Chapter X

TORT AND QUASI-DELICT

THIS chapter must begin with a doubt as to whether any such idea as quasi-delict or quasi-tort has been isolated in English law, and it must end with another doubt as to its practical value, even if we assume that it exists. Until quite recently it has lain in a dark and dusty corner of the Anglo-American system and a good deal of searching for it has resulted in little more than piecing together a "beggarly account of scraps and fragments".

Roman Law, to which the phrase quasi-delict owed its origin, unfortunately leaves us in some obscurity as to its exact basis. Four cases of it are mentioned in Justinian's *Institutes*, and Professor Buckland has pointed out that the common quality of these is uncertain, but that they were, at any rate, all instances of vicarious liability.[1]

Quasi-delict appears pretty early in our law in the *De legibus Angliae* of Bracton, but his treatment of it may be dismissed as the importation of an exotic which instantly withered on English soil. In classifying obligations, he includes those "quasi ex maleficio, ut si judex scienter male judicaverit", and he adds that the liability of the *judex* is reckoned as such because, though it does not arise from contract, yet he is deemed to have erred in some respect, even though by inadvertence.[2]

[1] *Text-Book of Roman Law* (1921) 594. In Roman-Dutch Law, Professor Lee regards their common link as "absolute liability", i.e. "cases in which the law draws an irrebuttable inference of culpa and of consequent liability". *Introduction to Roman-Dutch Law* (2nd ed. 1925), 307.

[2] Fol. 99.

This is a direct borrowing from Justinian's *Institutes*.[1] Shortly afterwards, Bracton speaks of actions which spring "quasi ex maleficio" in that they do not relate to agreements, nor strictly to delicts, but resemble delicts more than contracts.[2] This is all that Bracton says of quasi-delict. It corresponded to nothing real in our law and it was dropped by those who compiled the epitomes of the *De legibus Angliae* known as Britton and Fleta. Succeeding centuries saw no trace of its influence, except perhaps in the liability of the master of a merchant ship to the merchant and passengers for the torts of the crew.[3] If we turn to the law reports, references to quasi-delict are very uncommon. Lindley L.J. in 1895 thought that quasi-torts existed in English law, but he did not specify what they are.[4] In 1916, Phillimore L.J. made the rather fantastic suggestion that, while liability for breach of promise of marriage should be regarded as contractual, the exemplary damages recoverable in the action for such breach should be considered as arising out of quasi-tort.[5] There are no doubt other *dicta* of judges on the topic, but we do not know any machinery for discovering them except casual reading or examination of all the reports, for "quasi-delict" and "quasi-tort" are non-existent in the indexes to the reports, or, for that matter, in law dictionaries. In any event, we can set aside House of Lords cases in which the term appears in appeals from the Scottish Courts. In Scots law, delict signifies an offence committed with an injurious, fraudulent or criminal purpose, while quasi-delict implies gross negligence or imprudence which is not fraudulent, malicious or criminal;[6] or, as

[1] *Inst.* 3.13.2; 4.5 pr.
[2] Fol. 103. Cf. Maitland, *Bracton and Azo* (1894), 141, 177.
[3] Holdsworth, *History of English Law*, viii, 250.
[4] *Taylor* v. *M.S. & L.R. Co.* [1895] 1 Q.B. 134, 138.
[5] *Quirk* v. *Thomas* [1916] 1 K.B. 516, 533.
[6] Bell, *Principles of the Law of Scotland* (10th ed. 1899) §§ 543, 553.

has been said by Lord Watson, delicts proper embrace all breaches of the law which expose their perpetrators to criminal punishment, while quasi-delict is generally applied to any violation of the common or statute law, which does not infer criminal consequences, and which does not consist in any breach of contract, express or implied.[1]

Nor do writers on jurisprudence take any appreciable account of quasi-delict in English law. Where they do not contemptuously reject the term (as John Austin did), they are content to reproduce the Roman Law relating to it. Exceptionally, Street makes the distinction between delict and quasi-delict correspond, for modern purposes, to that between act and omission. "In delict, or tort proper, we should say, liability is founded upon the doing of a positive injurious act. In quasi-delict liability results from omissive breach of duty." And he gives as examples the unjustified refusal of an innkeeper to entertain a wayfarer, or of a common carrier to convey a passenger or his goods; and "a considerable part of the law of negligence".[2] But Street made no further development of quasi-delict, and, indeed, his later treatment of the very examples which he gives is inconsistent, for it is so framed as to connect them with "quasi-assumptual obligation", the definition of which includes "positive obligations" as well as negative ones.[3]

Of periodical literature on the subject, we are also almost totally destitute. An important exception is an article by Professor Nathan Isaacs in the *Yale Law Journal* on *Quasi-delict in Anglo-American Law*[4] in which he has given much careful consideration to the topic.

