

## Law of Tort 侵权行为的法律

### Definition 定义

The word ‘tort’ is derived from the Latin *tortus* i.e. ‘twist’. It means a civil wrong 民事过失 (other than a breach of contract 违反合约) for which the law will provide compensatory remedies. People may claim tortious reliefs under various circumstances in their daily life: traffic accident, personal injuries, medical negligence and defamation etc. The purpose of tort is to provide compensation to a victim for his harm suffered as a result of the breach of a legal duty of a third party. When such a duty is breached, the law punishes the wrongdoer and awards damages to the victim. The following are some examples.

### Negligence (疏忽)

Negligence is the most common type of tort actions. It involves four essential elements:

(1) **Duty of care (小心责任)**: In a negligence lawsuit, the court will ask whether the defendant (被告) owes the plaintiff (原告) any duty of care. Legal duty is imposed in different typical situations. For instance, a driver owes duties to road users; a doctor owes duties to patients; and a bank owes duties to customers.

(2) **Breach of duty (违责)**: When a duty of care exists, the court will ask what the standard of care is in the circumstances, and whether the defendant’s conduct is below such a standard. The standard of care of “the reasonable man” (合理人士) is the test adopted by the court. To illustrate, if a nurse does not follow the sterilization procedures to clean the operation equipment (a “reasonable nurse” would do so in the circumstances), there will be a breach of her duty of care. If a nurse does follow all the sterilization procedures but the equipment happens to be contaminated by some unknown bacteria beyond control, the court may not regard it as a breach of the duty of care.

(3) **Causation (引致)**: When there is a duty of care followed by a breach of such duty, the court will ask whether the breach “causes” the damage to the person. When a careless driver caused injury to his passenger who buckled up, the driver might be fully liable for his carelessness. But when a careless driver caused injury to his passenger who failed to put on the safety belt, the court might not hold the careless driver 100% liable. The passenger might bear part of the liability. The reason is that the chain of causation (引发炼) was broken by the

passenger's own fault, i.e. the contributory negligence of not wearing the safety belt.

(4) **Remoteness of damages (赔偿合情性)**: The court will not award damages to a victim if the plaintiff fails in the remoteness test. The plaintiff is only entitled to damages flowing directly from the negligent act and such damages must be foreseeable. If there is slight water seepage from an adjacent flat affecting only the wall paper of the plaintiff's flat, the Court may not award the costs and expenses of renovating the plaintiff's entire flat.

### **Occupiers' liability (占用人法律责任)**

In Hong Kong, occupiers' liability is partly governed by common law and partly by legislation, i.e. Occupiers Liability Ordinance (Cap. 314) (占用人法律责任条例). If a visitor to the premises sustains injury due to the occupier's failure to keep the place safe, he may bring an action against the occupier.

Firstly, the court will ask if the defendant is legally an "occupier". The deciding factor is whether the person has sufficient control over the premises. For example, property manager is usually regarded as an occupier because of his control over the daily management of a building.

Secondly, the court will ask if the plaintiff is legally a "visitor". A person expressly permitted to stay on the premises is a visitor. If the occupier knowingly tolerates and takes no step to prevent another person from entering the premises, the person entering the premises may also be deemed as a visitor.

Thirdly, the injury must occur on the premises. The word "premises" includes all parts of buildings, lands and structures.

Lastly, the injury must be caused by the "defective state" of the premises, for example, a slippery floor or a broken staircase. The damages must not be legally regarded as "too remote" and should be foreseeable.

### **Nuisance (滋扰)**

If an owner of a property can prove that another person unreasonably "interferes his use and enjoyment of the property", he can bring a court action in nuisance.

The first question that the court will ask is whether the interference emanates from the defendant's activity. Secondly, the defendant's act must be unreasonable. For example, consistent water dripping from an air-conditioner upstairs is unreasonable but the noise emanating from a water pump due to a few minutes of shower by a neighbouring flat unit per day may not be unreasonable.

### **Defamation (诽谤)**

In defamation cases (See *Sim v Stretch* [1936] 2 ALL ER 1237), the legal test of defamation is defined. The court will first examine whether such statement will "lower the reputation of the victim in a reasonable man's eyes either directly or implicitly". If in the affirmative, defamation is established.

In addition, the defamatory statement must refer to the plaintiff. The task for the court is to find out whether the statement in question is in fact communicated with or published to a third party. For example, if a defamatory statement is reported in a magazine, it can be sufficient evidence to prove communication to a third person. However, if a demand letter is issued to a debtor by a law firm on behalf of a creditor and the letter is marked “private and confidential”, such a letter may not amount to defamation of the lawyer against the debtor.

In a court action for defamation, when a plaintiff succeeds in establishing a prima facie case, it is for the defendant to explain and justify, by way of defence, the statements are not defamatory. The defendant may argue that the statement is true or represents a “fair comment” (公平评论) (for example, the defamatory statement is the honest opinion on a matter of public interest supported by facts). If not, the defendant may offer an apology as early as possible after the act of defamation. However, an apology is a mitigating factor (求情理由) only when assessing damages to the plaintiff. It is alone not a legal defence (办护理由) to defamation.

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