Chapter III

TORT DEFINED

WE have reached a point where a definition of tort appropriate to current law must be attempted. The chief aim of these lectures is to determine the province of the law of tort, and we cannot mark the boundaries between it and other regions of the law without hazarding at the outset some positive description of tort itself. Hazardous it is, for it may be doubted whether complete definition is possible. It is as well to emphasize here that, if one is to be framed at all, it must be in reasonable touch with the law as it is and not simply as it ought to be; and one characteristic of the English practitioner is his suspicion of unfamiliar terms. It is suggested that the following definition is less open to criticism than any other.

Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

Other possible definitions must be considered in the last chapter. It would be unwise to discuss them here, as that would assume a close acquaintance with quasi-contract and associated topics, all which follow after this chapter.

We have referred to "tortious liability" and have not tried to define a "tort", and this seems to be a fitting place to settle what is the foundation of liability in tort. Is it based on the principle that (1) all injuries done to another person are torts, unless there be some justification recognized by law; or on the principle that (2) there is a definite number of torts outside which liability in

tort does not exist? According to the first theory, if I injure my neighbour he can sue me in tort whether the wrong happens to have a particular name like assault, battery, deceit, defamation, or whether it has no special title at all. According to the second theory, I can injure my neighbour as much as I like, without fear of his suing me in tort, provided my conduct does not fall under some rubric like assault, battery, deceit, defamation. If the first principle is the correct one, the courts have full power to create new torts, or (more consistently with judicial caution) to extend the law of tort without any baptismal ceremony for each extension. But the second principle presents us with a row of pigeonholes, each labelled with the name of a particular tort, and if an injury cannot be fitted into one of these, whatever the plaintiff's remedy may be, he has none in tort.

Sir Frederick Pollock has consistently adopted the first view.[1] The chief British champion of the second was the late Sir John Salmond.[2] He says: "Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability".

I have been at some pains to shew elsewhere that, with all deference to the high authority of Sir John, the first view, and not the second, is the one which is more consistent with the English law of tort.[3] There is no need to repeat the arguments there set forth, but it may be as well to summarize them. Incidentally, the learned editor of Salmond's book seems to concur in them, so that the necessity for enlarging upon them is still further

[1] *Law of Torts* (13th ed.), 21–23.
[2] *Law of Torts* (7th ed.), § 2 (3).
[3] 27 *Columbia Law Review* (1927), 1–11.

diminished.[1] The greatest difficulty in the way of those who support the second, or "inexpansibility", theory is the development of the law of tort itself. From first to last it has steadily grown upwards and outwards. Innominate torts concealed behind the convenient shelter of "action upon the case" have become nominate torts, and at the present day it may safely be said, not only that there are specific torts in search of specific names, but also that the general principle forbidding the infliction of unjustifiable harm upon one's neighbour is a lively root for further development. Here are some of the nominate torts whose introduction can be definitely traced in our history: malicious prosecution (*temp.* Elizabeth); unlawfully enticing away a wife from her husband (1745);[2] the converse tort of enticing away a husband from his wife (1923);[3] deceit (1789);[4] negligence (early nineteenth century);[5] the rule in *Indermaur* v. *Dames*[6] as to dangerous structures (1866); the rule in *Rylands* v. *Fletcher* (1868);[7] malicious inducement of breach of contract (1881).[8] Whether there be an independent tort of conspiracy or not, only another decision of the House of Lords can tell us. Their latest pronouncement leaves open the possibility of such a wrong[9] and it has the advantage of a recognized name waiting for it. Much the same considerations apply to the "invasion of personal privacy", a tort which has been recognized as such in some jurisdictions in the United States and which is well known in India in Gujerat and the North-West Provinces. In England, it