[1] *Palmer* v. *Wick, etc. Shipping Co. Ld.* [1894] A.C. 318, 326.
[2] *Foundations of Legal Liability* (1906), vol. i, Introd. xxvi, note 2.
[3] *Op. cit.* vol. ii, 236.
[4] 31 *Yale Law Journal* (1922), 571–581.

He points out that, if we follow the school of thought which seeks to find a foundation for the law of tort in the presence of some wrongful state of mind on the part of the defendant, we encounter the difficulty that the formula "no responsibility without fault" will not apply to many acts and omissions which are reckoned as torts and which it is neither customary nor even possible to separate entirely from that branch of the law. Moreover, this difficulty has been aggravated by the increase during the latter part of the nineteenth century of torts in which liability without fault is conspicuous.[1]

For these anomalous cases he regards quasi-delict as an appropriate term, and he reduces them to three varieties, with the necessary warning that such classification must depend on the particular definition of tort which happens to be adopted by the reader.[2]

(1) The main head is that of harms inflicted otherwise than through breach of contract or through tort, for which restitution is none the less required by law on equitable grounds. This would include all cases of strict liability[3] and of vicarious liability. Two other examples given are equitable waste and trespass *ab initio*. On the definition of tort which we have adopted[4] the duty not to commit waste is not towards persons generally, and the analogy borne by waste to a tort is thus fainter than that borne by strict liability and vicarious responsibility. Perhaps, then, it might be better classified not as a quasi-delict, but as liability arising from agreement between the parties (or their predecessors in title), with respect to the property wasted. And trespass *ab initio* is not so entirely free from fault on the part of the

[1] 31 *Yale Law Journal* (1922). [2] *Ibid.* 576.

[3] Professor Isaacs styles it "absolute" liability. We have tried to shew elsewhere that this term is infelicitous, and that there is no such thing as "absolute" liability. Moreover, it is doubtful whether it ever has existed in English law. 42 *Law Quarterly Review* (1926), 37–51.

[4] *Ante*, p. 32.

defendant as to make it detachable from the law of tort, even on the "no responsibility without fault" hypothesis. True, the doctrine of trespass *ab initio* makes a man retrospectively liable for a wrong to possession of land, though in fact he had committed no wrong whatever until he abused his right, but still that retrospective liability would never have come into existence if he had not abused his right, i.e. if he had not done some intentionally wrongful act which vitiated his right from the very beginning. Moreover, the doctrine is an archaic survival which we have grown so accustomed to regard as an incident in expounding trespass that, on the score of convenience, it had better be left there.

(2) Statutory liability sounding in tort. This, says Professor Isaacs, must be distinguished from liability arising from true statutory torts. His examples of quasi-delicts of this sort are:

(i) Liability for a dog not known to be vicious. For the purposes of English law, this presumably refers to the Dogs Act, 1906, sect. (1) of which makes the owner of a dog liable for injury done by his dog to cattle, irrespective of whether he knew of any previous mischievous propensity of the dog or whether he were negligent or not. This seems to be merely a species of the strict liability referred to in (1).

(ii) Sale of goods in bulk which the law adjudges to be in fraud of creditors, though no fraud is in fact perpetrated. Here, again, we must seek for our own illustration in English law, and it is to be found in the law of bankruptcy.[1] The avoidance of such transfers of property seems to be placed quite as well on quasi-contractual grounds as on quasi-delict.

(iii) Constructive notice may indirectly impose quasi-delictal liability on one who acted without actual notice of the situation, and thereby unintentionally caused an

[1] Williams, *Bankruptcy* (13th ed. 1925), 14–15.

injury. The learned author gives no further details as to this, and, as the doctrine of constructive notice has nearly a dozen different applications in English law, some of which have no likeness to the law of tort, it is not possible to accept this example without more knowledge of what it implies.

