CHAPTER 1

THE NATURE OF A TORT

1. THE DEFINITION OF A TORT

"*A Tort is an act or omission which is unauthorized by law, and independently of contract* (i) *infringes either*—(a) *some absolute right of another; or* (b) *some qualified right of another causing damage; or* (c) *some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally; and* (ii) *gives rise to an action for damages at the suit of the injured party* (*a*).

Three distinct factors are therefore necessary to constitute a tort. First, there must be some act or omission on the part of the person who commits the tort (the defendant) which is not a breach of some obligation enforceable *only* by reason of its having been undertaken by *contract*. Secondly, the act or omission must not be authorized by law. Thirdly, the act or omission must in some way inflict an injury which is special, private and peculiar to the person injured (plaintiff), as distinct from an injury to the public in general, and this injury must be remediable by an action for damages (*b*).

The first two of these factors will receive separate examination below; at this stage we need only consider the third.

In order to succeed in an action sounding in tort the plaintiff must establish that he has been injured by some act or omission of the defendant's. And it has often been stated that *damnum absque injuriâ* is not actionable, but that *injuria sine damno* is.

By "*damnum*" is meant damage in the sense of substantial loss of money, comfort, health, or the like. By "*injuria*" is meant an unauthorized interference, however trivial, with some right

(*a*) A tort is also described in the Common Law Procedure Act, 1852, as "a wrong independent of contract". This is a good general definition; but it is not very illuminating to the uninitiated.

(*b*) Though, as will later appear, in some circumstances *injunctions* can also be obtained to restrain the commission or continuance of torts.

conferred by law upon the plaintiff (*e.g.* the right of excluding others from his property). All that these two maxims really signify is therefore this: that no action lies for mere damage (*damnum*), however substantial, caused by some act or omission which does *not violate a legal right*: but that an action does lie in certain circumstances for interference with another's legal right, even where it causes no actual damage, *e.g.* trespass (*c*).

Damnum absque injuriâ.—When an act or omission is itself lawful it is not actionable at the suit of anyone (*d*).

> "The mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right" (*e*).

Apart from statute, it is for the courts themselves to decide what is and what is not lawful. And it must be stressed at once that social life would become intolerable if every kind of harm were treated as a legally redressible injury. For example, in business affairs a profit for A will usually mean a loss to B; and since it is necessary for the well-being of the nation that reasonable and fairly-earned profits should be made the law must leave B without a remedy in respect of such loss.

Thus there are many kinds of harm which, for various reasons, fall outside the purview of the law of torts. For instance an act may be a crime, such as murder, which may inflict grievous loss upon the family of the deceased; yet, at common law (apart from statute), they have no civil remedy against the murderer (*f*). So also, in the case of a libel against a dead man, his children (unless their own reputation is also attacked) have no private right of action in the civil courts (*g*), whatever the effect of the libel upon them.

Further, in some instances a similar act or omission may give rise to legal injury to one person, but not to another; for instance it will be seen that the rights of a lawful visitor against an occupier

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(*c*) *Entick* v. *Carrington* (1765), 19 St. Tr. 1030; but the damages awarded for the nominal infringement of a right are not such as to encourage actions unduly.

(*d*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Chapman* v. *Honig*, [1963] 2 All E. R. 513; [1963] 2 Q. B. 502.

(*e*) *Grant* v. *Australian Knitting Mills, Ltd.*, [1935] All E. R. Rep. 209, 217; [1936] A. C. 85, 103; *per* Lord WRIGHT.

(*f*) *Baker* v. *Bolton* (1808), 1 Camp. 493: *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A. C. 38. There is, however, a limited statutory remedy which will be discussed in Part III, Chapter 4.

(*g*) As to *criminal* libel, see, however, *R.* v. *Ensor* (1887), 3 T. L. R. 366.

of premises are greater than the rights of a trespasser, and the former can sometimes sustain an action against the occupier where the latter cannot.

Injuria sine damno.—The cases in which an action will lie though there be no *damnum* are those in which there is an invasion of an "absolute" private right. In these cases a wrong is done to the plaintiff by the mere infringement of the right.

Subject to the qualification that—as will be explained in the next Chapter—infringement of legal rights may sometimes be authorized by law, a man has an absolute right to his property, to the immunity of his person, and to his liberty. Hence in actions of trespass, whether to land, to goods or to the person (including assault and false imprisonment) actual damage is *not* an essential part of the cause of action, for the plaintiff is entitled to damages for the mere infringement of these rights; or, as it is also put, infringement of these rights is actionable "*per se*".

But there are some private rights that are only qualified rights; that is, rights to be saved from loss (*damnum*). And where rights of this kind are infringed no action will lie without proof of "special" (*i.e.* actual) damage. Thus there is no absolute right not to be deceived, and in an action for fraud the plaintiff must establish not only that he has been deceived, but also that the deceit has caused him loss. The same applies (though with exceptions) in other kinds of actions such as actions for nuisance, malicious prosecution, slander and negligence. In torts of this kind damage is the gist of the action and without it there is no *injuria*.

Broadly speaking, the distinction between claims in tort that are actionable *per se* and those which are actionable only upon proof of special damage is historical; actions founded under the older practice upon Trespass falling into the former class, and actions founded upon Case into the latter (*h*).

Lastly, a tort may consist in the infringement of a public right (*i.e.* a right which all people enjoy in common), coupled with particular damage. Take for example rights in respect of the use of highways. If a highway is obstructed an injury is done to *the public*, and for that wrong the remedy is by way of criminal indictment or by proceedings by the Attorney-General on behalf of the public. If every member of the public could bring a civil

(*h*) For the distinction between Trespass and Case historical works such as Maitland, *The Forms of Action at Common Law*, and Plucknett, *A Concise History of English Law*, should be consulted. A good short explanation will also be found in Salmond, *Law of Torts* (14th Edn.), pp. 5–8.

action the number of possible actions for one such breach of duty would be without limit (*i*). But on the other hand if, in addition to the injury to the public, peculiar and substantial damage is occasioned *to an individual*, then, as is only just, he will have a private right of redress in tort (*k*).

It will therefore be seen that, for a tort to be committed, there must be an act or omission which causes either (a) an infringement of some *absolute* private right, or (b) an infringement of a qualified private right *resulting in damage*, or (c) an infringement of a public right which results in substantial and particular damage to the plaintiff beyond that suffered by the public at large.

Further, the hall-mark of a claim in tort is that it will give rise to a common law action for *damages*. Thus, although a breach of *trust* will often cause loss to beneficiaries, and breaches of trust are not permitted in Equity, a breach of trust is not a tort; for on the one hand, it gives rise to an equitable (as opposed to a legal) claim in the parties injured, and on the other hand it is remediable by proceedings in the Chancery Division, and not by an action for damages at law.

It should perhaps be added that, looked at from another point-of-view, a tort may also be regarded as *the breach of a legal duty owed independent of contract, by one person to another for which a common law action for damages may be brought.* This definition is, however, really only another way of saying that a tort is an infringement of a legal right; for "right" and "duty" are correlative terms, and the existence of a right in one person connotes the existence of a duty in another person to respect that right. Whichever way one looks at it, it is for the law, and for the law alone, to decide when the "right" or the "duty" shall exist. Nevertheless, the question whether a man has committed an actionable wrong is sometimes most conveniently approached by asking whether the alleged wrong-doer (the defendant) owed a duty to the person alleged to have been injured (the plaintiff), and if so what was the extent of that duty (*l*).

Before completing the discussion of definition reference must be made to the oft-repeated maxim "*ubi jus ibi remedium*"—"where there is a right there is also a remedy".

(*i*) See *Winterbottom* v. *Lord Derby* (1867), L. R. 2 Exch. 316, 321; *per* KELLY, C.B.

(*k*) See *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542.

(*l*) It will be seen, for example, that the tort of negligence is conveniently defined by reference to the defendant's duty of care.

It has been said that

"If men will multiply *injuries* actions must be multiplied too; for every man that is injured ought to have recompense" (*m*).

But both the maxim and this *dictum* must be properly understood. For the word "*jus*" means *moral*, not *legal*, right. And legal rights, like legal "injuries", are, as has already been repeated, things for the law itself to define at any given time. It follows that neither the maxim nor the *dictum*, although at first sight they may appear to do so, tell us anything about the nature of legal rights. Obviously, the granting of a legal remedy being the consequence (*n*) of the recognition of a legal right, where there is a legal right there will also be a remedy. Conversely where there is no right there will be no remedy, however much a moralist might consider it desirable that one should be granted.

Nevertheless the law of torts is to some extent a mirror of judicial notions of what represents a "wrong" at any given time; for it is mainly judge-made. Yet the process of its creation and the content of its structure do not result merely from a free exercise in judicial moralising, since they depend upon the interplay of many factors. For example in an age of conservatism the catalogue of torts may stagnate (*o*) lagging behind current needs. Considerations of policy (*p*) and the fortuities of historical development (*q*) play a major and often irrational (*r*) part in its make-up. In a system of law based upon the authority of precedent old rules outlive their uses. Amid all these complexities the categories of torts expand (*s*) and contract (*t*) with or without the help of

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(*m*) *Ashby* v. *White* (1703), 2 Ld. Raym. 938, 955; *per* Lord HOLT (italics ours).

(*n*) Though, as Sir Henry Maine pointed out long since in *Ancient Law*, historically the creation of a right followed upon the granting of a remedy rather than the reverse.

(*o*) And indeed in mediaeval times conservatism might well have strangled the action on the case, upon which much of the future law of torts was to depend, had not the judges seized a bold initiative. See Fifoot, *History and Sources of the Common Law*, Chapter 4.

(*p*) For a recent example of the influence of policy considerations see *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E. R. 394; [1952] A. C. 716.

(*q*) For example history alone explains the chaotic state of the law relating to nuisances and also the artificial distinction between libel and slander.

(*r*) Instance the law relating to injuries to domestic relations and to animal liability.

(*s*) And are expanding at the present time. For instance *Donoghue* (*or M'Alister*) v. *Stevenson*, [1932] All E. R. Rep. 1 (H. L.); [1932] A. C. 562 and *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E. R. 575 form new points of departure in the development of the law of negligence.

(*t*) For example actions for the institution of malicious civil proceedings and for malicious arrest are probably now obsolete.

Parliament (*u*), seeking to effect just solutions to disputes. It is perhaps in this, the very complexity of what is being attempted, that the fascination of this branch of the law lies.

2. TORT, CONTRACT AND CRIME

The late Sir Percy Winfield described the difference between tortious and contractual liability thus:—

> "the duties in the former are primarily fixed by law, while in the latter they are fixed by the parties themselves." (*v*).

As a broad proposition this is unexceptionable but if it was intended as an accurate definition examination shows it to be a serious over-simplification. It is true that contractual obligation (whether created by deed or by agreement) is initially voluntarily entered into by the parties, whereas tortious obligation is imposed by law as the result of the doing of an act treated by the law as wrongful. But after the moment of initiation the contrast largely ceases to be effective; for once a contract is made rules of law operate irrespective of the intentions of the parties to delineate their responsibilities —as for example to regulate the legally operative effect of a mistake, to designate an event as one which frustrates the purpose of the contract, or even to determine whether the agreement or promise is itself legally effective. Indeed the law of contract is *law*, not unrestricted private regulation of rights; and most of the law of contract consists of rules of law which operate in the *absence* of the parties' volition, express or implied.

Moreover the sanctions of the law usually impinge upon a contract not at the moment of its formation but at the time of its breach; and what difference in kind is there between a legal rule which provides that you must make good your neighbour's expectations which you have led him to entertain (contract) and a rule of law which provides that you must not make careless statements (*w*) which occasion him loss? The truth really is that breaches of contract and torts are species of the single genus civil wrong. They are

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(*u*) Legislation plays a comparatively small part in the law of torts; but sometimes Parliament has been forced to intervene where entrenched precedent has taken a wrong turn. *Eg.* the Law Reform (Personal Injuries) Act, 1948 (34 Halsbury's Statutes (2nd Edn.) 364), the Defamation Act, 1952 (32 Halsbury's Statutes (2nd Edn.) 399), or the Occupiers' Liability Act, 1957 (37 Halsbury's Statutes (2nd Edn.) 832).

(*v*) Winfield, *Province of the Law of Tort*, p. 40.

(*w*) Now actionable in certain circumstances: *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E. R. 575; [1964] A. C. 465.

thus fundamentally similar. With this proposition, not surprisingly, history agrees; for much (*x*) of the law of contract is the child of the action of *assumpsit*, an off-shoot of trespass (the acknowledged parent of torts), an action based upon the notion of loss occasioned by reliance upon a broken promise (*y*). This is closely akin to the rationale of the tort of deceit (or fraud)—reliance upon a wilfully misleading statement—and in truth there was a time (*z*) when it seemed that the mediaeval law might provide breaches of contract with a remedy by way of deceit rather than by way of trespass.

In the cold light of analysis there is therefore no real justification for distinguishing between wrongs arising from breach of agreement or breach of a unilateral promise under seal (contracts) from other kinds of civil wrongs (torts). Nor, to digress, is there a sound distinction between obligations arising from unjust enrichment (quasi-contract) and wrongs resting upon other forms of injustice. Indeed, lamely, the law has long been forced to admit that a claim in conversion (tort) may often be a legal alternative to a claim in quasi-contract (*a*). For both claims are in essence the same, and both arise by operation of law.

From all this it follows that one need scarcely be surprised that as in the case of quasi-contract, so in the case of contract, fact situations often arise in which claims may be alternative, either in contract or in tort. For instance where a dentist extracts a tooth so unskilfully that pieces of the tooth remain in the jaw (*b*) he breaks his contractual obligation to treat his patient with proper care and at the same time commits the tort of negligence which arises from

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(*x*) "Much", not all. For the contract under seal is the offspring of Covenant. And in this connexion a glance at Pollock and Maitland, *History of English Law*, Vol. II, p. 217, n. 4, is mighty instructive. It was reported in Y. B. 30–31 Edw. I, 145 that in respect of an action of covenant the court remarked: "this action is . . . given against the person who did the . . . tort". The learned authors observe that "the statement that a breach of covenenat is 'tort' . . . is of some importance when connected with the later history of *assumpsit*". Of course it was "tort", for breach of covenant is as much a civil wrong as the publication of a slander.

