ensure that that duty is never breached. You may well have to take verbal abuse from a customer who cannnot pay, or even worse, from one who *will not* pay, and while this may be upsetting sometimes, it does not give rise to an action in law. Verbal abuse, no matter how vulgar, is offensive, but it is not an offence. So you can be called a 'witch' a 'bitch' a 'bastard', among other things, as many unfortunate people in this role are on a daily basis, but there is no protection in tort law against such behaviour. The reasoning is that many of the vulgar words attributed to the vocabulary of army personnel, i.e. 'soldiers' language', are now so abused by right-thinking members of society that they are not used in a descriptive sense at all, but used for colloquial emphasis only. It must be stressed however that there is no hard and fast rule and we cannot say that name-calling and abusive language will ***never*** result in an actionable tort. At the core of any action in defamation is injury of the ***reputation*** and if the remarks are made in an abusive way or in anger so that they only injure the ***pride*** of the plaintiff rather than the reputation, then no action lies at common law. However, as is always the case when it comes to tort – it depends on the context and the circumstances.

Sample Case Study

Below is a sample case based on tort law. Follow the instructions and the advice given and apply it to the case study in your final assignment.

To help clarify the exact requirement, I have broken down the question relating to this case into several sections – this should make it easier to approach. If questions are broken down in this way, you must always ensure that you answer each section. You may break down your answer in the same way, or alternatively, you may present your answer as one complete essay. This case could be used for practice before you complete your assignment.

Sample Case:

Declan is a young teenager who is being bullied by another young boy, Rod, in his class at school. Rod has been taking Declan's lunch money and threatening to beat him up if he tells anyone. For months now Rod has been making Declan's life a living hell. Walking home from school one day, Declan notices that a local farmer, Tom Brown, has left the gates to a field open and being naturally curious he wanders in. The field contains a large barn and it too is unlocked so Declan wanders in there to 'nose around'. He searches through some presses and finds a shot-gun – the farmer has a licence for this gun and is a member of a local gamekeeping club, a fact that is well known in the community. The gun is empty, but after a more thorough search of the barn, Declan finds some shells. He hides the gun and shells in his schoolbag and heads home.

The following day, Declan arrives at the school and sees Rod playing in the yard. He takes out the shotgun, which he has already loaded, turns it on Rod and shoots him, causing serious injury. Declan also suffered an injury himself because of 'kick-back' from the shotgun.

Rod's parents want to bring a negligence action against Tom Brown because they believe that any person who owns a gun should be legally responsible for injuries caused by that gun.

(a) To bring a successful negligence action, what are Rod's parents required to prove?
(b) Will Tom Brown have the defence of contributory negligence because Rod bullied Declan?
(c) Rod's parents believe that Tom Brown was negligent because he left the gates open, because he left the shotgun in an unlocked barn, and because Declan was able to find the shells in the barn also. For each of these allegations, determine if there is actual causation.
(d) Can Declan maintain a cause of action against Tom for his injury?
(e) Summarise all the legal elements of this case.

ANSWER PLAN:
Introduction, Outline Plan, Opening Statement

Begin your review of the case with a list of legal principles arising, including a list of relevant cases and any relevant statute.

You should follow this with a general definition of tort, together with an examination of the purpose and goals of tort law to determine if there is a tort in the first place. Identify any tort or torts arising.

In this example, part (a) indicates that the tort in this case is negligence, so your starting point should be to find any relevant cases that you can use to support your answer. Include these in your answer plan, together with any relevant legal principles.

ANSWER:

You may find it better to deal with section (a) first, as it is the most important. In that case you should establish if the four essential elements of negligence are present in this case, starting with duty of care. This is the most difficult to prove in any case involving negligence, so spend more time on this and also use more than one case to support your answer.

Example:
Donoghue v Stevenson – established the 'neighbour principle'. Can this test be applied to the case? If not, then review the Anns case, followed by the Caparo case. The three stage test is more common, however, when trying to establish duty of care in any case, you should always explain all three.

Also look for a case with similar circumstances. The most appropriate case from your notes is ***Sullivan v Creed***, so review that case and jot down the main points that can be used here.

Establish also whether the duty of care in this instance represents a general duty, as for example applies to motorists, or a special duty, where a special relationship exists.

When you have established that a duty of care exists between the plaintiff (Rod's parents, on behalf of Rod) and the defendant (Tom Brown), you then need to examine the facts to determine if that duty has been breached, or if the defendant's care has fallen below the standard required in law. Again, use case law to establish this.

Example:
Sullivan v Creed provides a good example of standard of care falling below the norm. In addition to this, there is a simple test that can be applied, which is to answer the following questions:

1. Did the defendant (Tom Brown) do something which a reasonable man would not have done?
2. Did the defendant fail to do something which a reasonable man would have done?

In the present case, we can answer yes to both. He left a shotgun in a place where it could be easily found – the act. And he did not store the shotgun in a safe place where it should be locked and secure – failure to act.

What is or is not reasonable care? In this case, the probability of the accident and also the gravity of the threatened injury indicate clearly that reasonable care was not taken by the defendant.

We have now established breach of duty.