(iv) Statutes creating penalties, in so far as liability flows to one who has suffered no harm, e.g. where an informer can sue for the penalty. But, with us, this kind of liability belongs rather to public law than to private law.

(3) Waiver of contract and suing in tort. This heading is not very acceptable to a modern English lawyer. Professor Isaacs refers to it "standardized contracts", such as those with a banker, a carrier, or a warehouseman, which constitute relationships independent of contract.

> We therefore proceed as if such a relation as that of passenger and carrier, or of shipper and carrier, or of depositor and banker resulted from contract, but constituted a fact in itself independent of contract, much as marriage, whether resulting from a contract or not, constitutes a relationship free from the ordinary incidents of contract. Just as the husband owes certain duties to his wife which we hardly think of as contractual duties, so the banker, carrier, warehouseman, and a host of others owe duties to us by virtue of their relation to us. Hence we sue them in tort without reference to the contract for failure to perform these seemingly non-contractual duties.[1]

The following English authorities are cited. In *Marzetti* v. *Williams*,[2] a banker was held liable for dishonouring the cheque of a customer when he had sufficient money in the customer's account to meet the cheque. The court deemed it immaterial whether the plaintiff framed his declaration in contract or in tort.

[1] 31 *Yale Law Journal*, 578. [2] (1830) 1 B. & Ad. 415.

Weall v. *King*[1] and *Green* v. *Greenbank*[2] related to the liability of a warrantor on sale for deceit. All three cases have been treated earlier in these lectures[3] and further details of the decisions in them need not be repeated. It is submitted that the true explanation of them is given there. After stripping them of their procedural shell, it appears that the same set of facts might give rise to alternative remedies in contract and in tort. If this be so, it is unnecessary to borrow the head of quasi-delict in order to account for them, and it is difficult to accede to Professor Isaacs' statement that "in all these cases, we must bear in mind that although the action sounds in tort, we have no true tort". It does not follow that, because the ramifications of a standardized contract are extensive, they either cease to be terms in the contract, or that the breach of them cannot give rise to alternative liability in tort. If a railway company negligently injures my luggage, I can sue them either for breach of a term in their contract of carriage or for the tort of negligence, and it seems merely to complicate matters if we pray in aid such a disputable term as quasi-delict. Professor Isaacs rightly points to the historical confusion caused by the curious development of *assumpsit*. We have already examined this in some detail on our own account, but we do not gather from it that the English courts ever found refuge from the confusion in the blessed words "quasi-delict" or "quasi-tort". If these phrases helped no one in time past to explain standardized contracts, there is still less reason for using them at the present day as a compartment for such contracts.[4] Finally, this third head of quasi-delict has no link, except the mere name, with the first two heads, which are affiliated to the idea that there can be

[1] (1810) 12 East, 452.
[2] (1816) 2 Marshall, 485.
[3] *Ante*, pp. 67–68, 79–80.
[4] Cf. Salmond, *Law of Torts* (7th ed. 1928), pp. 5–6.

tortious liability without fault. It is somewhat disconcerting for a banker who has forgotten the amount which stands to his customer's credit to find himself bracketed with a man whose dog has bitten a sheep.

The genuine instances of quasi-delict would seem, therefore, to be reducible to (*a*) strict liability, and (*b*) vicarious responsibility. Strict liability is a strong illustration of it, for there a man may be held liable not only in the absence of intention or of inadvertence[1] on his own part, not only for the misdoings of his servants, but also for the wrongs of an independent contractor, a person over whom he has no control whatever so far as the details of executing the contract go. Vicarious responsibility does not go quite this length, but it goes far enough. It is best illustrated by the liability of an employer for the torts of his servant. Here, it is common knowledge that, provided the tort is committed in the course of employment, the employer is liable even if he has expressly forbidden the particular misconduct of the servant of which complaint is made.[2] His personal intention or inadvertence is beside the mark. The "course of employment" is determined by the courts irrespectively of either. Yet the analogy to tort holds in all other respects, and that would justify the use of "quasi-delict" or "quasi-tort" to describe the employer's liability.

So far we have taken Professor Isaacs on his own ground. The main plinth of his argument appears to be an acceptance of the theory "no responsibility without fault" as the basis of genuine liability in tort, and upon that he builds a very reasonable theory of quasi-delict in order to find a shelter for breaches of law which are commonly treated as torts, but which exhibit responsi-

[1] But some of the exceptions to the rule in *Rylands* v. *Fletcher* seem to turn upon absence of inadvertence. *Post*, chap. xii, p. 244.

