

THE COMMON LAW'S APPROACH TO LIABILITY AND REDRESS ITS APPLICABILITY TO EAST AFRICA

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1. WHAT IS THE COMMON LAW?

- The common law refers to the rules of customary law which have been recognized by English courts.
- The system is built on precedents and centers on individual decisions; it builds up its principles by gradual growth from case to case.
- In East Africa, the common law is a colonial legacy.
- Colonial governments sought to extend to English settlers the same rights and privileges they enjoyed at home.
- The common law was a significant part of this package of rights and privileges.
- English law was adopted in the colonies through a reception clause, which in Kenya's case, for instance, is now found in the Judicature Act, Chapter 8 of the Laws of Kenya
- Among other things, the Judicature provides that courts are to apply "the substances of the common law" but only to the extent that Kenya's circumstances and its inhabitants permit.
- Indeed, the common law constitutes a significant source of law for Kenya, since it is the applicable law where there is no local registration.

II. THE CONCEPTION OF RIGHTS AT COMMON LAW

- Before examining the question of liability and redress, it is important to determine who has rights at common law.
- The conception of rights under the common law should be seen in the context of the emergence and predominance of liberal theory or liberalism.
- So that liberal theory ought to be seen as reflection of life experience of the English people at that time.
- **But what are the key principles of liberal theory**

- First, a commitment to individual liberty
- So that each individual has the right to pursue his or own conception of the good.
- That is, individuals should be left to their own devices
- Obviously, there is therefore a significant assumption that each individual has the capacity and resources to pursue his or her own conception of the good.

Second, an endorsement of the institutions of private property and the free market.

Private property ensures personal independence, while

Free market is the only non-coercive means of coordinating economic activity.

Third, government neutrality. For instance the market should be left alone by government. That is government should not regulate the market because in doing so it would favor some individuals or groups at the expenses of others.

The question that then arises is how these principles of liberal theory are reflected in the common law's conception of rights.

The CL conception of rights is premised on the belief that the individual's property , personal liberty, and freedom of discussion and association should be sacrosanct from interference by the state.

Accordingly, the common law has traditionally been preoccupied with protecting the individual's rights to only those who possessed private rights, that is rights from property, contracts, or torts.

I will concentrate on rights arising from torts, which I think are the most relevant for our discussion today.

What are torts?

Torts are civil wrongs

A civil wrong is a breach of a legal duty which affects the interest of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account.

This is a fairly broad and abstract definition. For instance, it does not tell us what conducts would be regarded as a breach of that duty.

In order to understand why tort law protects certain interests, it is important to examine the functions of the tort system.

It should be noted that the tort system seeks to vindicate corrective, distributive and retributive principles of justice.

BUT, what stands out is that the system protects individual autonomy.

Once again, liberal theory offers some useful insights. Two examples suffice to illustrate this point.

First, strict liability is rare in the law of torts.

That is, respect for the defendant's autonomy equally demands that the infringement of his or her liberty should not be excessive.

Contrast this with the common law, in which there is no such objection to strict liability on the reasoning that the defendant has voluntarily chosen to restrict his or her freedom in that way.

Second, the preoccupation with individual autonomy means that tort law largely protects personal interests, as opposed to public interests.

Such personal interests include: bodily integrity, personal liberty, and physical security from injury, psychiatric harm.

Public rights are only protected if the claimant can demonstrate that he or she has suffered damage over and above that inflicted on the public. So that even here the idea is to protect a private interest.

III. THE COMMON LAW AND THE CARTAGENA PROTOCOL

Does the common law offer a suitable liability and redress framework in the context of living modified organisms?

I will concentrate on the tort of negligence, which I think is the most applicable tort as far as the Protocol is concerned.

Negligence protects interest in physical and mental health, reputation, property interests, economic relationships and public rights.

What are the requirements of the tort of negligence?

1. the existence of what in law we call "a duty of care situation," that is, a situation in which the law attached liability to carelessness;
2. a breach of the duty of care by the defendant, that is, failure to measure up to the standard set by the law;
3. a causal connection between the defendant's careless conduct and the damage; and
4. the damage is foreseeable, that is, not so unforeseeable as to be too remote.

Let us examine the requirements of reasonableness and foreseeability.

Reasonableness

The defendant will be in breach of the duty of care if his or her conduct falls below the standard required by the law.

The applicable standard is that of a reasonable and prudent person. But that leaves an important question unanswered: what level of care will be reasonable in any particular situation?

The common law has provided some useful guidance:

First, the standard of care expected of the reasonable person is generally objective.

That is, it does not take into account the weaknesses or inexperience of the defendant in question. [Except where, e.g., the defendant cannot meet the standard].