(*y*) This fundamental notion of loss/reliance too long eclipsed by the extraneous element of agreement is creeping back into the modern law of contract by way of the decision in *Central London Property Trust, Ltd.* v. *Hightrees House, Ltd.*, [1956] 1 All E. R. 256, n.; [1947] K. B. 130. And is it surprising, that by another door, it is also creeping back into the law of torts? See the opinion of Lord DEVLIN in *Hedley, Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*, [1963] 2 All E. R. 575; [1964] A. C. 465.

(*z*) See Fifoot, *History and Sources of the Common Law*, pp. 332–3.

(*a*) See Part III, Chapter V.

(*b*) *Edwards* v. *Mallan*, [1908] 1 K. B. 1002.

the inflicting of foreseeable harm (*c*). And there are many similar kinds of situation.

Save to the purist these fields of overlap between contractual and tortious claims would be of little importance except for one most obstrusive fact; namely that both by statute and at common law there are certain rules of general application which differ according to the category of wrong, "contract" or "tort". For example, County Courts Acts have from time to time prescribed different rules in respect of the right to recover costs according to the category ("contract" or "tort") of the case in question (*d*), statutes prescribe different periods of limitation according to the category, and at common law exemplary damages are recoverable in tort but not in contract (*e*). Thus to reach a conclusion in particular cases the courts are forced in this admitted area of borderland (*f*) between contract and tort to opt for the one to the exclusion of the other without any rational ground for making the distinction—since in truth the facts disclose *either* the one *or* the other. As long as what is really only a difference of degree is treated as a difference in kind to which different rules of general application are applied this difficulty will remain.

Thus the choice of category is necessarily irrational and forced, not logical: one which should not be made at all unless it *has* to be made. Though it must be admitted that in some circumstances a conclusive choice has been made covering all circumstances (*g*)

(*c*) In keeping with the argument in the text it should be noted that both these obligations were in fact imposed by law: doubtless neither party adverted to the duty to take due care in any agreement that there might actually have been.

(*d*) See also the Bankruptcy Act, 1914, s. 30 and *Re Great Orme Tramways, Co.* (1934), 50 T. L. R. 450.

(*e*) *Addis* v. *Gramophone Co., Ltd.*, [1908–1910] All E. R. Rep. 1; [1909] A. C. 488. Again damages for mental suffering are recoverable in tort but not in contract (*Groom* v. *Crocker*, [1938] 2 All E. R. 394; [1939] 1 K. B. 194; *Bailey* v. *Bullock*, [1950] 2 All E. R. 1167). And the rules as to remoteness of damage in contract and tort are dissimilar; a factor which gave rise to difficulty in *Hall* v. *Meyrick*, [1957] 1 All E. R. 208; [1957] 2 Q. B. 455.

(*f*) See Prosser, *Selected Topics in the Law of Torts*, Chapter VII, "The Borderland of Tort and Contract" (amusingly misprinted "Contact"—to which one might add "With Reality"; no disparagement of the author, but a comment upon the state of affairs).

(*g*) In the case of solicitors it would seem that as far as the *direct relationship of solicitor/client* is concerned claims in negligence lie only in contract: *Groom* v. *Crocker*, [1938] 2 All E. R. 394; *Hall* v. *Meyrick*, [1957] 1 All E. R. 208; [1957] 2 Q. B. 455; *Clark* v. *Kirby Smith*, [1964] 2 All E. R. 835; [1964] Ch. 506. (This was not always so: see *Russel* v. *Palmer* (1767), 2 Wils. 325.) The same would apply in the case of architects and stockbrokers—see below. It must not be thought, however, that no action in tort will ever lie at the suit of a client against a solicitor: obviously the client can sue in negligence if he

where there was only a need to make it in particular circumstances—such as for the purposes of limitation—where it had to be made. And it must also be noted that there have been attempts to rationalize a particular selection (*h*). Thus, for instance, in *Jarvis* v. *Moy, Davies, Smith & Co.* (*i*) GREER, L.J., suggested that "where the breach of duty arises out of a liability independently of the personal obligation undertaken by contract, it is tort"—but since, *ex hypothesi* there is a contractual duty to be careful when *is* the breach of duty deemed to be "independent" unless it be wholly unconnected with the contract? In which case no difficulty arises. So too, in *Bagot* v. *Stevens Scanlan & Co.* (*k*) DIPLOCK, L.J., seeks to introduce reason into the problem by drawing a distinction between circumstances where, at common law, a "status" relationship existed between the parties—as in the master/servant relationship and the case of the common carrier or common innkeeper—in which, according to the Lord Justice, it was and is proper for actions to lie either in contract or in tort—and circumstances where there is a contract involving professional skill. In the latter circumstances contract alone, according to the opinion expressed, is the "proper" cause of action. This attempted rationalization, however, fails to convince when it is remembered that, whatever the situation in regard to solicitors or architects, surgeons are often successfully sued in tort. There is in fact no way out of the logical dilemma: the choice when made is arbitrary (*l*) and it should only be made at all, and then unwillingly, when—for the kind of reasons we have given—it *has* to be made.

Be this as it may, some examples must be given of the choices made. Thus it has been held that negligence on the part of architects (*m*), solicitors (*n*) or stockbrokers (*o*) is a matter of contract.

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slips on the solicitor's defective doorstep. Many judicial utterances have been too sweeping.

(*h*) If one is to come near to an unexpressed (though by no means logically valid) rationalization it is probable that "contract" has been opted for where the injury is in general economic and "tort" where it is in general physical. Tort actions, deriving as they have, from Trespass, have historically been associated in the main with physical injury.

(*i*) [1936] 1 K. B. 399, 405. In some cases the question has been asked whether the situation is "predominately" contract or tort: but this only poses a question of degree and is no sure guide (see text).

(*k*) [1964] 3 All E. R. 577; [1966] 1 Q. B. 197.

(*l*) In *Edwards* v. *Mallan*, [1908] 1 K. B. 1002, VAUGHAN WILLIAMS, L.J., pointed out that the choice of category may depend upon the state of the pleadings at the time of action: this arbitrary determinant probably gets near the truth.

(*m*) *Steljes* v. *Ingram* (1903), 19 T. L. R. 534: *Bagot's Case* (above, n. (*k*)).

(*n*) See above, n. (*g*).

(*o*) *Jarvis' Case*, above, n. (*i*).

That negligence of dentists (*p*), railway authorities in respect of personal injuries (*q*) and bailees (*r*) is matter of tort. This list could, as the law now stands, be expanded either way: and unless some day the law of torts be subsumed under a single law of civil obligation (embracing both contract and tort) it will continue to expand.

Further, where a rule of *policy* determines that a claim shall not be maintainable in contract, policy equally dictates that this rule must not be evaded by basing the claim in tort. Thus though tort is present in a fraudulent breach of contract, and an infant may be sued in tort, an action of deceit is not maintainable against a fraudulent infant contractor since if it were, the policy which grants him immunity in contract would be defeated (*s*).

To this we must add that, though no theoretical difficulty here arises, it may sometimes happen that a particular act or omission constitutes a breach of contract to one person and a tort to another; as where a manufacturer sells a dangerous article to A, knowing that it is likely to be used or consumed by B (*t*). If such an article injures both, then the first person will have a claim arising from contract and the second person will have a claim in tort.

ILLUSTRATION I

"It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of . . . contract" (*u*).

Matthews *v.* Kuwait Bechtel Corporation, [1959] 2 Q. B. 57.

By R. S. C. Ord. 11, r.1(e) (*a*) a writ could be served out of the jurisdiction "whenever . . . (e) the action is brought . . . to . . . affect a contract . . . (iii) by its terms . . . governed by English law". Under a contract expressly governed by English law plaintiff was working for defendant firm in Kuwait when he sustained injuries allegedly occasioned by their negligence. Defendant's office being in Panama, and not in England, plaintiff sought leave to serve a writ out of the jurisdiction in reliance upon Ord. 11, r. 1(e). *Held*: That he was entitled to do so; although the negligence might constitute a tort it was also clearly a breach of contractual duty and accordingly Ord. 11, r. 1(e) applied.

(*p*) *Edwards' Case*, above, n. (*l*).

(*q*) *Kelly* v. *Metropolitan Railway Co.*, [1895] 1 Q. B. 944.

(*r*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56; *Chesworth* v. *Farrar*, [1966] 2 All E. R. 107; [1967] 1 Q. B. 407.

(*s*) See Part I, Chapter IV, 2 (b).

(*t*) *Donoghue* (*or M'Alister*) v. *Stevenson*, [1932] All E. R. Rep. 1; [1932] A. C. 562.

(*u*) *Lister* v. *Romford Ice and Cold Storage, Ltd.*, [1957] 1 All E. R. 125, 131; [1957] A. C. 555, 573, *per* Lord SIMONDS. He adds, "Of this the negligence of a servant (which was in issue in that case) is a clear example".

(*a*) This rule has been revoked and replaced in identical terms by R. S. C. (Revision), 1962, Ord. 11, r. 1(g).

Brief mention must now be made of the distinction between torts and crimes. At first sight this is obvious; the commission of a crime generally carries with it the punishments of the criminal law, such as fine or imprisonment, whereas the commission of a tort generally gives rise only to a right of civil compensation at the suit of the person injured. Criminal proceedings are materially different from civil proceedings and they are mainly conducted in separate courts.

But at this point the obvious ceases, for if we seek to distinguish torts from crimes either upon the basis that they are essentially different in kind or upon the basis that the aims of tort law are necessarily different from the aims of criminal law difficulty arises. On the one hand many fact situations which constitute torts also constitute crimes; thus for instance the facts necessary to establish the tort of conversion may also constitute facts necessary to constitute the crimes of larceny or of obtaining by false pretences, negligence may coincide with manslaughter; and civil libel, civil assault and civil conspiracy also have their counterparts in the criminal law. On the other hand although the main emphasis in the administration of tort law rests upon the aim of enforcing reparation for damage done—upon the theory that it is the business of this branch of the law to ensure compensation of the plaintiff—it carries with it both overtones and undertones of a punitive theory.

As to overtones of punitive theory, mention need only be made of the fact, already alluded to, that in tort (as opposed to contract) exemplary or "punitive" damages may be awarded, not by way merely of compensation to the plaintiff but by way of a lesson (*b*) to the defendant to warn him and others not to perpetrate a similar affront—thus, illogically as some may think, awarding the plaintiff an unmerited sum of money which ought in theory to go by way of fine to the State. As to undertones of punitive theory; the serious student of the law of torts will detect that it is alive with them. Two may be mentioned. In the first place if it be correct that the plaintiff's right to damages in tort is to be measured by reference to the limits of the supposed foresight of the defendant, rather than by reference to the damage (foreseeable or unforeseeable) actually ensuing from the wrong, this proposition implies the major premise that the plaintiff's right to compensation ceases within the limits of the defendant's "fault": thus the guilt of the defendant is the measuring-rod, not the plaintiff's loss. In the second place there is a strong school of thought to-day, of which the late Sir Percy Winfield was a leading exponent, which maintains that "fault" should

(*b*) See below, p. 460.

be the basis, in some form or another (*c*), of all tort liability. If the actual state of the law were really (*d*) such as to justify this theory then it would logically follow that tort liability would be a kind of punishment achieved by way of civil reparation, and it might also follow that the amount of reparation should be measured by the degree of fault rather than—as in the main it actually does—by reference to the harm suffered by the person injured. And this intrusion of punitive ideas into the field of tort may not be even theoretically wrong: since there are some who think that it is legitimate to use tort liability as a means of inhibiting undesirable conduct, ancillary to the criminal law. Just as the modern criminal law envisages prevention (*e*), admonition (*f*), and education (*g*), as well as punishment.

All this confusion of aim in the administration of tort law should not cause surprise for, again, history speaks. To F. W. Maitland Trespass was "the fertile mother of actions" (*h*); in particular it was the root-stock of most of our modern law of torts. And Trespass was a "hybrid", both tortious and criminal in intent—for in trespass in earlier times

> "The plaintiff seeks not violence but compensation, but the unsuccessful defendant will also be *punished* and pretty severely . . . the defendant *found guilty* of trespass is *fined* and *imprisoned*. What is more, the action for trespass shows its *semi-criminal* nature in the process that can be used against a defendant who will not appear—if he will not appear, his body will be seized and *imprisoned*; if he cannot be found he may be outlawed" (*i*).

So that, at the birth of the law of torts, tort and crime are one and now in their maturity they are not entirely divided. Whether they should be so divided as to create a clear dichotomy is another question. There would be much to be said for so framing the rules of tort law as to keep in view a solely compensative aim and leaving

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(*c*) Not necessarily "fault" in the form of malice, intent or lack of care; for it is possible to argue that a basis of "fault" may be found in the mere undertaking of things which necessarily carry with them a high degree of hazard, which create a "risk": *E.g.* the activities which come within the Rule in *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330.

(*d*) See the next section. The "fault" theory is undoubtedly in the ascendant, but as will be seen, if it is the rule it is a rule with many exceptions: and the existence of these exceptions was admitted in *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471; [1947] A. C. 156.

(*e*) *E.g.* under the provisions of ss. 37 and 38 of the Criminal Justice Act, 1967 (47 Halsbury's Statutes (2nd Edn.), 391, 393).

(*f*) *E.g.* conditional or absolute discharges.

(*g*) *E.g.* Borstal treatment.

(*h*) Maitland, *The Forms of Action at Common Law* (ed. Chaytor and Whittaker), p. 48.

(*i*) Maitland, *op. cit.* at p. 49.

the matter of punishment to the criminal courts. Its administration might be made simpler and its rules more logical; but one has to remember that the administration of justice is in fact an aspect of government, and that the art of government is a complex thing not always compatible with the pursuit of a single aim. The only overriding aim in torts is the adjustment of the conflicting interests of people by the means most suitable to the case. Indeed, there was much in the *crie de coeur* of the ancient Writ of Right which ordered the lord to do full right between the parties and ended with the threat that if he failed to do it the Sheriff would; ending "*ne amplius . . . clamorem audiamus pro defectu recti*" (*k*)—("so that we hear no more complaining of right unremedied"). The practical aim of tort law (whatever the theory) is to achieve a just settlement and set a quietus to disputes.

3. VOLITION, FAULT AND ACCIDENT

Whatever may be the theoretical difficulties which were touched on in the last section the position at the present time is that in the main (*l*) in tortious liability

> "the *emphasis* . . . is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent" (*m*).