The third point is to establish injury, damage or loss. This is fairly straightforward in this case. However, to be absolutely sure you should always apply the appropriate test, which in this case is the foreseeability test. Was this accident foreseeable? The ***Wagonmound*** case provides an example where an accident was not reasonably foreseeable, but this is not the case here. However, this case should still be cited as it provides evidence where the opposite was found, and you can base your findings in the present case on the essential differences which indicate that in this case, the accident was reasonably foreseeable, particularly as there is a gun involved. Guns are intended to inflict injury. Foreseeing injury in these circumstances is beyond doubt.

Finally, establish whether there is a causal link between Tom Brown's acts or omissions and Rod's injuries.

The test to be applied here is the 'but for' test. But for Tom Brown's act, would this accident have happened, resulting in injury to Rod? The answer is no, therefore we have established a causal link between the defendant's act and the plaintiff's injury.

The case to apply here is ***Kenny v O'Rourke***.

You have now established the four key elements of negligence which must be proven in order to be able to attach liability to the defendant.

(b) Examine the criteria for contributory negligence. Are there any relevant cases or statutes? Can you use a ruling from any previous case that can be applied here?

Example:
The ***Civil Liability Act 1961*** provides that where a plaintiff has contributed in some way to his or her own injury, then the defendant will not be found 100% negligent. In this case, there is a causal link between Declan's act and Rod's injury, however, there is no causal link between Rod's behaviour and his own injury. This would not be allowed as a defence, but the plaintiff may be able to rely on ***res ipsa loquitur*** in the circumstances. The issue of Rod's bullying calls for a separate enquiry involving professional negligence on the part of the school authorities and also perhaps the parents who also failed to notice the behaviour in both cases.

(c) Causation can be quite difficult to prove. Again, scan cases and/or legal principles in your notes. What tests can be applied? Will the 'reasonable man' test, established in ***Sullivan v Creed***, provide evidence of causation in this case? Also examine any defences that the defendant may rely on. For example, do you think ***res ipsa loquitur*** could be applied here? What is the likelihood of it being displaced by the courts? Deal with each part of this question separately. Leaving the gates open would not be found to be negligent in normal circumstances. Many people leave gates open so it is fair to assume that a reasonable man would not foresee any harm from this action. A

shotgun in an unlocked barn is a different matter. Any reasonable man would know, or ought to be aware of, the natural curiosity of children. Now the issue of the open gate comes into play, because that could be viewed as an invitation to a child to come inside and then to wander into the unlocked barn. Finally, leaving the shells in the same general area as the gun is unquestionably a key link in this case. This represents causation, because no reasonable man would have done this, and any reasonable man would have foreseen the possible damage. In particular, because there is a gun involved and this is a weapon intended to inflict injury, the probability of the accident is extremely high as is the gravity of the threatened injury. In this case, a life was threatened. Causation has been proven beyond doubt.

(d) The answer here is yes. Declan sustained an injury from a shotgun which he was easily able to find in the first place and also to find the shells and load the gun, turning it into a lethal weapon. Under the Age of Majority Act (1985), Declan is a minor and therefore is protected in law from harm caused by carelessness of any adult. Applying the ‘***but for’*** test, (***Kenny v O'Rourke)*** it could be said that ‘but for’ Tom Brown leaving the gates open, the barn unlocked and the gun and shells in the same place, Declan himself would not have been injured. There is duty of care, breach of that duty, injury and causation. Therefore Declan has a good action in tort.

(e) This just requires a summing up of the facts of the case and a conclusion.
For example:

Summary

Tom Brown left the gates to his field open, he left his barn unlocked and he kept a shotgun and shells in close proximity in this barn. As a result of Tom's acts and failure to act as a reasonable man and failure to take reasonable care, he is in breach of his duty of care to any person who might be injured. In this case, both Declan and Rod were injured. As minors they are protected in law and but for the acts and omissions of Tom Brown, they would not have been injured in this way. Negligence is effectively blameworthiness, and there is no question that Tom Brown is to blame. Therefore both Rod and Declan have a good action in tort for the negligence of Tom Brown. In both cases the plaintiffs may be able to rely on ***res ipsa loquitur***, whereby the burden of proof passes from the plaintiff to the defendant. This is unlikely to be displaced by the courts because of the nature of the injuries.

Further actions may arise involving professional negligence in relation to the issue of bullying. School authorities, including teachers and board of management, and also parents, owe a special duty of care to minors. If it could be proved that any of these parties were aware of the bullying and did nothing about it, then an action could be taken against them for either professional negligence or vicarious liability.

As you can see from the above case, the most important thing in any case involving negligence is to establish the existence of a duty of care, either a general duty or a special duty. Then the other three elements should be established, as without all four, there is no liability in negligence.

To sum up – start with an answer plan, a good introduction, the main body of your answer and finally a brief summary with a clear conclusion.

All of the above principles should be applied to your second assignment, however, be aware that it may not involve exactly the same tort. Where negligence is involved, the principles of negligence apply to all cases, however, sometimes more specific principles are involved in cases where there is a special duty and a special relationship. In your assignment, there may be a more specific form of negligence indicated, but either way, you should always try to prove negligence in general first and then establish whether a more specific form could be proven, given the facts of the case. Also, you must ensure that you look in the right places for appropriate relevant cases.

Your second assignment contains two separate sections relating to one case study. The first question is based on tort law and should be completed along the lines of the sample case above. The second question may require some revision of other areas of law covered in earlier modules.

This now completes your introductory course in law.