Comparative Law

Unit 5: Introduction to Common Law: Contract and Torts

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Final Exams – save the date!

First appointment:

- 9.02.2025, 11:00-13:00 (written exam/Audimax)
- Registration start: 01.12.2025
- Registration deadline: 26.01.2026
- End of withdrawel period: 2.02.2026

Second appointment:

31.03.2026, 11:00-13:00 Uhr (written exam/Audimax)

- Registration start: 01.12.2025
- Registration deadline: 23.03.2026
- End of withdrawel period: 23.03.2026

Overview of today's topics

Introduction to common law

- **History (Unit 4)**
- **Law (Unit 5, 6)**
  - Contract
  - Torts
  - (Property Law)
  - Trusts

→ **Civil Law (French and German legal family) (Unit 6, 7)**

I. Basics of English Contract Law: Overview

1. Formation of a contract
2. Contents of the contract
3. Contracts and third parties
4. Void and voidable contracts
5. End of contract
6. Remedies

Contract: A legally binding agreement between two or more parties that creates legally enforceable obligations.

I. Basics of English Contract Law

1. Formation of a contract

- **Freedom of contract:** with regards to formation and content
  - Laissez-faire philosophy vs. consumer protection and anti-discrimination legislation
- **Offer and Acceptance (Agreement)**
  - **Offer:** statement to the effect that the person making it is willing to enter into a contract, provided that the party to whom it is addressed accepts its terms. → Must be intended to be legally binding
  - **Acceptance:** unqualified and final expression of assent to the terms of the offer.
- **Consideration:** Act or forbearance of one party being the price for which the promise of the other is bought.
  - Contract is viewed as **bargain** (element of reciprocity)
  - (P) Determination what consideration can or must consist of
  - Function: distinguish between binding and non-binding agreements

I. Basics of English Contract Law

1. Formation of a contract

– **Consideration** "some value in the eyes of the law"

(1) Consideration must be sufficient, but not adequate

→ Nominal consideration / peppercorn consideration

(2) Past consideration is not good consideration

→ A promise cannot be based upon consideration that was said, given or done before the promise was performed

(3) Consideration must move from the promisee, but not necessarily towards the promisor (privity)

→ only a party to a contract is permitted to sue upon that contract's terms

→ The promisee may provide consideration to a third party, if agreed

I. Basics of English Contract Law

1. Formation of a contract

– **Intention to create legal relations**
  - If parties intend that any dispute arising from the contract will be resolved by a court

– **Form**
  - Without
  - General rule: no special form required
  - Exceptions
    - Contracts in writing (i.e. sale of land)
    - Deed: Written instrument signed by the person making it, witnessed by at least one witness and clear from the face of the document that it is intended to be a deed (i.e. sale of land, certain securities (mortgages))
    - Unilateral promises will be binding if in the form of a deed.

I. Basics of English Contract Law

2. Contents of the contract

- **Express and implied terms**
  - **Express terms**: statements of the parties that become binding terms of the contract
  - **Implied terms:** not expressly agreed on by the parties
    - Terms implied in fact, in law or by custom
- **Conditions, warranties and innominate terms**
  - **Conditions:** in case of breach, damages and termination are possible
  - **Warranties:** only damages
  - **Innominate/Intermediate terms:** remedy depends on severity of breach in individual case
- **Standard form contracts**
  - No individual negotiations between the parties; “accept or reject”
  - (P) Imposition of unfair terms, part. vis à vis consumers
    - Exemption/exclusion clauses
    - Statutory rules (consumer protection)

I. Basics of English Contract Law

3. Contracts and third parties

- **Agency**
  - Relationship under which the **agent** is authorised to act as a representative of the **principal**
  - Agent enters into a contract with third party, principal is bound by the agreement

- **Privity of contract and the Contract (Rights of Third Parties) Act 1999**
  - **Privity of contract: A** contract can confer rights and impose obligations only on the parties to it.
    → Obligations cannot be imposed on sb else
    → Exceptions: Benefits and rights can be conferred on third parties; third parties can enforce these rights
    → Contract (Rights of Third Parties) Act 1999

I. Basics of English Contract Law

4. Void and voidable contracts

- **Meaning of void and voidable**
  - **Void**: agreement intended to be binding does not produce any legal effects
  - **Voidable:** Party has the right to rescind the contract – she can affirm or avoid it; affirmation extinguishes avoidance
- **Capacity**
  - A person´s ability to enter in a contract
  - **General Rule:** anybody. Exceptions: Minors, mentally ill and intoxicated persons
- **Illegality**
  - Exception to the principle of freedom of contract
  - When a commission of a legal wrong is involved or if contract is against public policy

I. Basics of English Contract Law

4. Void and voidable contracts

- **Mistake**
  - **Unilateral, mutual or common mistake**
  - **(P) Effects** in common law (void) and equity (voidable)?
- **Misrepresentation (fraudulent, negligent or innocent)**
  - **False Statement** of past or existing fact by one party before or at the time the contract is made which is addressed to the other party and induces her to enter into the contract

    ←→ **non-disclosure** (no general duty of disclosure in English law)
- **Duress and undue influence**
  - Consent on which the contract is based is regarded as defective, because it was obtained by some form of pressure
  - **Duress: Common law** concept; illegitimate threat is used to force s.o. to enter a contract (physical violence or economic duress)
  - **Undue influence: Equitable doctrine;** pressure does not amount to duress