Generally speaking, therefore, the act complained of must be *voluntary*; and this means that it must either be intentional or negligent (*n*). "Negligent" in this context means that the act or omission must be one which a person in the defendant's position could, and should, have avoided. So that to this extent tortious liability is in general based upon an element of "fault".

As will later appear (*o*), this rule that fault is essential to liability has recently been extended to the tort of trespass to the person, with the effect that proof of fault is essential to the plaintiff's case (*p*).

(*k*) Bracton, f. 328 a.

(*l*) But only "in the main", as will appear below.

(*m*) *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E. R. 471; 476; [1947] A. C. 156, 171; *per* Lord MACMILLAN. (Italics ours: it is to be noted that he only says "emphasis").

(*n*) "Negligence" in the present context as a general ground of liability must not be confused with "negligence" in the guise of a specific tort: for which see Part II, Chapter 8.

(*o*) Below, p. 68. The relevant decision being *Fowler* v. *Lanning*, [1959] 1 All E. R. 290; [1959] 1 Q. B. 426.

(*p*) It used to be thought that, on the authority of *Stanley* v. *Powell*, [1891] 1 Q. B. 86, the onus lay on the defendant to prove inevitable accident if he were to escape liability.

But there is no reason to suppose that it applies to other forms of trespass; in respect of them it would seem that liability may arise without proof of fault. But even then innocence may excuse if the defendant can show that what he did was an "*inevitable accident*" in the sense that it was unavoidable by any use of care (*q*). Similar reasoning applies to cases of "*inevitable necessity*"; as where in an emergency it is essential in defence of one's own property or in the public interest to trespass upon the property of others—as to prevent the spread of fire (*r*) or to raise works to repel an invasion (*s*).

But broad propositions are dangerous and like most others these need to be qualified.

In the first place inevitable accident, which excludes volition entirely, is not the same thing as *mistake*, which does not. Mistake is usually (*t*) no defence in tort. Thus if freely and voluntarily I trespass upon your land, knowing what I am about, it will afford me no defence to an action that I believed the land was my own, or that for some mistaken reason I thought I had a right to go upon it. Similarly, it is no defence to an action for conversion that in selling goods that were yours I genuinely supposed them to belong to another person who had given me authority to sell them (*u*).

In the second place, for historical reasons, and probably also for reasons of policy, there are certain torts of so-called "*strict*" (or "absolute" (*v*)) liability in which it is no defence that the defendant acted with all due care. Where these torts are concerned it has been said that a man acts "at his peril" (*a*), volition is not essential, and inevitable accident does not excuse. The nature of each of these torts will be examined in its proper place; but examples are libel (*b*), liability under the rule in *Rylands* v. *Fletcher* (*c*), liability for dangerous animals, and, in some instances, liability in nuisance and for breach of statutory duty (*d*). But even under the rule in

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(*q*) See Illustration 2 (a).

(*r*) *Cope* v. *Sharpe*, [1912] 1 K. B. 496. And see *Cresswell* v. *Sirl*, [1947] 2 All E. R. 730; [1948] 1 K. B. 241, shooting dog in act of attacking sheep.

(*s*) *The Case of Saltpetre* (1606), 12 Co. Rep. 12.

(*t*) Though it may be in some instances; as in fraud, where an *intent* to defraud is essential.

(*u*) *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757 (Illustration 2 (b)); *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495.

(*v*) Though in common use, this word is misleading; for even in the case of these torts there are, as will be seen, some defences.

(*a*) *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265, 279; *per* BLACKBURN, J.

(*b*) Except in so far as the law has been affected by the Defamation Act, 1952 (32 Halsbury's Statutes (2nd Edn.) 399).

(*c*) (1868), L. R. 3 H. L. 330.

(*d*) The nature of statutory liability depends, however, upon the true construction of each particular enactment. In some instances it may be truly

Rylands v. *Fletcher* the occurrence of an *exceptional* accident (inelegantly termed an "Act of God") will provide a defence (*e*).

ILLUSTRATION 2

(a) *As a general rule it is a defence to an action in tort that the defendant neither intended to injure the plaintiff nor could have avoided doing so by the use of reasonable care.*

National Coal Board *v.* J. E. Evans & Co. (Cardiff), Ltd., [1951] 2 All E. R. 310; [1951] 2 K. B. 861.

While employed upon a contract which required that they should make excavations upon land belonging to a third party, the respondents, through their servants, struck and damaged the appellants' electric cable which was buried beneath the land. Neither the third party nor the respondents had reason to know of the existence of the cable, and the respondents had no opportunity of discovering it before it was struck. *Held:* Respondents not liable (*f*).

(b) *As a general rule mistake is no defence.*

Hollins *v.* Fowler (1875), L. R. 7 H. L. 757.

The appellants, who were brokers, sold some cotton which they had bought from X. They honestly though mistakenly believed that this cotton belonged to X; but in truth it belonged to the respondents from whom X had obtained it by fraud. In an action by the respondents. *Held:* That the appellants were liable to them in conversion.

4. THE CAUSAL ELEMENT

Whether "fault" in the sense just defined be present or absent it is axiomatic that there can be no liability unless what the defendant did or omitted to do was the cause of the plaintiff's injury (*g*). To the philosophers the concepts of cause and effect have always been troublesome (*h*) and the courts can only approach the question of causation in a commonsense way.

Problems of causation most commonly arise in connection with the tort of negligence and actions for breach of statutory duty, and

"absolute": see *Makin* v. *London and North Eastern Rail. Co.*, [1943] 1 All E. R. 645; [1943] K. B. 467, but contrast *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743.

(*e*) For the rule in *Rylands* v. *Fletcher* and "Act of God" see Part II, Chapter 12.

(*f*) But as regards trespass to the person see *Fowler* v. *Lanning*, [1959] 1 All E. R. 290; [1959] 1 Q. B. 426.

(*g*) See, *e.g.*, *Barnett* v. *Chelsea and Kensington Hospital Management Committee*, [1968] 1 All E. R. 1068—doctor found negligent but not established by plaintiff that this caused the injury.

(*h*) The whole problem is discussed by Hart and Honoré in their book, *Causation in the Law*.

they are often relevant to the issue of remoteness of damage (*i*). But here it must be stressed that they may arise in relation to tortious (*k*) liability in any form (*l*). For in any case in which the connection of the defendant's wrongful act with the injury suffered is in issue it may become essential to liability to establish that the defendant's conduct was the effective cause of the injury; for if it was not the defendant *cannot* be liable.

Thus for instance if the harm complained of is the result of some independent cause which intervenes between it and the act or omission complained of ("*nova causa interveniens*") or is the result of some action of the plaintiff himself, or of some third party, which is uninfluenced by the state of affairs brought about by the alleged tort ("*novus actus interveniens*") there can be no recovery from the defendant in respect of that harm.

What will amount to an intervening cause or act was well summed up by Lord WRIGHT:—

> "To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as unreasonable or extraneous or extrinsic" (*m*).

But of course what will thus be treated as extraneous or extrinsic is a matter that can only be considered in relation to all the facts (*n*) of each case and here, above all, illustrations, and illustrations alone, will serve to explain the law.

ILLUSTRATION 3

(a) *The defendant will not be held responsible for damage which arises from an extraneous cause ("nova causa interveniens") which is not directly traceable to his act.*

(*i*) See below pp. 209–213; 418–420.

(*k*) And of course they are not peculiar to tort but may also arise in the criminal law; see *R.* v. *Jordan* (1956), 40 Cr. App. Rep. 152; *R.* v. *Smith*, [1959] 2 All E. R. 193; [1959] 2 Q. B. 35. And in the law of contract: see *Quinn* v. *Burch, Bros., (Builders) Ltd.*, [1966] 2 All E. R. 283; [1966] 2 Q. B. 370

(*l*) See *e.g. Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Donovan* v. *Union Cartage Co., Ltd.*, [1932] All E. Rep. 273; [1933] 2 K. B. 71; *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E. R. Rep. 222; [1934] 2 K. B. 101 (nuisance): *Harnett* v. *Bond*, [1925] All E. R. Rep. 110; [1925] A. C. 669 (false imprisonment).

(*m*) *Lord* v. *Pacific Steam Navigation Co., Ltd. The Oropesa*, [1943] 1 All E. R. 211, 215; [1943] P. 32, 39.

(*n*) Issues involving causation are technically questions of mixed law and fact in the sense that if there be a jury the judge may rule that there is no evidence to support a particular allegation—see *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193—but apart from this technicality the facts predominate.

Liesbosch Dredger *v.* S.S. Edison, [1933] All E. R. Rep. 912; [1933] A. C. 449 (*o*).

Due to negligence of Edison, Liesbosch Dredger sank. Because the owners of Liesbosch (appellants) had insufficient funds to buy a new dredger comparatively cheaply they were forced to hire (and ultimately to buy by instalments) a much more expensive one. They sought to claim this outlay in full from respondents (owners of Edison). *Held:* This claim failed. The reason for the excessive outlay was the result of an extraneous cause (*p*), the appellants' own "impecuniosity" (*q*), which was not traceable to the respondents' acts, "and . . . was outside the legal purview of these acts" (*r*). They were allowed damages upon the basis of the cost of a new dredger which, but for their lack of funds, they would have been able to buy" (*s*).

(b) *The plaintiff's own act may constitute a "novus actus interveniens" if it, rather than the defendant's act or omission, caused the harm.*

Cummings (or McWilliams) *v.* Sir William Arrol & Co., Ltd., [1962] 1 All E. R. 623.

The deceased met his death by falling from a steel tower which he was employed by defendants to erect. Had he been wearing a safety belt he would not have been killed by the fall. On the day in question no safety belts were in fact available but the evidence was that the deceased, an experienced steel erector, would not have worn one had it been available. *Held:* On this evidence the cause of the accident was not the failure to supply a safety belt, since had there been one the deceased would not have worn it. And defendants were not liable (*t*) . . . "there are four steps of causation: (i) a duty to supply a safety belt; (ii) a breach; (iii) that if there had been a safety belt the deceased would have used it; (iv) that if there had been a safety belt the deceased would not have been killed. If the irresistible inference is that the deceased would not have worn a safety belt had it been available, then the first two steps in the chain of causation cease to operate" (*u*).

(*o*) Examples could be multiplied. See *e.g. Dwyer* v. *Mansfield*, [1946] 2 All E. R. 247; [1946] K. B. 437; *Dunne* v. *North Western Gas Board*, [1963] 3 All E. R. 916; [1964] 2 Q. B. 806.

(*p*) Note that here the extraneous cause was antecedent to the commission of the tort; in most instances it is subsequent in time.

(*q*) Lord WRIGHT's word for it.

(*r*) [1933] A. C. at p. 460; *per* Lord WRIGHT.

(*s*) The *nova causa* may be a natural event: hence the "Act of God" exception under the Rule in *Rylands* v. *Fletcher*. And see *East Suffolk Rivers Catchment Board* v. *Kent*, [1940] 4 All E. R. 527; [1941] A. C. 74: *Dunne* v. *North Western Gas Board*, above n (*o*).

(*t*) Compare *Speight* v. *Gosnay* (1891), 60 L. J. Q. B. 231; *Corn* v. *Weir's Glass (Hanley), Ltd.*, [1960] 2 All E. R. 300; *Wigley* v. *British Vinegars, Ltd.*, [1962] 3 All E. R. 161; [1964] 307; *The Fritz Thyssen*, [1967]. 1 All E. R. 628; [1968] P. 255, (affirmed [1967] 3 All E. R. 117, C. A.); *James* v. *Hepworth, & Grandage, Ltd.*, [1967] 2 All E. R. 829; [1968] 1 Q. B. 94.

(*u*) [1962] 1 All E. R. at p. 627; *per* Viscount KILMUIR, L.C. See also *Farr* v. *Butters Brothers & Co.*, [1932] All E. R. Rep. 339; [1932]2 K. B. 606;

(c) *The act of a third party may constitute a "novus actus interveniens".*

Weld-Blundell *v.* Stephens, [1920] All E. R. Rep. 32; [1920] A. C. 956.

Appellant employed respondent, a chartered accountant, to investigate a company's affairs. He gave him written instructions which contained matter libellous of two officials of the company. Respondent passed these instructions to his partner who carelessly left them on the floor at the company's office. The company's manager found them and communicated their contents to the officials, who then recovered damages against the appellant for the libel. In the instant action appellant sought to recoup himself against respondent for his loss. *Held:* Appellant could recover nominal (*a*) damages only. He could not recover upon the basis of an indemnity for his actual loss in the libel action because the manager's act was the voluntary act of a free agent over whom he (respondent) had no control, and for whose acts he (was) not answerable" (*b*).

Thus the intervention of an act which is free and voluntary will, as it is often put, "break the chain of causation" and render the defendant immune. But by no means *all* intervening acts will afford this immunity; for the act must be an act of free will if it is to have this effect. Thus for example the intervening act may be dictated by a dangerous situation to which the tort has given rise; in such circumstances people act instinctively, without time for consideration—they are done while the "hand" of the defendant is still "heavy" (*c*) upon the actor. And this principle extends somewhat further; for it is held that where the defendant creates a situation

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The Majfrid, [1942] P. 145: *Gledhill* v. *Liverpool Abbatoir Utility Co., Ltd.*, [1957] 3 All E. R. 117: contrast *Denny* v. *Supplies and Transport Co., Ltd.*, [1950] 2 K. B. 374. If the plaintiff's own act contributes to the infliction of the harm but is yet not the sole effective cause of it there may be reason for reducing the damages under the Law Reform (Contributory Negligence) Act, 1945 (17 Halsbury's Statutes (2nd Edn.) 12), instead of extinguishing the claim entirely: *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240.

(*a*) This was because the case was pleaded alternatively in contract and tort, and there had been a technical breach of the respondent's contractual obligation to the appellant.