[1] *Law of Torts* (7th ed.), 64.
[2] *Winsmore* v. *Greenbank* Willes, 577.
[3] *Gray* v. *Gee* 39 T.L.R. 429. [4] *Pasley* v. *Freeman* T.R. 51.
[5] 42 *Law Quarterly Review*, 184–201.
[6] L.R. 1 C.P. 274; 2 C.P. 311. [7] L.R. 3 H.L. 330.
[8] *Bowen* v. *Hall* 6 Q.B.D. 333.
[9] *Sorrell* v. *Smith* [1925] A.C. 700. So too the *dicta* in *Clark* v. *Urquhart* [1930] A.C. 28, 51–52, 76.

is probably only the House of Lords which now has a free hand to pronounce judicially in favour of its existence.[1] On the other hand, one or two other torts are still innominate and their existence is doubtful or not completely established. Thus it is not clear whether an action for damages will lie for maliciously causing the retirement of a naval officer. The House of Lords left this point open in *Fraser* v. *Balfour*.[2] Another tort of recent origin, if indeed it really exists at all, which has no definite name, is attributable to *Brooke* v. *Bool*.[3] It is worth some attention as illustrating both the vitality of the law of tort and the judicial caution attending its development. *A* let to *B* a lock-up shop adjoining a house in which *A* resided. It was arranged that *A* might enter the shop after *B* had left it at night, to see that it was secure. One night, *C*, the lodger of *A*, told *A* that he suspected a gas escape from the shop. *A* and *C* entered the shop. *A* examined the lower part of a gas-pipe with a naked light. Nothing happened. *C*, who was a much younger man, got on the counter and did the like to the upper part of the pipe. An explosion occurred which damaged *B*'s goods. *B* sued *A* for negligence. *A* admitted that he welcomed *C*'s help in examining the upper part of the pipe. A Divisional Court held, in an unconsidered judgment, that *A* was liable on any one of four grounds: (1) *C* was *A*'s agent, invited and instructed by *A* to act as he did. (2) *C*'s act was done in the course of proceedings over which *A* had control. (3) *C*'s act was done in pursuance of a joint enterprise concerted by *A* and *C*. (4) *Per* Talbot J.: *A*, having undertaken on or near another's property an operation involving danger to that property, unless proper precautions were taken, was under a duty to take

[1] 47 *Law Quarterly Review* (1931), 23–42.
[2] (1918) 87 L.J.K.B. 1118.
[3] [1928] 2 K.B. 578.

reasonable care to avoid actual danger [? damage] to property resulting from it, and he could not escape liability for breach of this duty by getting any one else, whether agent, servant, or contractor, to discharge it for him.

It is this fourth ground (supplied, be it noted, by one only of the two judges) which looks very much like the recognition of a new tort. No one would quarrel with the justice of holding a defendant liable in such circumstances, or with the reasonableness of making this the basis of his liability. But the novelty of it is seen when we try to fit it under any existing tort. It is not merely negligence, for it includes liability for the default of an independent contractor. It falls short of responsibility under the rule in *Rylands* v. *Fletcher*, for *A* would not have been liable if he had shewn "proper care" or "reasonable care", and, moreover there was no "escape" of anything from the occupier's land. It is near the duty set up by the rule in *Indermaur* v. *Dames*, but differs from it in scope. In fact, if it exists, it is a new tort, and the balance of probability is in favour of its existence. For there were several previous *dicta*[1] and perhaps even one earlier decision[2] that indicated the formation of the rule.[3]

There does seem to be, therefore, a respectable body of opinion and practice in favour of the view that the law of tort is based upon a general principle that all harm to another person is presumptively unlawful. And from this standpoint it is a matter of small import whether we speak of the "law of tort" or the "law of torts". The contents of that compartment of the law

[1] They are reducible to an opinion in a considered judgment of the Q.B.D. delivered by Cockburn C.J. in *Bower* v. *Peate* (1876) 1 Q.B.D. 321, 326.

[2] *Tarry* v. *Ashton* (1876) 1 Q.B.D. 314. But it is doubtful what exactly was the *ratio decidendi* in this case.