I. Basics of English Contract Law

5. End of contract

- **Performance**
  - **Parties fulfil their obligations** under the contract
  - **Non-performance** and **malperformance** amount to a breach of contract (unless only slight difference between promise and performance)
- **Breach**
  - **Party does not or cannot fulfil obligations** under a contract without having a lawful excuse
  - Performance must be **due**, unless in case of **anticipatory breach**
- **Frustration**
  - After formation of a contract, events may occur which the **parties could not foresee** and which interfere with performance (make it impossible or illegal)
  - Only applicable to events that are not due to the fault of either party

I. Basics of English Contract Law

6. Remedies

- **Damages**
  - **Monetary compensation** in case of a breach of contract
  - Claimant does not need to prove a financial loss, in absence of financial loss, only nominal (trivial) damages can be received
- **Specific performance**
  - **Equitable remedy:** Discretionary only; if damages are not enough
  - Court orders defaulting party to fulfil obligations under the contract
- **Restitution**
  - When one party has performed her obligation without receiving counter-performance

II. Basics of the Law of Tort: Overview

1. Fundamental principles of tortious liability
2. Main torts
   - Defamation
   - Nuisance
   - Trespass
   - Strict liability
   - Negligence
3. Remedies
4. Defences

Tort: A civil wrong independent of contract. No need for prior connection.

→ Tort law covers a wide variety of different situations

→ Tort law must be distinguished from criminal law

II. Basics of the Law of Tort

1. Fundamental principles of tortious liability

- **Introduction**
  - Gen. required: wrongful act by defendant, damage suffered by claimant
  - Questions of causation, remoteness and contributory negligence
- **Causation**
  - **Causal link** between defendant´s behaviour and claimant´s damage
  - **‘but for test’**
- **Remoteness (‘legal causation’)**
  - No damages, if **consequences are too indirect** from original act
- **Contributory Negligence**
  - **Claimant** himself **partly responsible** for the damage he has suffered

II. Basics of the Law of Tort

2. Main Torts

– **Defamation**

- Person who publishes an untrue statement that reflects negatively on another´s **reputation**
- **Libel:** defamatory representations in a permanent form (pictures, print)
- **Slander:** conveyance of a defamatory meaning through spoken words or gestures

II. Basics of the Law of Tort

2. Main Torts

- **Nuisance**
- **Private nuisance (tort):** "unreasonable interference with the reasonable enjoyment of land"
  - Claimant is disturbed in the use of her property (smoke, smells, music)
  - **Balancing of conflicting interests**: enjoyment of land vs carrying out certain activities
- **Public nuisance (crime):** "act or omission which materially affects the reasonable comfort and convenience of life of a class of His Majesty´s subjects"
  - Common example: obstruction of a highway

II. Basics of the Law of Tort

2. Main Torts

– Trespass

- Original meaning: “wrong” (writ of trespass); today: tort that can be committed to goods, land or against a person
- **Trespass to goods:** one person interferes intentionally and forcefully with the goods possessed by another person.
  - **Example:** Visitor in a museum touches a painting owned by an art collector and possessed by the museum without permission
- **Trespass to land:** unjustifiable interference with the possession of land
  - Can amount to a crime (aggravated trespass), usually just a tort
- **Trespass to the person:** can amount to crimes as well as torts:
  - **Battery:** Intentional and direct application of force to another person
  - **Assault:** Act which causes a person to apprehend that force will be used against her
  - **False imprisonment:** infliction of bodily restraint that is not expressly or impliedly authorised by law

II. Basics of the Law of Tort

2. Main Torts

– **Strict Liability: The rule in Rylands v Fletcher**

- Generally refers to a system where liability is imposed, even if a person did not act intentionally or negligently
- Exception to the general rule that tortious liability is based on **fault**
- Strict liability has developed into a **separate principle in relation to land: "The rule in Rylands v Fletcher"** (1868)
  - A person who collects on his land something which is likely to cause harm if it escapes is strictly liable for any damage caused by an escape.
  - **Examples:** Water, fire, gas, electricity, poisonous vegetation
  - Close link to the law of nuisance

II. Basics of the Law of Tort

2. Main Torts

– **Negligence (Donoghue v. Stevenson (1932))**

- Several meanings in tort law
- **Breach of a legal duty to take care** which is imposed on the defendant *vis-à-vis* the claimant
- (P) Did the defendant owe a legal duty to take care?
- (P) Is the defendant in breach of that duty? → objective test: standard of the law must be attained ("reasonable person")
- (P) Different forms of damage:
  - Personal injury
  - Property damage
  - Economic loss
  - Nervous shock

II. Basics of the Law of Tort

3. Remedies

- **Damages**
  - Amount of money that the defendant is ordered to pay to the claimant once he has been found liable
  - **Compensation for the loss suffered**: Claimant has to be put in the position he would have been in if the tort had not been committed
  - Rare: **punitive damages** to punish defendant an prevent similar behaviour in the future
  - **Pecuniary** and **non-pecuniary loss**
- **Injunctions**
  - Equitable remedy; if damages are not sufficient
  - Order of the court prohibiting a person from doing sth or requiring a person to do sth
  - Example: X repeatedly trespasses onto Y's property without causing any damage → An injunction will order X to stop

II. Basics of the Law of Tort

4. Defences

- **General defences**
  - **Apply to all torts**
  - Consent (by claimant to the conduct in question)
  - Illegality (both parties are engaged in an illegal activity)
  - Necessity (damage had to be caused to avoid greater loss)
- **Special defences**
  - **Only available in relation to specific torts**
  - Trespass: License, justification by law (i.e. police officers)
  - Defamation: Privilege (freedom of speech prevails)
  - Strict liability: Vis major (act of god)

Additional Reading for today´s session

– Richards/Mollica, English Law and Terminology, 4th Ed., 2016, chapter 10 and 11.

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