(*b*) [1920] A. C. at p. 987; *per* Lord SUMNER, citing TINDAL, C. J., in *Ward* v. *Weeks* (1830), 7 Bing. 211, 215. See also *Ward* v. *Weeks*; *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419; *S.S. Singleton Abbey* v. *S.S. Paludina*, [1926] All E. R. Rep. 220; [1927] A. C. 16. Similarly in the law of defamation the defendant is not held responsible for the publication of a letter which is opened by some officious person for whom it was not intended: *Sharp* v. *Skues* (1909), 25 T. L. R. 336; *Powell* v. *Gelston*, [1916–1917] All E. R. Rep. 953; [1916] 2 K. B. 615. And there is no liability under the Rule in *Rylands* v. *Fletcher* for the act of a stranger: *Box* v. *Jubb* (1879), 4 Ex. D. 76.

(*c*) Lord SUMNER's description: *S.S. Singleton Abbey* v. *S.S. Paludina* (last note) at p. 27.

fraught with danger it may sometimes be reasonable for the plaintiff knowingly to take the risk of it; and if he is injured the defendant's tort and not the plaintiff's act will be taken as the cause of the injury (*d*). Further, it seems to be established that where the intervening act is one which the defendant ought to have expected as likely the defendant will not be immune; though it must be confessed that what the defendant ought to expect is an arbitrary question which must often depend more upon broad considerations of policy than upon exact speculation as to what an ordinary man would in fact expect (*e*).

ILLUSTRATION 4

(a) *Instinctive action, prompted by the circumstances to which the tort has given rise, will not be treated as an intervening cause.*

Brandon *v.* Osborne Garrett & Co., Ltd., [1924] All E. R. Rep. 703; [1924] 1 K. B. 548.

Plaintiff and her husband were in defendants' store. Due to negligence for which defendants were responsible, a skylight broke. Plaintiff strained her leg (with resulting thrombosis) in endeavouring to snatch her husband away from the area of falling glass. *Held:* Though plaintiff was not in danger from the glass herself, her act was instinctive—not a "*novus actus interveniens*"—and she could accordingly recover.

The same principle is illustrated by *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892 and *Jones* v. *Boyce* (1816), 1 Stark. 493. In the former celebrated decision a lighted squib was thrown upon a stall in a crowded market; having been tossed from one stall to another by people acting in instinctive self-defence, it finally landed in the infant plaintiff's eye. In the latter case the plaintiff jumped off a moving coach which he thought was about to overturn.

Neither the acts of the stall holders in the first case nor the plaintiff's leap to safety in the second were held to constitute independent causes (*f*).

(*d*) And the defence of "*Volenti non fit injuria*" (see below, p. 34) is thus excluded.

(*e*) See, for example, the "rescue" cases (below, p. 36). If, as is doubted in the text, these cases ought really to turn upon the principle of "foresight" then the rule is that "rescue "is foreseeable, but not intermeddling—*Ward* v. *T. E. Hopkins & Son, Ltd.*, [1959] 3 All E. R. 225. On the other hand the act of a gossip is not held to be "foreseeable" though gossiping is a universal frailty (see *Weld-Blundell* v. *Stephens*, [1920] All E. R. Rep. 32, 50; [1920] A. C. 956, 991; *per* Lord SUMNER), nor is an act of dishonesty: *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419. For the influence of policy upon the foresight principle, see below, pp. 37, 172, 235.

(*f*) See also *The City of Lincoln* (1889), 15 P. D. 15; *Pigney* v. *Pointers Transport Services, Ltd.*, [1957] 2 All E. R. 807.

(b) *Where the tort creates a dangerous situation it may sometimes be reasonable for the plaintiff to take the risk of injury; when this is so his act will not constitute an independent cause.*

Clayards *v.* Dethick (1848), 12 Q. B. D. 439.

Defendants blocked a passage-way leading to plaintiff's stables by digging a trench along the length of it and piling up the excavated soil beside it. Plaintiff, a cab proprietor, decided to risk getting his horses out across the loose earth; they fell in and were injured. *Held:* Plaintiff could recover. The risk was one that in the circumstances (*g*) he was entitled to take; but what he did might have constituted a "*novus actus*" if the danger had been "so great that no reasonable man would have incurred it" (*h*).

(c) *Where the defendant ought reasonably to foresee the probability of an intervening act, that act will not constitute an independent cause.*

Philco Radio and Television Corporation of Great Britain, Ltd. *v.* J. Spurling, Ltd., [1949] 2 All E. R. 882.

Respondents' carter mistakenly delivered some cases of highly inflammable celluloid at appellants' premises. A typist employed by appellants brought a lighted cigarette into contact with this material and an explosion followed causing serious damage to appellants' premises. *Held:* That in the absence of evidence that the typist set light to the material intentionally respondents were liable. The carter ought to have foreseen that if the celluloid were left where it was damage might arise from the act of some foolish person (*i*).

It remains to be added that more than one cause may sometimes operate to produce a single result and that this concurrence of causes may have to be taken into account; for unless one cause is entirely separate from and independent of the other or others it must be taken as a factor in determining liability (*k*).

(*g*) Contrast, however, *Torrance* v. *Ilford Urban District Council* (1909), 25 T. L. R. 355.

(*h*) (1848), 12 Q. B. D. at p. 446; *per* PATTESON J. And see *Lord* v. *Pacific Steam Navigation Co., Ltd., The Oropesa*, [1943] 1 All E. R. 211; [1943] P. 32; *The Guildford Owners of S.S. Temple Bar* v. *Owners of M.V. Guildford*, [1956] 2 All E. R. 915; [1956] P. 364: *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240: *Sayers* v. *Harlow Urban District Council*, [1958] 2 All E. R. 342.

(*i*) For a similar principle relating to foreseeability in relation to publication in the law of defamation see *Theaker* v. *Richardson*, [1962] 1 All E. R. 229 and contrast with *Sharp* v. *Skues* and *Powell* v. *Gelston*, [1916–17] All E. R. Rep. 953; [1916] 2 K. B. 615. And for "foresight" in relation to the "rescue" cases see above p. 21, n. (*e*), and text p. 36.

(*k*) As well as Illustration 5 see *Hill* v. *New River Co.* (1868), 9 B. & S. 303: *Burrows* v. *March Gas & Coke Co.* (1872), L. R. 7 Exch. 96; *Minister of Pensions* v. *Chennell*, [1946] 2 All E. R. 719; [1947] K. B. 250; *Clay* v. *A. J. Crump & Sons, Ltd.*, [1963] 3 All E. R. 687; [1964] 1 Q. B. 533.

ILLUSTRATION 5

More than one cause may have to be taken into account in determining liability.

Stapley *v.* Gypsum Mines, Ltd., [1953], 2 All E. R. 478; [1953] A. C. 663.

Deceased and a fellow miner were directed by their foreman to bring down the unsafe roof of a stope. After unsuccessful attempts to bring it down they decided to give up, failed in contravention of a mining regulation to report their failure to the foreman, and the deceased remained in the stope while his fellow went elsewhere. The roof then fell in on deceased. In an action by the widow of deceased against the employers. *Held:* Since both men acted jointly in disobeying the regulation the mate's participation (*l*) in the accident could not be disregarded as an effective cause and (though deceased was guilty of contributory negligence which reduced the amount of the claim) the employers were liable for the mate's lack of care.

5. IMPROPER MOTIVE: MALICE

Intention and motive are different things. For instance, a man may write a cheque with the *intention* of making a gift to charity; but along with this intention he may have many different *motives*. For example he may be moved on the one hand by an altruistic desire to do good; whereas on the other hand he may be moved by a selfish motive, such as a desire to obtain popular applause, or indirectly to obtain some form of advancement by the gift.

In general, though it is otherwise in the criminal law, the law of torts is not concerned with motives whether selfish or altruistic, good or bad. A good motive will usually not excuse a tortious act and a bad one will not usually make that a tort which would otherwise have been innocent (*m*). But there are exceptions to this rule, and although each of them will be noticed in its proper place, some examples may be given here.

First as to good motives. It will be seen that in the tort of conspiracy (*n*) whereas it is *primâ facie* a conspiracy for two or more

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(*l*) The complexities of this problem may be illustrated by the fact that in *Imperial Chemical Industries Ltd.* v. *Shatwell*, [1964] 2 All E. R. 999; [1965] A. C. 656, at pp. 1006 and 677 respectively Viscount RADCLIFFE doubts whether cases like this, involving *participation*, should be approached in terms of causation.

(*m*) See *Bradford Corporation* v. *Pickles*, [1895] A. C. 587 (Illustration 6).

(*n*) Part II, Chapter 18.

persons to combine to injure another, such injury may be excused if the motive of the combination is one that the law considers proper; for instance a desire to protect the joint interests of the combiners. It will be seen that in the tort of enticement (*o*) the defendant's act may be justified if it is motivated by reasons of humanity, such as a desire to protect a wife against an intolerable husband. It will be seen that in the tort of interference with contractual relations (*p*) the interference may be justified where the defendant's purpose is one of which the law approves, such as a desire to save an underpaid party to a contract from resorting to immorality (*q*).

Secondly, as to bad motives. "*Malice*" (in the sense of improper motive, embracing, amongst other things, spite or ill-will) is an essential element of liability in certain torts; these include malicious prosecution (*r*) and malicious falsehood (*s*). And it is also a relevant factor to be considered in certain others, including defamation, where the existence of malice will defeat a plea of qualified privilege or of fair comment (*t*), and, in some circumstances, nuisance (*u*).

A word must however be added about the meaning of "Malice", for when used in the law of torts it may have two meanings. The first meaning is the one already given; namely "improper motive". But it is sometimes (though not so often as it used to be) used in a purely technical sense, in effect simply as the equivalent of "intention". Thus for example in pleadings in a libel action it used to be common form to state that the defendant "falsely and *maliciously*" wrote such-and-such of and concerning the plantiff. In this sense the word does not mean improper motive, and its inclusion really adds nothing to the plaintiff's case, for which proof of such motive is not essential. Indeed, there is a celebrated *dictum* that "malice" in this sense connotes no more than "a wrongful act done intentionally without just cause or excuse" (*a*).

(*o*) Part II, Chapter 15.
(*p*) Part II, Chapter 16.
(*q*) *Brimelow* v. *Casson*, [1924] 1 Ch. 302.
(*r*) Part II, Chapter 14.
(*s*) Part II, Chapter 19.
(*t*) Part II, Chapter 13.
(*u*) See *Christie* v. *Davey*, [1893] 1 Ch. 316; *Hollywood Silver Fox Farm, Ltd.* v. *Emmett*, [1936] 1 All E. R. 825; [1936] 2 K. B. 468. In *Chapman* v. *Honig*, [1963] 2 All E. R. 513, 516; [1963] 2 Q. B. 502, 511, Lord DENNING, M.R. suggests that the presence of malice may also render the exercise of a contractual right unlawful.
(*a*) *Bromage* v. *Prosser* (1825), 4 B. & C. 247, 255; *per* BAYLEY, J.

ILLUSTRATION 6

In general the law of torts is not concerned with the motives of the defendant.

Bradford Corporation *v.* Pickles, [1895] A. C. 587.

Water percolated in no defined channels beneath Pickles' land and flowed thence to land belonging to the appellant Corporation. The Corporation used this water for their City water supply. Actuated by an unworthy desire to force the Corporation to buy his land at his own price, Pickles extracted the water. In an action by the Corporation. *Held:* Since (although it is a tort to extract water which flows from one property to another in defined channels) it is *no tort* to extract water which merely percolates in undefined channels (*b*), Pickles was not liable. And even if his motive was malicious (in the sense of improper and mercenary) this could not turn an innocent act into a tort. "If it was a lawful act, however ill the motive might be he had a right to do it" (*c*).

(*b*) See below, p. 140.

(*c*) [1895] A. C. at p. 594; *per* Lord HALSBURY, L.C. See also *Allen* v. *Flood*, [1898] A. C. 1. "We cannot go into the motives for enforcing a legal right. If it exists we must enforce it": *Wyld* v. *Silver*, [1962] 3 All E. R. 309, 315; [1963] 1 Q. B. 169, 184; *per* Lord DENNING, M.R.

CHAPTER 2

GENERAL EXEMPTIONS FROM TORTIOUS LIABILITY

It will have been noted that in order to be actionable as a tort an act or omission must be something that is "unauthorized by law". This part of the definition of a tort now requires amplification.

In some circumstances something which would otherwise give rise to tortious liability will not do so because it is a thing which has been sanctioned by some particular or general rule of law. There are in fact many such circumstances but here we need only consider four instances. These are statutory authority, Act of State, the general immunity afforded to judicial and other officers, and the principle enshrined in the maxim "*volenti non fit injuria*". Mention must also be made of a special rule governing the actionability of torts which are also felonies.

1. STATUTORY AUTHORITY

Nothing that a statute authorizes can be unlawful; and statutory authority is thus a complete defence to a claim in respect of an act which, apart from that authority, would have been a tort (*a*).

Whether a statute has thus sanctioned the commission of a wrong is always a matter of construction of the particular enactment concerned. Where immunity is granted by express words there can be no room for argument. But the immunity may sometimes also arise by necessary implication from what the statute has expressly authorized: for instance, if a railway authority is empowered to construct a line over a track which has been planned with the

(*a*) But it may be no defence to the commission of a tort that a statute has given authority for the commission of an act which would be (apart from such authority) a crime: *Gaynor* v. *Allen*, [1959] 2 All E. R. 644; [1959] 2 Q. B. 403 —policeman exceeding speed limit liable in negligence.

approval of the legislature, no action will lie against the authority for any nuisance caused by the running of trains upon that track, provided that the nuisance is one which is a necessary concomitant to the running of trains.

> "When the legislature has sanctioned . . . the use of a particular thing, and it is used for the purpose for which it was authorized . . . the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing . . . the party using it is not responsible" (*b*).

But on the other hand it is only *necessary* consequences that will fall within the protection of the statute; and where what is done need not necessarily have been done in pursuance of the powers given by the statute, the protection ceases to be afforded (*c*).

Further, the courts will not presume that a statute has sanctioned a display of carelessness, so that

> "an action does lie for doing that which the legislature has authorized if it be done *negligently*" (*d*).

And it rests upon the party who does cause injury by the doing of an authorized act to establish that he used all proper care to avoid the causing of it (*e*).

ILLUSTRATION 7

(a) *Where something is done in pursuance of statutory authority, no action will lie in respect of it unless it is done negligently.*

Vaughan *v.* Taff Vale Rail. Co. (1860), 5 H. & N. 679.

The respondent company were authorized by statute to run a railway close to the appellant's land. Sparks from an engine set fire to his woods. *Held:* The company were not liable. They had taken all known care to prevent the emission of sparks, and, in running locomotives on the line they were only doing what they had statutory authority to do (*f*).

