

LAW OF TORTS IN MALAYSIA

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PREFACE

Tort is a civil wrong and tort law is essentially a set of principles of personal responsibility for conduct. It is structured as arguments, one unique argument for each tort, which has its own name, such as conversion, negligence, trespass, false imprisonment, passing-off, tortious conspiracy and many more. Each of these named torts represents a state of affairs proven by an aggregate of elements, each of which, in turn, is composed of facts constructed from evidence. To establish liability, whether in strict tort liability or in fault-based tort liability, it is essential for the plaintiff to prove the established elements including the causation of harm.

The tort of defamation, for example, is aimed at protecting the interests of the individual in his reputation. When the defendant makes an untrue defamatory statement about the plaintiff, the plaintiff will have a right of action against the defendant unless the defendant can establish one of the many defences available in a defamation action. Likewise, in negligence, the plaintiff is required to show that the defendant caused the damage or harm in question. The burden is on the plaintiff, and he must show the court precisely how the damage or harm he suffered was caused by an act or omission of the defendant.

Further, the tort system is a cause-based compensation system in that, through tort law, the injured party is compensated by way of damages. To earn such compensation, it is necessary for the plaintiff to prove that the tortfeasor is solely responsible for the injuries suffered by the plaintiff. The defendant would not be held liable for injuries unless his conduct caused the harm to the plaintiff. The damage sustained must have been reasonably foreseeable and not too remote.

With that said, the book *Law of Torts in Malaysia* consists of 36 chapters which extensively discuss on various topics which commonly found in many undergraduate and postgraduate syllabus on this subject. What sets this book apart from many others in the market is its wide coverage, from core concepts to contemporary issues. It traces the origin and development of the law of torts at common law and in Malaysia, the tort of negligence and its common defences, professional negligence with a special focus on medical and legal professions, trespass to person, land and goods, occupiers' liability, defamation, *Reynolds* Privilege defence, strict liability, vicarious liability, product liability and legal responsibilities in relation to protecting animals.

It also covers topics like nervous shock, psychiatric injury, nuisance, the tort of sexual harassment, the right to privacy, misfeasance in public office, and malicious prosecution. The limitation period, the judicial remedy of damages, injunctive relief and extinction of or discharge of liability are also featured in this book. Tort in public international law and from the Islamic perspective, as well as the application of private international law in torts cases, are additional features of this book that are generally not found in many books on this subject in the market. Undeniably, this is a rich source of scholarly discussion on the aforementioned topics, written and contributed by experts in their respective fields of research and interest.

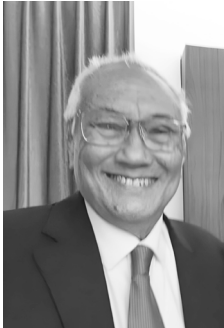
Having said that, on behalf of the contributors, we would like to express our sincere appreciation to 'Tun Dato' Seri Zaki bin Tun Azmi, the former Chief Justice of Malaysia, for spending his invaluable time preparing the foreword to this book. Our gratitude is further extended to the publisher, CLJ Malaysia Sdn Bhd for taking a great deal of interest in the publication and for their support in finally getting this book published. Last but not least, our heartfelt appreciation goes out to all the contributors for their hard work and efforts in making this book a success.

Whether you are an undergraduate law student mastering the essentials or a legal profession seeking depth, *Law of Torts in Malaysia* delivers the clarity and insight you need to navigate this complex field with confidence.

The applicable laws and the developments stated in this book stand as of 1 November 2024.

Professor Dato' Sri Dr Ashgar Ali Ali Mohamed
Dr Muhamad Hassan Ahmad
1 November 2024

FOREWORD



The word “tort”, which is derived from the Latin term *tortum*, in its simple term is a “wrongdoing”. It is a civil wrong committed on the person or property of another where the relationship between the party that has suffered damage and the party that committed the tort in question in most cases have been strangers to each other. Tortious liability arises from the breach of a legal duty which results in damage to a person or property. In other words, a tort is a civil wrong which is committed either intentionally or negligently against a private person, including other legal entities other than the State.