[3] Cf. 45 *Law Quarterly Review*, 1.

consist at any given moment partly of nominate torts, partly of innominate. "Law of tort" is perhaps the more accurate expression as indicating the existence of unoccupied territory which is bit by bit and from time to time being recognized as the source of fresh liabilities in tort. The recognition is sometimes by the legislature, but more frequently by the judges.

The main argument the other way is that there are many instances of *damnum absque injuria*. The man who is ruined by fair business competition, or who is injured by a merely spiteful act of his neighbour, or who acts to his damage upon a telegram never intended for him, has no action in tort. This is true enough, but the fallacy lies in the inference that, because the law will not give a remedy in every case, it will therefore never give a remedy in a new case. To say that all unjustifiable harm is actionable is a totally different thing from saying that all harm is actionable. The first proposition fully admits the possibility of many circumstances in which an injured person can recover nothing. There never was a time when a plaintiff who asserted a new cause of action could be sure of getting the courts to admit its existence; and that is just as true now as it was nine centuries ago. The courts have power to create new remedies for tortious injuries, but whether they will create them or not is a matter of judicial discretion. They may well be slow in creating them, for their primary duty is to get rid of the case before them, and, for the rest, they have to consider many other things besides the stark fact that the plaintiff has been injured before they concede him a remedy. Logic, history, what Judge Cardozo calls *mores*, the general needs of the community—all these have to be taken into account. "Public policy" under one name or another has been a weighty influence in the growth of Anglo-American law.[1] It may well be

[1] 42 *Harvard Law Review* (1928), 76–102.

that the plaintiff is asking for more than any court will give him, because he has forgotten or underrated the competing interests of other people, or because it is the legislature, and not the judicature, whom he should approach. All these reasons, or any of them, may suffice to make the allowance of a new remedy unwise. That is one source of *damnum absque injuria*. Another is connected with the plaintiff's loss of an action for a tort which is already well recognized. Every such nominate tort has its specific legal ingredients and if the plaintiff cannot establish them all he will recover nothing. It is not every blow that is a battery, nor every lie that is a slander, nor every detention that is a false imprisonment. It may be worth while to cite once again a parallel from medicine.

Certain specific remedies are fitted to cure only certain specific diseases; and no remedy of any sort may be applied to procure an abortion, to satisfy a craving for drugs, or to end suffering by depriving the patient of life. But these limitations do not prevent a medical practitioner from creating new remedies for the alleviation or the cure of human ills.[1]

It is worth while to notice how the Civil Codes of France and Germany treat the basis of what corresponds to tort in those countries. In the French *Code Civil*, Art. 1382 postulates a general liability in tort in the broadest terms. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."[2] The German *Bürgerliches Gesetzbuch* states liability in a mode which, though it is more specific than the French code, is nevertheless framed as a general prohibition against wrongdoing. Art. 823 provides that any one who, in contravention of

[1] 27 *Columbia Law Review* (1927), 11.

[2] So too the Italian *Codice civile*, Arts. 1151–1152. See too *Progetto di Codice delle Obbligazioni e dei Contratti* (Roma, 1928), pp. lxxxi *seq.*, and Art. 74.

law, intentionally or negligently injures the life, body, health, liberty, ownership, or any other right of another person, is liable to compensate that person for the ensuing damage. Art. 826 enacts that any one who intentionally causes damage to another in such a way as to offend "gegen die guten Sitten" is liable to make good the damage to that other. An exact English equivalent to "gegen die guten Sitten" is difficult to find, but perhaps the best description of the phrase is "unsocial conduct". Between them, Arts. 823 and 826 cover the domain of possible torts, except that Art. 824 fills up what was regarded as a lacuna in Art. 823 by dealing with attacks on the honour and credit of another person, and Art. 824 makes seduction of a woman a tort. Of course, these general propositions in the two codes will not, standing by themselves, help us to say of any particular injury whether it is a tort or not; much less do they countenance any idea that every conceivable injury to another person is redressible by an action. We have to know a good deal more about such terms as "dommage", "faute", "widerrechtlich", "Schade", before we can determine exactly what harm is unlawful; and in both systems the literature is sufficiently copious on these points.