(*b*) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679 (Illustration 7 (a)), at p. 685; *per* COCKBURN, C.J. And see *Dunne* v. *North Western Gas Board*, [1963] 3 All E. R. 916; [1964] 2 Q. B. 806.

(*c*) *Metropolitan Asylum District Managers* v. *Hill* (1881), 6 App. Cas. 193 (Illustration 7 (b)).

(*d*) *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, 456; *per* Lord BLACKBURN (italics ours).

(*e*) *Manchester Corporation* v. *Farnworth*, [1930] A. C. 171; *Provender Millers (Winchester), Ltd.* v. *Southampton County Council*, [1939] 4 All E. R. 157; [1940] Ch. 131.

(*f*) See also *Hammersmith and City Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949]2 All E.R. 1021; [1950] 1 K. B. 284. But contrast *Jones* v. *Festiniog Rail. Co.* (1868). L. R 3 Q. B. 733, where the company were *not* authorized to run steam locomotives.

(b) *But where the commission of a tort is not a necessary consequence of an authorized act the courts will not presume that the Legislature has sanctioned it.*

Metropolitan Asylum District *v.* Hill (1881), 6 App. Cas. 193.

The appellants, a hospital authority, were empowered by statute to set up hospitals (*inter alia*) for people suffering from smallpox. They erected such a hospital in a residential district where it caused danger of infection to people living nearby. *Held:* This was a nuisance; and since the statute in question had merely given the appellants general authority for the erection of such hospitals, and had not sanctioned it in places where they would be a danger to the public, the respondents (who were local residents) were entitled to an injunction compelling the appellants to remove the hospital (*g*).

2. ACT OF STATE

Apart from the other special grounds of immunity now being considered the general rule is that every act which affects the legal rights of a British subject, or of a person who owes allegiance to the Crown, is subject to the law; and that if such a person is injured by such an act he can seek redress in the courts. This is none the less the case if the injury is caused by the action of a member of the Executive, for it is no defence to an officer of the Government to plead "reason of State" (*h*).

Acts of State are however exceptions to the rule. An "Act of State" may be defined as

> "an act of the executive as a matter of policy performed in the course of its relations with another state including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown" (*i*).

Such acts, being matters of policy, are not justiciable by the courts and the remedy, if any, for a person who is injured by them is by diplomatic rather than legal process. Thus for example if a wrong is committed by a member of Her Majesty's forces against a foreigner abroad, and this member's act is approved by the responsible Department of State concerned, the plea that it was an Act of State may be successfully raised to oust the jurisdiction of the courts (*k*).

(*g*) See also *Pride of Derby Angling Association* v. *British Celanese, Ltd.*, [1953] 1 All E. R. 179; [1953] Ch. 149.

(*h*) *Entick* v. *Carrington* (1765), 19 State Tr. 1029.

(*i*) See Halsbury's Laws of England (3rd Edn.), Vol. 7, p. 279, and Prof. E. C. S. Wade (1934), 15 *British Year Book of International Law*, 98.

(*k*) *Buron* v. *Denman* (1848), 2 Exch. 167 (Illustration 8).

But there are strict limits to this principle. The plea of "Act of State" is not available in respect of direct (*l*) injury caused anywhere to a British subject (*m*). Nor is it, in general, available in respect of an act done to anyone within the realm, whether he be a British subject or even an alien who is a subject of a State at peace with Her Majesty and even though he be only temporarily resident within the jurisdiction (*n*).

Further, "Act of State" can only succeed as a defence if the act complained of is either authorized by, or subsequently ratified by, the appropriate Minister or Department on behalf of the Sovereign. For no private individual may claim of his own responsibility to represent the State.

It is however for the courts to decide whether a particular act is in truth an act of policy or whether it is an act within the law (*o*), for they will not permit the Executive to infringe private rights under the pretence of Act of State.

It should also be added that, unless they waive the privilege, Foreign Sovereigns are immune from the jurisdiction of our courts, both in their public and in their private (*p*) capacity: and that their property is similarly immune (*q*). Moreover diplomatic and certain other officials also enjoy the privilege of immunity (unless they waive it) during the period of their official employment (*r*).

ILLUSTRATION 8

No action can be brought in respect of a wrong committed outside the jurisdiction against a subject of a foreign State if the act which constitutes the wrong is previously authorized or subsequently ratified as an Act of State by the proper Executive authorities.

(*l*) But an act of state may in some circumstances cause indirect injury even to a British subject—as where upon annexation of territory established rights are abrogated—and such injury will not be redressible: *Cook* v. *Sprigg*, [1899] A. C. 572.

(*m*) *Walker* v. *Baird*, [1892] A. C. 491.

(*n*) *Johnstone* v. *Pedlar*, [1921] 2 A. C. 262 (see Illustration 8). It does, however, appear to be available against an alien enemy resident by licence within the jurisdiction: *Netz* v. *Ede*, [1946] 1 All E. R. 628; [1946] Ch. 224; *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 2 All E. R. 434; [1947] K. B. 41.

(*o*) See *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, 639; *per* FLETCHER MOULTON, L.J., and see *Secretary of State for the Council of India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476; 13 Moo. P. C. C. 22.

(*p*) *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149.

(*q*) See *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] 1 All E. R. 719; [1938] A. C. 485, and authorities there cited, and *Rahimtoola* v. *Nizam of Hyderabad*, [1957] 3 All E. R. 441.

(*r*) The subject of sovereign and diplomatic immunity is a large one. For full discussion and citation of authorities, see Cheshire, *Private International Law*.

Buron *v.* Denman (1848), 2 Ex. 167.

The plaintiff was a Spaniard engaged in the slave trade in Spanish territory off the coast of West Africa. The defendant, a British naval officer, intervened by force and freed some slaves the plaintiff had captured, and his action was subsequently ratified by the Lords of the Admiralty and the Secretaries of State for the foreign and colonial Departments. In a claim for trespass brought by the plaintiff against the defendant. *Held:* (i) That since slavery was allowed by Spanish law the plaintiff was *primâ facie* entitled to sue, for the slaves were his property, but (ii) the ratification of the defendant's act by the proper authorities made it an Act of State for which the Crown had assumed responsibility: and the claim therefore failed.

Contrast Johnstone v. *Pedlar*, [1921] 2 A. C. 262, where the plea "Act of State" failed as against an American citizen resident in Ireland (*within* the jurisdiction), even though his claim was in respect of property taken from him by the police when he was arrested for illegal drilling.

3. IMMUNITY OF JUDICIAL AND OTHER OFFICERS

"No action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motives are malicious and the acts or words are not done or spoken in the honest exercise of his office" (*s*).

The reason for this rule is said to be that if it were otherwise judges would lose their independence; and that judicial independence is essential to the proper administration of justice (*t*). It is an absolute rule, and it could thus even be invoked in a case in which a judge maliciously brought about the conviction of an innocent person.

But an important distinction has to be made; for judges are only so privileged if they are acting "in the exercise of their judicial office". Hence, in their conduct outside court they are susceptible to the ordinary law; and, further, they may be liable even in the exercise of their judicial powers if they exceed the jurisdiction which has been conferred upon them. In practice there is, therefore, a difference between the immunity enjoyed by judges of the superior courts and that enjoyed by judges of inferior (*u*) courts. Inasmuch

(*s*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, 671; *per* Lord ESHER, M.R. (Illustration 9 (a)).

(*t*) A judge of the Supreme Court of Judicature does, however, hold office only "during good behaviour"; and there is machinery by which such judges might be removed from office: Supreme Court of Judicature (Consolidation) Act, 1925, s. 12 (5 Halsbury's Statutes (2nd Edn.) 345).

(*u*) This includes County Court judges (*Houlden* v. *Smith* (1850), 14 Q. B. 841), judges of consular courts (*Haggard* v. *Pelicier Frères* [1892] A. C. 61), and justices of the peace (*Law* v. *Llewellyn*, [1906] 1 K. B. 487; and see Justices Protection Act, 1848, s. 1) amongst others.

as the jurisdiction of the former is extremely wide they are practically immune from liability as long as they are acting in performance of their duties. But the jurisdiction of the latter being limited, they *will* be liable in respect of anything done in excess of it, even if they are purporting to exercise it; though it has been decided that this will only be the case if the facts before them are such that they knew or ought to have known that they were exceeding their powers (*a*).

The immunity accorded to inferior judges in the strict sense also applies "wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes" (*b*), and it has thus been held to apply to official receivers (*c*), members of military courts of inquiry (*d*), arbitrators (*e*), and even, it seems, to members of domestic tribunals (*f*), but it does not apply to members of tribunals having a primarily administrative function (*g*).

It is provided by the Crown Proceedings Act, 1947 (*h*), that no action in tort shall lie against the Crown in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a *judicial* nature vested in him.

It should also be added that the immunity which attaches to judicial proceedings also protects people, such as jurors, witnesses (*i*) and advocates (*k*), who cannot be made liable for what they say in the course of such proceedings. Moreover certain executive officers such as sheriffs' officers (*l*), county court bailiffs (*m*),

(*a*) *Calder* v. *Halket* (1839–40), 3 Moo. P. C. C. 28: *Willis* v. *Maclachlan* (1876), 1 Ex. D. 376; *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624.

(*b*) *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q. B. 431, 442; *per* Lord ESHER, M.R.

(*c*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.

(*d*) *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744. See also *Barratt* v. *Kearns*, [1905] 1 K. B. 504 (ecclesiastical commission).

(*e*) *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624.

(*f*) *Philips* v. *Bury* (1693), Skinner 447; *Abbott* v. *Sullivan*, [1952] 1 All E. R. 226; [1952] 1 K. B. 189: *Addis* v. *Crocker*, [1960] 2 All E. R. 629; [1961] 1 Q. B. 11.

(*g*) See *O'Connor* v. *Waldron*, [1935] A. C. 76, 82. And see below, p. 308, n. (*i*).

(*h*) Section 2 (5) (6 Halsbury's Statutes (2nd Edn.) 48).

(*i*) *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53; *Watson* v. *M'Ewan*, [1905] A. C. 480; *Hargreaves* v. *Bretherton*, [1958] 3 All E. R. 122; [1959] 1 Q. B. 45: *Marrinan* v. *Vibart*, [1963] 3 All E. R. 380.

(*k*) *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

(*l*) *Williams* v. *Williams and Nathan*, [1937] 2 All E. R. 559; *Barclays Bank, Ltd.* v. *Roberts*, [1954] 3 All E. R. 107.

(*m*) See County Courts Act, 1959, ss. 165, 166. And see *Southam* v. *Smout*, [1963] 3 All E. R. 104; [1964] 1 Q. B. 308; *Vaughan* v. *McKenzie*, [1968] 1 All E. R. 1154.

gaolers (*n*) and constables, are protected from liability for anything they do in execution of a warrant which is valid on the face of it and which is issued by a person who has *lawful power to issue* it. But a warrant or order of a court which has *no jurisdiction* in the matter is no protection (*o*), except in the case of constables—who are protected by statute (*p*) in respect of arrests made under a warrant of a magistrate, notwithstanding any defect of jurisdiction.

It must be added that it has now finally been settled by the House of Lords in *Rondel* v. *Worsley* (*q*) that a barrister is immune from action in respect of professional negligence for anything said or done in the course of litigation (*r*); though this immunity does not extend to purely advisory and paper work unconnected with litigation. It also seems (though this was *obiter*, and its effect in view of past practice therefore uncertain) that the House endorse the view that solicitors should have equal immunity in doing any work which a barrister would do—*i.e.* in particular, advocacy and the settling of pleadings.

It is thought that this decision was both unfortunate and unnecessary. In giving their reasons the House discarded the ancient theory that the immunity rests upon the barrister's inability to sue for his fees, and based the decision mainly upon two propositions. First, that since a barrister has a public duty to deal honestly with the court he must not be open to action by his client whose interests, real or supposed, may conflict with the performance of this duty. Second, that to permit such claims by the client would result in rehearing of what has once been finally heard, giving rise to a "recurring chain-like course of litigation" (*s*). Since neither of these reasons will bear over-close examination the result is, perhaps, unfortunate in that, it being admitted that Bench and Bar are closely knit, the House would appear—whatever the reality—to be giving peculiar protection, not to be enjoyed by others (such as surgeons) whose position is somewhat similar (*t*), to an emanation of their own (*u*).

It may be thought that the argument that the advocate owes a

(*n*) *Olliet* v. *Bessey* (1679), T. Jo. 214; *Henderson* v. *Preston* (1888), 21 Q. B. D. 362.

(*o*) *Clark* v. *Woods* (1848), 2 Exch. 395; *Wingate* v. *Waite* (1840), 6 M. & W. 739.

(*p*) Constables Protection Act, 1750, s. 6 (18 Halsbury Statutes (2nd Edn.) 10).

(*q*) [1967] 3 All E. R. 993.

(*r*) This covers chambers work as well as court work and should date according to Lord UPJOHN (at p. 1036) from the time of letter before action.

(*s*) *Per* Lord MORRIS at p. 1013.

(*t*) All true professions are subject to rules of etiquette which often displease the client.

(*u*) A practice of the mediaeval courts looked upon askance in modern times.

duty to the court which may conflict with the interests of his client is weak since *ex hypothesi*, if he were loyal to his duty to the court, no tribunal could find him negligent; and it may be thought, too, that the fear of trial on trial is unrealistic since, as LAWTON, J., pointed out in *Roadels Case* at first instance (*a*), negligence in advocacy would be very hard to prove. And after all, in the case of a competent advocate a small insurance would meet the risk.

However, this may be, it is only proper to admit that university teachers (including law teachers) have been accorded a similar immunity as far at any rate as negligence in examining and the conferring of degrees are concerned (*b*).

ILLUSTRATION 9

(a) *No action will lie against a judge acting within his jurisdiction even if what he has done is malicious and done in bad faith.*

Anderson *v.* Gorrie, [1895] 1 Q. B. 668.

The defendants were judges of the Supreme Court of Trinidad and Tobago. The plaintiff contended that they had, from malicious and improper motives, called him before the court for contempt and had, with similar motives, committed him to prison in default of bail. *Held:* The defendants were acting within their jurisdiction and consequently whatever their motives, and however wrong their decision, they were immune from liability.