Tortious liabilities may arise through trespass to a person, trespass to land, or trespass to property. The law of torts covers numerous types of private civil wrongdoings such as trespass to person, land, and goods, defamation, and negligence, among others. The person who intentionally or negligently acts or fails to act in a particular manner thereby inflicting injury or damage to the aggrieved party will be liable to the person who suffered the injury or damage.

Being the product of the English common law developed in the late 18th century, it was implanted in the Malay peninsula during the British administration of these States. The very first case on the application of the English torts law in the Straits Settlements can be seen in the case of *Kamoo v. Thomas Turner Basset* (1808) 1 Ky 1 which clearly demonstrated the retrospective application of civil injury claims committed before the implementation of the Royal Charter of Justice 1807.

Likewise, in the Federated Malay States’s case of *Government of Perak v. AR Adams* [1914] 2 FMSLR 144, a case involving damage to the plaintiff’s road and the drains caused by the defendant. In deciding the case, Woodward CJ stated: “In dealing with cases of tort, this Court has always turned for guidance, as to the fundamental principles, to English decisions. The occupation of land has always been held in England to impose upon the occupant the duty of using it as not to injure his neighbour – *sic tuo ut alienum non laetias*. That was the maxim laid down in *Rylands v. Fletcher*”. Again, in the case of *Mohamed Gunny v. Vadwang Kuti* (1930) 7 FMSLR 170, the English principles on tort was enforced by Burton CJ who said “Although no case of civil wrongs has ever been passed, the courts in this country in matters of tort have always followed the law of England”. Being part of the common law, the current application of the common law of torts in Malaysia is governed by s. 3(1) of the Civil Law Act 1956 (Revised 1972) [Act 67].

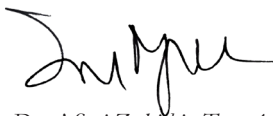
It is worthwhile noting that many of the common law principles on torts are traceable from the Shariah or Islamic law. In this book, a chapter had been dedicated to “Torts in Islamic Law”. A few chapters also mentioned in passing the applicable Shariah principles on torts such as the *Reynolds* privilege defence propounded in the well-known case of *Reynolds v. Times Newspapers* [1998] 3 WLR 863 which protects “responsible journalism” in a defamation claim. The Quran, *Surah al Hujurat* (Chapter 49: verse 6), deals with the news brought by a *fasiq*, or untrustworthy or unreliable person or any news where there is doubt. From this verse, the believers are reminded not to be hasty, not to act on impulse but to wait and verify the correctness of words before it is made known to another. Likewise, in the tort of misfeasance of public official or public authority, the Shariah had spoken at great length about the responsibility of a person entrusted with public duties to discharge their duties with honesty, sincerity, diligence and with full commitment. Incompetent, inefficient or complacent, being greedy, unscrupulous and unproductive, among others are some of the acts which are abhorred in Islam.

Having said the above, the book, *Law of Torts in Malaysia* provides a wide coverage of the subject from the core concepts to contemporary issues. Comprising 36 chapters, it extensively covers the development of the law of torts, elements of negligence including professional negligence particularly, the medical and legal profession, trespass to the person, land, and goods, defamation, strict liability, vicarious liability, product liability, liability for animals, nervous shock, psychiatric injury, nuisance, the tort of sexual harassment, the remedies including damages and injunctive relief. The application of private international law in torts cases, tort in the sphere of public international law, and tort from the Islamic perspective are also covered by the book which are rarely found in other books on similar titles.

I am confident that this book will be of great interest not only to undergraduate law students but also to the public in deepening their knowledge, understanding, and application of the essentials or the key concepts of the Malaysian law of torts. With that said, I heartily congratulate the contributors for their extensive research on the subject and the editors for successfully completing this tedious task and coming up with this useful legal material which would certainly contribute to the pool of legal knowledge from the Malaysian perspective for years to come.

I wish you all great success with this publication.

Thank you.



Tun Dato' Seri Zaki bin Tun Azmi
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