[2] *Limpus* v. *L.G.O. Co.* (1862) 1 H. & C. 526.

bility even where there is no fault.[1] Whether, on practical grounds, it is worth while to create a sub-department of the law, and to baptize it with an unfamiliar term, is a disputable matter. Even if the balance of opinion welcomed the change, it would not release anyone who contemplates writing a book on the Law of Tort from including in it the law relating to strict liability or the general principles of vicarious responsibility, though the Workmen's Compensation Acts could—indeed must be—omitted.

A more vital objection to making quasi-delict an independent head of the law is this. Is it really possible or practicable to make the formula "no responsibility without fault" an integral factor in describing liability in tort? Professor Isaacs freely admits that what we include in quasi-delict must depend largely on how we define tort. That opens the door to our own definition of tort, which, it will be recollected, is silent as to mental culpability on the part of the tort-feasor. So far, then, we should have some excuse for putting aside quasi-delict altogether. But, as we have not the hardihood to regard the definition as canonical, we must suppose that there are some other analyses of tort which make "no liability without fault" an essential ingredient. On the English side of the Atlantic they are so rare as to be beyond our ken. And it must be confessed that there is nothing in the history of the law of tort or in its condition at the present day to warrant any incorporation of the mental element in a definition of it. It has never been admitted in time past, nor is it now the fact, that a universal element in tortious liability is intention or inadvertence. Far from it, the pendulum has occasionally swung so much the other way as to lead some writers

[1] Sir Frederick Pollock regards quasi-delict as both significant and appropriate to an owner's liability for the safe keeping of dangerous things. *Essays in Jurisprudence and Ethics* (1882), 17.

to assert that in mediaeval, and even in later, law a man acted "at his peril". But this, it is submitted, is just as much an overstatement in one direction as "no liability without fault" is in the other.[1] It may not be easy to mark the boundaries that lie between tort and other species of liability, but it is possible to achieve this without reference to any mental element. That is no part of the external wall which separates tort from breach of contract, crime, or any of the other topics which have been handled in these lectures. In the region within the wall, the investigation of it is both necessary and helpful. It is important to know that assault and battery cannot be committed unintentionally, and that intention or inadvertence is (or is said to be) immaterial in some torts of strict liability; but that is not a valid reason for putting assault and battery inside the wall and torts of strict liability outside it. Criminal law affords an instructive parallel here. No definition of crime in current textbooks on English criminal law takes account of the mental attitude of the wrongdoer. Yet *mens rea* is always the subject of careful examination for the purpose of distinguishing various kinds of criminal liability. And there is a strong resemblance between some offences in which statutes have made it a matter of indifference whether any mental element accompanies the act or omission, and strict liability in tort. Yet no one has urged that they should be segregated and styled "quasi-crimes".

It is worthy of note that Dean Pound, although he is of opinion that the theory of liability for nothing except culpable damage had much influence in Anglo-American law during the last half of the nineteenth century,[2] nevertheless holds that the generalization of "no liability without fault" was "never adequate to explain

[1] 42 *Law Quarterly Review* (1926), 37–51.
[2] *Introduction to the Philosophy of Law* (1922), 162.

all the phenomena of liability for tort in the common law".[1]

Various reasons have been advanced for the fact that quasi-delict is unknown in English law. So far as the duties imposed by law on the innkeeper and the common carrier are concerned, Sir William Holdsworth thinks that they might have been classed as quasi-tortious but for the fact that *assumpsit* was wide enough to embrace them.[2] Professor Isaacs, who gives quasi-delict a wider meaning, naturally adds several other causes for the neglect of the term in Anglo-American law. One of these is that

> so long as every type of tort stood on its own bottom, so long as it was deemed useless to formulate a uniform law of torts, there was no particular reason for isolating the law of trespass or the law of trover or the law of libel or the law of slander, those instances in which an action traditionally lay in spite of the absence of elements generally present in torts.[3]

And his epitome of this paragraph is that quasi-delict is unknown in our law because hitherto there has been no need of it. We would respectfully add that there is no need of it now.

[1] *Interpretations of Legal History* (1923), 35.
[2] *History of English Law*, viii, 89.
[3] 31 *Yale Law Journal*, 580–581.