(b) *But a judge who acts in excess of the jurisdiction conferred upon him enjoys no immunity.*

Polley *v.* Fordham (No. 2) (1904), 91 L. T. 525 (*c*).

The defendant, a metropolitan magistrate, issued a distress warrant against the plaintiff on account of the latter's failure to pay a fine which had been imposed upon him by the former for failing to have his children vaccinated. It later appeared that it had been clear upon the face of the summons originally issued that the prosecution had been instituted outside the time limit fixed by law in such a case. The distress was therefore illegal and, in an action by the plaintiff in respect of it, *Held:* The defendant was liable. He had no jurisdiction, and the summons itself provided him with the means of knowledge of this fact.

(*a*) [1966] 1 All E. R. 467.

(*b*) *R.* v. *Dunsheath, Ex parte Meredith*, [1950] 2 All E. R. 741; [1951] 1 K. B. 127: *Thorne* v. *University of London*, [1966] 2 All E. R. 338; [1966] 2 Q. B. 237. University teachers are responsible to the *domus* (in most cases represented by the Visitor) just as barristers are responsible to the Benches of their Inns. In *Thorne's Case* DIPLOCK, L.J., remarked that he was "glad to decline" jurisdiction to act as examiner upon appeal!

(*c*) For earlier proceedings see [1904] 2 K. B. 345.

4. VOLENTI NON FIT INJURIA: ASSUMPTION OF RISK

The significance of the maxim "*Volenti non fit injuria*" is that it expresses the idea that a person who consents to the infliction upon himself of a civil wrong (*d*) cannot recover in respect of the injury to which he has consented, any more than anyone can recover in respect of an injury which he himself, rather than the defendant, has caused (*e*). Thus if you permit (or "license") me to walk upon your land or if you submit to a surgical operation you will have no right to complain of the trespasses concomitant to the things you have knowingly allowed. And again if a man agrees to the publication of matter defamatory of himself he cannot sue for the libel (*f*).

The first difficulty about the application of this maxim lies in the nature of the consent. It may of course be an express consent forming part of a contract (*g*), and here there is little difficulty: prove the consent and the claim will be barred. But it may also take the form of a bare licence or permission, independent of contract; and it may take the form of an implied consent inferred from the circumstances or from the conduct of the parties (*h*), or of a term implied by law as a necessary adjunct of a contract they have made. Examples of consent inferred from the conduct of the parties are the implicit immunity conferred upon participants in lawful games, such as cricket or football, from actions by other participants in respect of injuries received from blows inflicted in the normal course of the game; though this immunity will cease to be accorded if violence is used beyond what the game necessarily requires (*i*), and it does not apply as between spectator and participant as opposed to participant and participant. Again, as Lord DENNING, M.R., said in *Lane* v. *Holloway* (*l*) in

> "... an ordinary fight with fists there is no cause of action to either (party) for the injury suffered. The reason is that each of the

(*d*) As a general rule, however, consent will not excuse the commission of a crime: see *R.* v. *Donovan*, [1934] All E. R. Rep. 207; [1934] 2 K. B. 498. Though there are many exceptions, *e.g.* larceny must be without the owner's consent.

(*e*) As to the element of causation, see above, p. 6.

(*f*) *Chapman* v. *Lord Ellesmere*, [1932] All E. R. Rep. 221, 233–234; [1932] 2 K. B. 431, 463–465.

(*g*) As in the "ticket" cases: see Cheshire and Fifoot, *The Law of Contract*.

(*h*) See *Imperial Chemical Industries, Ltd.* v. *Shatwell*, [1964] 2 All E. R. 999; [1965] A. C. 656; *Buckpitt* v. *Oates*, [1968] 1 All E. R. 1145. See Illustration 10.

(*i*) *Payne* v. *Maple Leaf Gardens, Ltd., Stewart and Marucci*, [1949] 1 D. L. R. 369.

(*k*) *Cleghorn* v. *Oldham* (1927), 43 T. L. R. 465.

(*l*) [1967] 3 All E. R. 129, 131; [1968] 1 Q. B. 379.

participants . . . voluntarily takes upon himself the risk of incidental injuries to himself. *Volenti non fit injuria.* But he does not take on himself the risk of a savage blow out of all proportion to the occasion."

Consent may be implied as forming part of a contract where the particular contract entails likely risks not avoidable by the exercise of care commensurate with the reasonable performance of the contract; as where a spectator who buys a ticket to watch a cricket match or a motor race is struck by a ball or injured by a car which leaves the track (*m*). In such cases a claim against the owner or occupier of the ground or track (*n*) will be debarred by the spectator's implied acceptance of the known risk—*volenti non fit injuria*—provided, of course that such care has been taken as may reasonably be expected in the circumstances to minimize the risk.

But unless the element of consent be imported as a bare legal fiction (*o*) there are analogous situations which need to be explained otherwise than by reference to "*volenti*". These situations are probably best analysed in terms of policy, or social necessity, which requires that in a community the doing of some kinds of things requires a degree of give and take. An important situation of this kind is recognized in the established (*p*) rule that mere proof of trespass is not enough to support a claim in respect of a highway collision; the plaintiff must prove more and establish negligence, or lack of due care. Use of the road is necessarily a hazardous affair (*q*).

(*m*) *Hall* v. *Brooklands Auto-Racing Club*, [1932] All E. R. Rep. 208; [1933] 1 K. B. 205; *Murray* v. *Harringay Arena, Ltd.*, [1951] 2 All E. R. 320, n.; 2 K. B. 529; *Callaghan* v. *Killarney Race Co., Ltd.*, [1958] I. R. 366.

(*n*) But, as will be seen, different considerations apply where the claim is brought against a participant, as opposed to the owner or occupier of the premises; for as between spectator and participant there is no contractual nexus.

(*o*) And nothing confuses the law more certainly than the importation of fictions.

(*p*) *Holmes* v. *Mather* (1875), L. R. 10 Exh. 261. But since *Fowler* v. *Lanning*, [1959] 1 All E. R. 290; [1959] 1 Q. B. 426, it must be taken that this rule—that negligence must be proved—seems to have been extended to *all* cases of trespass to the person; with the result that in respect of trespass to the person highway cases no longer attract a special rule. The reasoning and policy of *Fowler* v. *Lanning* seem to the author doubtful (see below, p. 69).

(*q*) Similar policy considerations pervade much of highway law as, for example, the following cases which will be mentioned below illustrate: *Tillett* v. *Ward* (1882), 10 Q. B. D. 17; *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652; *Maitland* v. *Raisbeck and R. T. and J. Hewitt, Ltd.*, [1944] 2 All E. R. 272; [1944] 1 K. B. 689; *Searle* v. *Wallbank*, [1947] 1 All E. R. 12;

Similar theoretical difficulty besets the kind of case in which a person voluntarily runs a risk in seeking to avert a danger created by the carelessness of another. This may be illustrated by *Cutler* v. *United Dairies (London), Ltd.* (*r*) in which the plaintiff received injuries by being thrown to the ground by a runaway horse. The accident occurred in the country, where no one was in danger, and the plaintiff was seeking to assist the driver of the van to which the horse was harnessed. The jury found that the horse was not fit for the work—and therefore the driver's employers were negligent in allowing it on the road. In an action against the employers it was held that the claim failed. The Court of Appeal rested their decision on "*Volenti*"; but it is notable that SCRUTTON, L.J., a member of the court, remarked (*s*) that it could equally have rested upon the element of causation since the plaintiff could be regarded as having brought the injury upon himself. And it may be stretching the notion of consent dangerously into the realm of fiction to hold that people who do this kind of thing impliedly consent to the receipt of injuries. This consideration is reinforced by the "rescue" cases. These are typified by *Haynes* v. *Harwood* (*t*): this was similar to *Cutler's Case* but with important variations. The defendants' servant having left a van unattended in a crowded street the horses bolted; the plaintiff, a policeman, realizing that unless the horses were stopped people in the street, including children, would be endangered, managed to stop the animals but was himself injured. It was held that the policeman could recover, and the distinction was drawn that where a man acts under a duty (*u*) to protect another from a danger created by the defendant and receives injuries his claim will not be debarred by an implied element of consent. This "rescue" principle has since been extended to cases in which, for one reason or another—as for instance that the property belongs to his master—a person acts under a duty to protect property endangered by the defendant's negligence, as where the defendant allows it to catch fire (*a*).

[1947] A. C. 341. And "give and take" is by no means confined to highways; as will appear it provides the key to much of the law of private nuisance, which governs the conduct of neighbours.

(*r*) [1933] All E. R. Rep. 594; [1933] 2 K. B. 297. And see *Torrance* v. *Ilford Urban District Council* (1909), 25 T. L. R. 355.

(*s*) [1933] 2 K. B. at p. 303.

(*t*) [1934] All E. R. Rep. 103; [1935] 1 K. B. 146. See also *Morgan* v. *Aylen*, [1942] 1 All E. R. 489 (plaintiff injured while attempting to save child) and *Ward* v. *T. E. Hopkins & Son, Ltd.*, [1959] 3 All E. R. 225 (Illustration 11).

(*u*) As the plaintiff in *Cutler's Case* did not.

(*a*) *D'Urso* v. *Sanson*, [1939] 4 All E. R. 26; *Hyett* v. *Great Western Railway*, [1947] 2 All E. R. 264; [1948] 1 K. B. 345.

In the *Cutler* kind of situation there is therefore no recovery; in the "rescue" situations there is. But if implied consent is to be given as the reason for the bar in the one kind of situation why should it not also form a bar in the other? The hero could be taken to consent as much as the wanton interferer—perhaps more so. The explanation in terms of implied consent is therefore suspect; and similar reasoning would apply if causation were taken as the criterion of distinction. These and other considerations have recently given rise to a strong current of judicial opinion (*b*) which seeks to find an answer to the quandary in terms of "foresight" rather than of implied consent or causation. As will be seen below it is a prerequisite for recovery in a claim for negligence that the defendant ought reasonably to have foreseen the likelihood of the injury he caused. And it is by reference to this element of foresight that the courts now seem to be seeking to distinguish the two kinds of situation. They appear to maintian that the defendant ought to foresee the advent of a hero (rescuer) but not that of a busybody; hence there will be liability in the one case but not in the other (*c*). This in fact seems to represent the present law. But as a rationalization surely it is as open to objection as the others? For in fact busybodies are commoner than heroes (*d*). The truth probably is that the distinction can only be properly explained in terms of policy (*e*) rather than by reference to any rule of law that can be precisely formulated. The fact is that the rescuer *should* be allowed a claim, the intermeddler *should* not (*f*). And apart from morality, the gravest inexpedience would arise if all such claims were allowed; for a single act of negligence might sanc-

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(*b*) See *Ward* v. *T. E. Hopkins & Son, Ltd.* (above n. (*t*)) adopting a *dictum* of GREER, L.J., in *Haynes* v. *Harwood*, [1934] All E. R. Rep. at p. 106; [1935] 1 K. B. at p. 153: *Wooldridge* v. *Sumner*, [1962] 2 All E. R. 978, 990; [1963] 2 Q. B. 43, 69: *Videan* v. *British Transport Commission*, [1963] 2 All E. R. 860, 872; [1963] 2 Q. B. 650, 675.

(*c*) See *Ward's Case* (Illustration 11) and *Chadwick* v. *British Transport Commission*, [1967] 2 All E. R. 945.

(*d*) If it be true that as Lord SUMNER said "more than half of human kind are tale-bearers by nature" (*Weld-Blundell* v. *Stephens*, [1920] All E. R. Rep. 32, 50; [1920] A. C. 956, 991) it is equally true that more than half of them are busybodies.

(*e*) And this comment applies also to the "foresight" test in relation to the tort of negligence because what a man ought to foresee is a question compounded just as much of policy as of hypothetical speculation upon matters of fact.

(*f*) This explanation in terms of policy is strengthened by the remark of Lord DENNING, M.R. in *Videan's Case* (above, n. (*b*)) at pp. 867 and 669 that in his opinion the "rescuer's" right of action is independent of any right of the person rescued; according to Lord DENNING it does not therefore stand or fall upon proof of foresight of injury.

tion the intervention and injury of all the town or all the world (*g*), and the number of actions might be legion.

If it is difficult to apply "*Volenti non fit injuria*" so as to make an implied consent a bar to a claim where a person knowingly encounters an existing danger created by the defendant's carelessness even more difficulty arises where it is sought to invoke the maxim so as to exclude a claim in respect of prospective or hypothetical acts of negligence on the part of the defendant. Admittedly the common law sees no objection to a contract which exempts the defendant from such prospective negligence, as the ticket cases (*h*) show. But outside pure contract or unequivocal express consent it must necessarily be rare that the law will imply consent to a prospective act of negligence from the circumstances; for it has been truly said that if "*volenti*" is to apply it must be proved that "the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it" (*i*). And this burden of proof is by no means light because "if the consent precedes the act of negligence, the plaintiff cannot at that time have full knowledge of the extent as well as the nature of the risk he will run" (*k*).

Indeed, Sir Frederick Pollock considered that "the whole law of negligence assumes the principle of '*volenti non fit injuria*' not to be applicable" (*l*). This proposition may be rather too sweeping and an eminent Australian judge (*m*) has explained it away thus,

> . . . "no more is meant (by the statement) than that the duty of care persists beyond or outside the specific conduct or state of things which is not (*sic*) (*n*) the subject of consent" (*o*).

And he continued, "A party may be disabled from complaining that a state of things or specific conduct implies actionable negligence

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(*g*) Beyond the authorities cited just what constitutes a "duty" situation so as to make a man a "rescuer" rather than an intermeddler lies tantalizingly in the womb of future cases. Will a student of mine, for instance, be entitled from that very fact to be treated as a "rescuer" if, unasked, he seeks to save my property from fire? It has been held that a man may be a "rescuer" of his own property: *Hutterley* v. *Imperial Oil and Calder* (1956), 3 D. L. R. (2d) 719. And a New Zealand case has gone as far as holding that a man has a duty to act where a fire is endangering not an individual but a section of the countryside: *Russell* v. *McCabe*, [1962] N. Z. L. R. 392.

(*h*) See above, p. 34, n. (*g*).

(*i*) *Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220, 224; *per* WILLS, J.