Second, the common law requires courts to do cost benefit analysis:

It is reasonable (or fair) for the defendant to bear the cost of a particular form of precautionary conduct in light of the level of protection and benefit it will confer on the plaintiff and others?

Third, community values

Courts will be influenced by the evidence practice within the community. But this is to be balanced against the reasonable expectations of the community.

What about foreseeability?

The foreseeability is not one of the actual foresight of the defendant. Instead, it is what the court determines to be foreseeable, after reviewing the evidence and trying to do justice.

Why is this a good test?

1. It is flexible and leaves a large element of discretion to courts.
2. This is good because it enables courts to raise standards of expected behaviour by insisting on better precautions being taken in advance. Thus it enables justice to be done according to the merits of each individual case.

Negligence and the Protocol

The transboundary movement of LMOs could have a number of effects on ecosystems:

Crossing of introduced traits such as herbicide resistance into wild relatives of the LMO, toxic effects produced on other organisms in the environment or on humans or livestock affected via the food chain.

A number of questions arise

1. Who should be liable in these situations? Manufacturers, exporters, operators, exporting states, states of origin? Who owes a duty of care?
2. What constitutes damage?
 - Any degree of change of biodiversity?
 - Thresholds?
3. Is the damage foreseeable?
 - Will “state of the art” defence be appropriate?
4. Should liability be strict?
 - So that it does not matter that the defendant was not negligent.

I think these questions cannot effectively be addressed in the abstract; they are best dealt within the context of specific cases. This makes the tort of negligence a suitable regime for addressing them [except 4, which should be a policy question for national governments, as guided by international instruments.] The tort of negligence can effectively deal with the liability of manufacturers, exporters and operators.

In these cases, it would be relatively easy for courts to determine whether there are duty of care situations. Indeed, the common law’s of such a character it would have been actionable if committed in Kenya, for instance. And the act must not have been justified by the law of the place where it was done.

But I think the idea of imposing liability on states for the acts of private entities is bound to be problematic: state action doctrine

I think that the tests of reasonableness and foreseeability make the tort of negligence a potentially effective and redress regime for the handling, transfer and use of LMOs. In particular, two features of LMOs make the tort of negligence an appropriate liability and redress regime:

First, the effects of LMOs are still largely unknown. So that any liability regime would be speculative at best.

By contrast, a statutory liability regime is unlikely to anticipate all the possible harmful effects that might be generated by the manufacture and utilization of LMOs.

Second, LMOs may be dangerous and therefore a need for precaution arises.

- In applying these tests, the courts should be guided by the provisions of relevant international instruments, including the Cartagena Protocol, which in my estimation constitute an expression of “reasonable expectations” of the international community. Examples
- First, the precautionary principle, which constitutes an international recognition of the need for and legitimacy of applying precaution in a situation of scientific uncertainty about the potential risks associated with particular uses of biotechnology.

- Second, whether or not there is a duty of care situation will depend on the level of compliance with the Protocol, e.g., whether there was exporter notification or risk assessment.
- Corruption: Worst case scenario
- So that the level of liability may vary according to the level of compliance with requirements of the Protocol.
- I am therefore suggesting that local courts need not wait for their governments to domesticate international treaties.
- Instead, and where appropriate, they should treat treaties as expressions of the reasonable expectations of the people within their jurisdiction.
- [Cf. The South African constitution mandates the national courts to seek guidance from relevant international treaties.]

IV. LIMITATIONS OF THE COMMON LAW APPROACH

The common law may therefore offer a suitable liability and redress regime. Nevertheless, it has a number of limitations:

First, the common law's conception of rights is quite narrow. A broader conception of rights is quite narrow. A broader conception of rights will thus be necessary, if the law of torts is to provide an effective liability and redress regime for the use of LMOs.

Here, it is encouraging that courts throughout the commonwealth have relaxed their standing requirements. But there is still a need to retrain judges so that they may see beyond common law rights.

Class actions: Limitations for the experience and the loss or damage by impairment or environment.

Second, the common law works best where there is a good flow of information. Unfortunately, the international intellectual property regime has restricted the flow of information.

For example, the protection of process limits the flow of technical information about biotech products.

As a result, the amount of information available to operators, regulators, courts and the general public is not sufficient.

In the context of the tort of negligence, this would make it difficult for courts to effectively apply the tests of foreseeability and reasonableness.

Access to research output.

Third, and still concerned with information, the common law system requires effective law reporting. Unfortunately, law reporting has not been given the appropriate attention in developing countries, such as ours.

Four, Evidence of cost i.e the movie Civil action by John Grisham, and developing capacity for class actions, and managing it – who gets what, legal fees.

To sum up, if the common law is to provide an effective liability and redress regime then it will be necessary to educate and train policy makers, judges and the general public about the nature and potential adverse effects of LMOs.