(*k*) *Wooldridge* v. *Sumner*, [1962] 2 All E. R. 978, 990; [1963] 2 Q. B. 43, 69; *per* DIPLOCK, L.J.

(*l*) *Law of Torts* (15th Ed.), p. 120.

(*m*) DIXON, J.

(*n*) The sense is clear, but perhaps the "not" seems strange?

(*o*) *Insurance Commissioner* v. *Joyce* (1948), 77 C. L. R. 39, 56.

(on account of implied consent), though otherwise he might have done so." In other words if the implied consent *can* be clearly established it will bar the claim in respect of such acts of negligence as it can properly be held to apply to. The difficulty of making this implication is, however, illustrated by the drunken driver cases (*p*). If a person accepts a ride in a car from someone whom he knows to be drunk, does his acceptance debar him from claiming in respect of personal injuries arising from a subsequent accident? The courts have been averse to making such a drastic implication, and indeed in the case before him (*q*) DIXON, J., in fact refused to do so. But in a Canadian case (*r*) where plaintiff and defendant had set out together "to drink a bunch of beers and get feeling good" with the result that there was an accident at a later stage of the evening's festivities in which the plaintiff (passenger) was injured, the implication was made (*s*) upon the ground that the plaintiff, sober at the start, must be taken to have appreciated the full extent of the risk. The truth of the matter may be that *"volenti"*, despite the views that have been expressed to the contrary (*t*), is a possible bar in the case of prospective negligence, but that in practice it can seldom be invoked.

It must also be added that many negligence cases which seem at first sight to turn upon *"volenti"* may be explained in other, and more satisfactory, ways. For example accepting a ride with a drunken driver may be treated as contributory negligence (*u*), and the claim be accordingly reduced or even entirely barred. Further, in some circumstances the true reason for disallowing the claim may be not the plaintiff's acquiescence so much as the fact that in the circumstances the defendant has not in reality failed to take such care for the plaintiff's safety as the law requires—has not, in other words, been negligent at all. Thus though it would clearly be negligent for someone standing in a crowded street to hit a cricket ball into the

(*p*) See *Dann v. Hamilton*, [1939] 1 All E. R. 59; [1939] 1 K. B. 509: *Joyce's Case* (last note): *Car and General Insurance Co., Ltd.* v. *Seymour and Maloney* (1956), 2. D. L. R. (2d.) 369: *Miller* v. *Decker* (1957), 9 D. L. R. (2d) 1: *Stein* v. *Lehnert* (1962), 31 D. L. R. (2d.) 673.

(*q*) *Joyce's Case* (above, n. (*o*)).

(*r*) *Miller* v. *Decker* (above, n. (*p*)).

(*s*) ABBOTT and TASHEREAU, JJ., dissenting; but finding contributory negligence in the plaintiff.

(*t*) In *Wooldridge* v. *Sumner*, [1962] 2 All E. R. 978, 990, [1963] 2 Q. B. 43, 69, DIPLOCK L.J., said that "the maxim, in the absence of express contract, has no application to negligence simpliciter". This agrees with Sir Frederick Pollock; but as suggested in the text, probably goes too far.

(*u*) See n. (*s*) above and STABLE, J.'s, reference to *Dann* v. *Hamilton*, [1939] 1 All E. R. 59; [1939] 1 K. B. 509, in *Dawrant* v. *Nutt*, [1960] 3 All E. R. 681.

crowd, a player (*a*) at Lords or the Oval will not be held responsible (at any rate except in a most flagrant case) for hitting a ball among the spectators; in the circumstances his act cannot be treated as negligent (*b*). The exigencies of the game require give and take between spectator and player as well as between player and player (*c*). So in *Wooldridge* v. *Sumner* (*d*) a rider at a show jumping contest misjudged the speed of his horse while rounding a corner. This resulted in the horse colliding with and injuring a film cameraman who was standing inside the arena. It was held that the cameraman could not recover from the rider because on such an occasion a mere error of judgment, as opposed to reckless disregard for the plaintiff's safety was not enough to constitute negligence; the defendant had every right to "ride to win": "*Volenti non fit injuria*" had no application.

It must finally be noticed that "*Volenti non fit injuria*" is not the same thing as "*Scienti non fit injuria*": mere knowledge of the existence of a danger, as opposed to consent to run the risk of it, cannot of itself defeat a claim.

> "It has often been pointed out that the maxim says *volenti*, not *scienti*. A complete knowledge of the danger is in any event necessary, but such knowledge does not necessarily import consent. It is evidence of consent, weak or strong according to the circumstances" (*e*).

Knowledge may be evidence of consent; but it is nothing more. Full knowledge there must be (*f*), but in many kinds of circumstances mere knowledge will not import consent (*g*). And this is particularly true where special economic or moral considerations come into play. Thus, as will appear below (*h*), since the circum-

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(*a*) As has been seen, the position between spectator and owner or occupier of the ground may be subtly different in that there is a contract between them.

(*b*) Nor will it be regarded as negligence to injure someone outside the ground by hitting a prodigious "six" where the performance of such a feat is made rare due to the distance involved: *Bolton* v. *Stone*, [1951] 1 All E. R. 1078; [1951] A. C. 850.

(*c*) As between players of course "*volenti*" may apply.

(*d*) [1962] 2 All E. R. 978.

(*e*) *Dann* v. *Hamilton*, [1939] 1 All E. R. 59, 62; [1939] 1 K. B. 509, 515; *per* ASQUITH J.

(*f*) For acquiescence to form a bar to a claim in respect of the infringement of a proprietary right knowledge of the existence of the right is essential: *Armstrong* v. *Sheppard and Short, Ltd.*, [1959] 2 All E. R. 651; [1959] 2 Q. B. 384.

(*g*) And this is also true where the danger, though known, is one which is not very likely to arise: see *Reardon Smith Line, Ltd.* v. *Australian Wheat Board*, [1956] 1 All E. R. 456: [1956] A. C. 266, 281–282: *Behrens* v. *Bertram Mills Circus, Ltd.*, [1957] 1 All E. R. 583, 591–592; [1957] 2 Q. B. 1, 20–21.

(*h*) See p. 245.

stances of his occupation often force an employee to run a known risk or lose his job knowledge of the risk alone will seldom be treated as conclusive evidence of consent so as to prevent him claiming against his employer where the employer is responsible for the existence of the risk.

It must, however, be added that knowledge, if never in itself a bar to recovery, as well as providing possible evidence of consent may be a most important factor in deciding whether there has been contributory negligence (*i*) on the part of the plaintiff so as to reduce the damages which he is entitled to claim (*k*).

ILLUSTRATION 10

The defence of volenti non fit injuria *is available where consent can be implied from the conduct of the parties.*

Imperial Chemical Industries, Ltd. *v.* Shatwell, [1964] 2 All E. R. 999; [1965] A. C. 656.

Respondent, George S. and his brother, James S., were employed by appellants. Both were experienced shotfirers. In a breach of a Regulation which imposed on them personally a duty to take shelter while testing an electric circuit for shotfiring they deliberately conducted such a test in the open, James handing George the wires and George connecting them with a galvanometer. In the ensuing explosion both were injured. George claimed against the respondents as being vicariously responsible for James' negligence. *Held:* George's behaviour amounted in the circumstances to implied consent to run a known risk: *volenti non fit injuria* applied and respondents were not liable. [The facts were similar to those in *Stapley's Case* (Illustration 5) but in that case "*volenti*" was not relied upon. In any event the danger in that case was less apparent than in this.] Compare *Buckpitt* v. *Oates*, [1968] 1 All E. R. 1145 where the plaintiff, a youth of eighteen, took a ride in the defendant's car knowing that he was accepted only at his own risk: an accident occurring, *volenti* applied.

ILLUSTRATION 11

Where a man seeks to rescue another who has been put in peril by a state of affairs created by the carelessness of the defendant his claim in respect of injury will not be disallowed upon the ground that he has consented to run the risk of it.

Ward *v.* T. E. Hopkins & Son, Ltd., [1959] 3 All E. R. 225.

The defendant company, who were engaged upon clearing a well permitted their workmen to lower a petrol driven pump into it. This pump set up a concentration of carbon monoxide in the well. One of the company's workmen entered the well in this condition and was overcome by fumes. The plaintiff claimed in respect of the death of her

(*i*) See below, Chapter 8, Section 2.
(*k*) *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E. R. 625; [1956] 2 Q. B. 264.

husband, a doctor, who had been called to the assistance of the workman and had himself succumbed to the gas. *Held*: "*Volenti non fit injuria*" did not apply because it could not be invoked by a person who had negligently placed another in a situation of such peril that it was foreseeable (*l*) that the plaintiff would attempt to rescue him (*m*).

NOTE

"*Ex turpi causa non oritur actio*" is a well-known maxim of the law of contract, and it means that where the contract upon which the plaintiff seeks to rely is unlawful he will not, in general, be allowed to succeed in his action—for the courts will not enforce an illegality.

How far this principle applies in tort, or whether it should even be applied at all (*n*) is doubtful; though a few instances of its application are to be found (*o*). The reason for this would seem to be that whereas a contract is by definition a joint venture (*p*), as between plaintiff and defendant a tort is not, and any element of illegality that there may be in the plaintiff's conduct will usually, in tort, have no direct connexion with the injury the defendant inflicts upon him.

(*l*) It will have been noted that the validity of this particular way of explaining the inapplicability of the maxim to this kind of case has been questioned in the text.

(*m*) See also *Chadwick* v. *British Transport Commission*, [1967] 2 All E. R. 945.

(*n*) See *National Coal Board* v. *England*, [1954] 1 All E. R. 546, 552–3; [1954] A. C. 403, 418–19; *per* Lord PORTER.

(*o*) *E.g. Fivaz* v. *Nicholls* (1846), 2 C. B. 501: *Askey* v. *Golden Wine Co., Ltd.*, [1948] 2 All E. R. 35. For such authorities as there are, see Street, *Torts* (4th Edn.) 96–98. Its existence at least receives recognition (*obiter*) by BLACKBURN, J. and Lord DENNING, M.R., in *Cattle* v. *Stockton Waterworks Co.* (1875), L. R. Q. B. 453 and *Lane* v. *Holloway*, [1967] 3 All E. R. 129; [1968] 1 Q. B. 379 respectively.

(*p*) Indeed in the case of *joint* torts the old rule "no contribution between joint tortfeasors"—abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 Halsbury's Statutes (2nd Edn.) 359)—may well have been an application of the maxim.

CHAPTER 3

TORTS COMMITTED ABROAD

This is not the place for extended discussion of private international law which this topic raises. These principles which are complex, and very far from settled, must be studied in specialized works (*a*). As the law now stands it may not be incorrect (*b*) to state that

> "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, *two conditions* must be fulfilled. *First*, the wrong must be of such a character that *it would have been actionable if committed in England . . . . Secondly, the act must not have been justifiable by the law of the place where it was done*" (*c*).

The general rule therefore is that in an action brought in our courts upon a foreign wrong it must be established that the wrong would have been a *tort* in England had it been committed here (*d*), *and also* that it was *unjustifiable* by the law of the place of commission.

The word "unjustifiable" causes difficulty; it means that the wrong must not be something for which the defendant would not *in any way* be held legally responsible in the country of commission (*e*); if it is of this nature the plaintiff's claim will fail even though it would be actionable had it been committed here. But on the other hand, if the first requirement is satisfied (*i.e.* the wrong is a *tort* by our law), there is no need to establish that the country of commission regards it as a *tort*, as long as it is not "justifiable": hence, for example, an action will lie here in respect of something that would be actionable had it been done in England though it is not actionable, but *criminally* punishable, by the law of the place in which it has occurred (*f*).

(*a*) *E.g.* Cheshire, *Private International Law.*
(*b*) But see the references to *Boys* v. *Chaplin* below.
(*c*) *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, 28; *per* WILLES, J. (italics ours).
(*d*) *The Halley* (1868), L. R. 2 P. C. 193 (Illustration 12).
(*e*) *The Mary Moxham* (1876), 1 P. D. 107; *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1 (Illustration 13); *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.
(*f*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 (Illustration 14).

Such is the general rule in respect of foreign torts. But there is one major exception. This is the case of actions concerning the right to *land* situated abroad and actions of trespass in relation to such land (*g*). These are not actionable here (*h*) and the plaintiff must seek his remedy in the country where the wrong arises.

Having stated these principles we must, however, draw the attention of the reader to the recent case of *Boys* v. *Chaplin* (*i*) where, although Lord UPJOHN accepted the rule in *Phillips* v. *Eyre* as correct, doubts were cast upon it both by Lord DENNING, M.R., and by DIPLOCK, L.J. The former (following modern American practice) would make the test of actionability whether English law is the "proper" law of the tort, *i.e.* the system of law with which it has the most real connexion—and this entails an examination of such matters as the nationality and domicile of the parties. The latter, following BRETT, L.J., in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co., Ltd.* (*k*), would only permit an action in this country where "the cause of action would be a cause of action in (the foreign) country, and would also be a cause of action in this country" (*l*): the difference being that the rule as stated in *Phillips* v. *Eyre* and repeated in *Machado* v. *Fontes* would permit an action in England where the act complained of was only a *crime*, instead of being an *actionable* wrong, in the country of commission; whereas the rule as stated by BRETT, L.J., would not. The resolution of these doubts must await decision of the House of Lords.

ILLUSTRATION 12

A foreign tort cannot be sued upon in England if it is founded on facts which are not actionable by English law.

The Halley (1868), L. R. 2 P. C. 193.

As the result of a collision in Belgian waters between a Norwegian and a British ship the owners of the former claimed in negligence against the owners of the latter in England. The English defendants pleaded that they were not liable because their ship was at the time in charge of a pilot whom they were compelled by Belgian law to employ. By *that law* they *would* have been liable for the pilot's negligence, but in those days (*m*) shipowners were not liable for the negligence of compulsory pilots by *English* law. *Held:* The plea was

(*g*) See Cheshire, *Private International Law*.
(*h*) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602.
(*i*) [1968] 1 All E. R. 283 (C. A.).
(*k*) (1883), 10 Q. B. D. 521.
(*l*) *Ibid.* at pp. 536–537.
(*m*) This immunity no longer exists: see Pilotage Act, 1913, s. 15 (23 Halsbury's Statutes (2nd Edn.) 844).

good: no action lay, since though the defendants might have been liable by Belgian law *English* law would give no cause of action.

ILLUSTRATION 13

Nothing done abroad will be actionable here if it gives rise to no legal liability in the country of commission.

Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1.

A colonial governor was sued in England for assault and false imprisonment committed in his colony. The colonial legislature had passed an Act of Indemnity which excused the defendant from legal liability in respect of his acts. *Held:* No action lay.

ILLUSTRATION 14

But a foreign tort will be actionable in England if the facts which give rise to it are a tort according to English law and are also unjustifiable by the law of the country of commission.

Machado *v.* Fontes, [1897] 2 Q. B. 231.

The plaintiff alleged that the defendant had published a libellous pamphlet about him in Brazil. The defendant pleaded that libel, though *criminally* punishable, was not *actionable* by Portuguese law (which prevailed in Brazil). *Held:* This was no defence; for it is not necessary that the wrongful act should be a *tort* in the country of commission. A crime is not a legally innocent, but an "unjustifiable" act.

CHAPTER 4

PARTIES TO AN ACTION IN TORT

1. WHO MAY SUE

The general rule is that anyone may sue in tort including infants (*a*), alien friends (*b*) and now (*c*) even convicted criminals undergoing punishment.

Before the passing of the Law Reform (Husband and Wife) Act, 1962 (*d*), subject to certain statutory (*e*) exceptions in favour of the wife, the policy (*f*) of the common law forbade tort actions between husband and wife. This Act (*g*) has now abolished the common law

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(*a*) Though, as a matter of procedure, an adult must represent them as "next friend". The rights of *unborn* children *en ventre sa mère* are uncertain: there is no English authority in point—*The George and Richard* (1871), L. R. 3 A. & E. 466, in favour of the child, is a decision on the interpretation of Lord Campbell's Act. In *Walker* v. *Great Northern Rail. Co. of Ireland* (1891), 28 L. R. Ir. 69, the Queen's Bench Division of Ireland decided against such a right of action; and in *Montreal Tramways* v. *Leveille*, [1933] 4 D. L. R. 337, the Supreme Court of Canada (under the civil law) decided in favour of it.

(*b*) Whatever their political antecedents: see *Kuchenmeister* v. *Home Office*, [1958] 1 All E. R. 485; [1958] 1 Q. B. 496. But alien enemies are precluded from suing in our courts save by royal licence. For the meaning of "alien enemy" and authorities on the subject, see Halsbury's Laws of England (3rd Edn.), Vol. 39, 30–32; *V/O Sovfracht* v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E. R. 76; [1943] A. C. 203; *Kuenigl* v. *Donnersmarck*, [1955] 1 All E. R. 46; [1955] 1 Q. B. 515; *Boston Deep Sea Fishing and Ice Co., Ltd.* v. *Farnham*, [1957] 3 All E. R. 204.

(*c*) Since the Criminal Justice Act, 1948, ss. 70 (1), 83 (3) and Sched. X, Part I (28 Halsbury's Statutes (2nd Edn.) 388, 393, 407).

(*d*) 10 & 11 Eliz. 2 c. 48 (42 Halsbury's Statutes (2nd Edn.) 333). With some modifications the Act gives effect to the recommendations of the 9th Report of the Law Reform Committee, (1961) Cmnd. 1268.

(*e*) In favour of the wife by the Married Women's Property Act, 1882, s. 12 (11 Halsbury's Statutes (2nd Edn.) 802) as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935 (11 Halsbury's Statutes (2nd Edn.) 811). The former is now repealed by s. 3 (Schedule) of the 1962 Act entirely and the latter insofar as s. 1 of it refers to husband and wife.

(*f*) The common law rule was probably based upon the unseemliness of permitting public disputes between husband and wife (see *Gotliffe* v. *Edelston*, [1930] 2 K. B. 378, 392) and the importance of preserving an appearance of domestic solidarity, rather than the theoretical notion of conjugal unity.

(*g*) S. 1.

rule, so that husband and wife are free to sue each other. But by s. 1 (2) of the Act it is provided that

> "Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may *stay the action* if it appears—
>
> (*a*) that no *substantial benefit* would accrue to either party from the continuation of the proceedings;—*or*
>
> (*b*) that the question in issue could more conveniently be disposed of *on an application* made under s. 17 of the Married Women's Property Act, 1882 . . ." (*h*).

The effect of s. 17 of the Married Women's Property Act, 1882 (*i*), is that both husband and wife are at liberty to apply by summons to a judge to have any question as to the title to or possession of property arising between them determined in a summary way: this kind of action is, of course, not founded on tort, but is a special statutory remedy.

2. WHO MAY BE SUED

Apart from the special rules as to immunity from tortious liability discussed in Chapter 2 the general rule is that anyone may be sued in tort, but there are some special cases that require notice.

(a) The Crown

At common law the Crown could not be sued in tort (*k*). This wrought considerable injustice because although no individual member of the government could, as against a British subject, plead Act of State as a defence to any tort that he personally committed, any more than he can to-day, yet neither the Crown as such, nor Departments as representing it (*l*), nor Heads of Departments (*m*) could be made liable for the wrongs of junior—and as often as not impecunious—officials in the way that an ordinary employer may be held liable for the acts of his servants.

This unfortunate immunity has now been removed by the Crown

(*h*) Italics ours. The subsection further provides that, without resort to *an application* the court may in the action exercise any power which could be exercised under s. 17 of the Married Women's Property Act, 1882 or give directions for the disposal under that section of any question arising in the proceedings.

(*i*) 11 Halsbury's Statutes, 2nd Edn., 799.

(*k*) *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310.

(*l*) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

(*m*) On account of the peculiar doctrine that they were "fellow servants" of the Crown, and not the principals of their subordinates: *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178.

Proceedings Act, 1947, Part I, and, save that the Queen herself may not be sued (*n*), the Crown (*o*) (*i.e.* the State) may now be held responsible in tort like any other employer.

It is not within the scope of this work to deal exhaustively with Crown proceedings, but reference will be made to the Act in appropriate places.

(b) Infants

In tort there is no rule that an infant as such is immune from liability, and infants may be sued just as much as adults—though in practice of course claims are seldom brought against them (*p*).

On the other hand, though there is no direct authority on this point (*q*), where negligence or intention are relevant to tortious liability it is reasonably clear that a child will be judged according to the standards of a child, and one of tender years may therefore sometimes escape liability in circumstances in which an adult would not. By parity of reasoning, also, where the infant is plaintiff he will be judged according to the standards of an infant and may not be guilty of contributory negligence in circumstances in which an adult would (*r*).

And further the fact that in general an infant cannot be made liable upon his *contracts* also affects his liability in tort; for the law will not permit the rule of contractual immunity to be circumvented by allowing an action in tort for what is in essence a breach of contract. Thus it was early held that

> "If one delivers goods to an infant on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that means all infants in England would be ruined" (*s*).

And in *Jennings* v. *Rundall* (*t*) an infant who hired a mare was held not liable in tort for overstraining her during the ride; for "if

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(*n*) Crown Proceedings Act, 1947, s. 40 (1) (6 Halsbury's Statutes (2nd Edn.) 73).

(*o*) In practice the defendant will usually be the Department concerned.

(*p*) Sometimes, however, a parent may be sued for failure to exercise such control over the child as to prevent him from causing injury: *Newton* v. *Edgerley*, [1959] 3 All E. R. 337. Contrast *Donaldson* v. *McNiven*, [1952] 2 All E. R. 691; *Gorley* v. *Codd*, [1966] 3 All E. R. 891.

(*q*) But analogies are not wanting: see, *e.g. Yachuk* v. *Oliver Blais Co., Ltd.* [1949] 2 All E. R. 150; [1949] A. C. 386; *Carmarthenshire County Council* v. *Lewis*, [1955] 1 All E. R. 565; [1955] A. C. 549.

(*r*) *Gough* v. *Thorne*, [1966] 3 All E. R. 398.

(*s*) *Manby* v. *Scott* (1663), 1 Sid. 109.

(*t*) (1799), 8 Term Rep. 335. See also *Fawcett* v. *Smethurst* (1914), 84 L. J. K. B. 473 (Illustration 15).

it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants" (*u*). So too, if an infant obtains a benefit under a contract by making a fraudulent representation he cannot be sued in deceit, even if the representation is one as to his age (*a*).

But the protection which the law casts around infants' contracts ceases to be effective where on the facts of the case a tort has been committed which is substantially unconnected with the contract. An excellent contrast with *Jennings* v. *Rundall* is afforded by *Burnard* v. *Haggis* (*b*) where the fact that the infant defendant (a Cambridge undergraduate) had hired a mare from the plaintiff for *riding* (and was thus in contractual relationship with him) was held not to bar the plaintiff's claim in tort when the infant, having lent the mare to a friend for the purpose of *jumping*, a purpose for which she was quite unfit, she was impaled upon a stake. It was just as if without any hiring at all the defendant had taken the mare out and hunted her.

ILLUSTRATION 15

An infant may not be sued in tort where the claim against him is primarily grounded upon a breach of contractual duty.

Fawcett *v.* Smethurst (1914), 84 L. J. K. B. 473.

The defendant, a young man of twenty, hired the plaintiff's car for a short journey. Having reached the destination envisaged in the contract he then drove the car on to another place, and during this extended journey the car caught fire and was damaged beyond repair. The plaintiff sued both for breach of contract and in tort. In respect of the latter claim. *Held:* The defendant could not be liable since the use of the car for an extension of the original journey was merely an abuse of the contract, and there was no ground for holding that such liability as there might be was in substance anything but contractual.

(c) Persons of Unsound Mind

There is very little authority (*c*) on the liability of persons of unsound mind for their torts. On the whole it seems that they *will*

(*u*) (1799) 8 Term Rep. at p. 336; *per* Lord Kenyon, C.J.

(*a*) *Johnson* v. *Pye* (1665), 1 Keb. 905, 913; *R. Leslie, Ltd.* v. *Sheill*, [1914] 3 K. B. 607. For the plaintiff's right to restitution in Equity see *Stocks* v. *Wilson*, [1913] 2 K. B. 235, and Lord Sumner's explanation of it in *Leslie's Case* at pp. 618–19.

(*b*) (1863), 14 C. B. (N. S.) 45. See also *Walley* v. *Holt* (1876), 35 L. T. 631; *Ballett* v. *Mingay*, [1943] 1 All E. R. 143; [1943] K. B. 281.

(*c*) See *Haycraft* v. *Creasy* (1801), 2 East 92, 104; Sergeant Manning's note to *Borradaile* v. *Hunter* (1843), 5 M. & G. 639, 669; *Mordaunt* v. *Mordaunt* (1870), L. R. 2 P. D. 103, 142; *Hanbury* v. *Hanbury* (1892), 8 T. L. R. 559, 560.

be liable; and it was held in a modern case (*d*) that, unlike the rule (*e*) in the criminal law, a man may be held civilly liable for assault where he knows the nature and quality of his act, even though he has no power to appreciate that it is wrong.

In the case of torts which require some element of intent or negligence there may, however, be some force in Lord ESHER's suggestion that liability should depend upon whether the defendant "is sane enough to know what he is doing" (*f*).

(d) CORPORATIONS

A corporation is a legal entity separate from its directors and other agents who act on its behalf; and since the corporation is itself an abstraction and not a human entity, its undoubted liability in tort must depend upon whether acts or omissions of its agents which are called in question are within the scope of their authority as such—in other words, the liability of a corporation depends upon the principles which govern vicarious liability (*g*) in general.

The difficulties that arise in determining when a corporation will be liable are therefore two. First, it has to be determined whether or not the act or omission complained of was within the scope of the general authority or duty of the agent. Secondly, it has to be determined whether the tortious act is a mere excess in the exercise of the corporate powers or is something altogether outside the scope of those powers (*h*). These are essentially questions of fact and degree.

There is now no doubt that a corporation can be made liable for torts of all kinds, even where malice (as in malicious prosecution or publication of a libel on a privileged occasion) in the sense of spite or ill-will on the part of the agent is involved (*i*).

(*d*) *Morriss* v. *Marsden*, [1952] 1 All E. R. 925.

(*e*) *I.e.* the Rule in *M'Naghten's Case* (1843), 10 Cl. & Fin. 200.

(*f*) *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354, 356.

(*g*) See Part III, Chapter 1.

(*h*) According to the better view there is little doubt that a corporation may be made liable for what are sometimes called "*ultra vires*" torts, *i.e.* torts committed by its agents outside the sphere of its corporate powers, at any rate where the agents concerned are its superior representatives, such as its managing director. This raises theoretical difficulties (see Goodhart, *Essays in Jurisprudence and the Common Law*, Chapter 5), but in practice it is essential; for those who manage and control a corporation are really the driving force of the corporation itself, and it would be inequitable if it could escape liability for their misdeeds by hiding behind the shield of the limited powers which "it" is legally accorded as an abstract entity. See *e.g. Campbell* v. *Paddington Corporation*, [1911] 1 K. B. 869.

(*i*) *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392; *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423.

(e) Unincorporated Bodies

The law governing the legal liability of unincorporated bodies is not in a very satisfactory state. As a general rule it would seem that it ought not to be possible to make them liable since they are not recognized legal entities. On the other hand where an unincorporated association such as a trade union has large powers and considerable funds it seems only just that, for this purpose, it should be *treated as* a legal entity; and in the case of trade unions this is what, apart from the important provisions of the Trade Disputes Act, 1906, the courts in fact did (*k*). But it is clear that other unincorporated bodies, such as clubs, cannot be sued as such (*l*).

There are, nevertheless, ways of reaching the funds of unincorporated bodies in general. For, on the principle that a body which can own property must be capable of being sued (*m*), where a tort is directly concerned with the use of the property of an unincorporated association liability can be enforced, where there is no other form of redress (*n*), against the association in a representative action (*o*) and, if the property is held by trustees, the funds can be reached by making the trustees parties.

In many instances, however, the question of liability is specially provided for in particular statutes under which such associations often act; as in the case of port and harbour authorities (*p*).

(f) Trade Unions

The Trade Disputes Act, 1906 (*q*), placed trade unions in a highly privileged position for it was enacted by s. 4 that

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(*k*) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426. As regards tortious liability the effect of this decision is, however, nullified by the Trade Disputes Act, 1906, s. 4 (25 Halsbury's Statutes (2nd Edn.) 1269) (see below). Though it has recently been decided that trade unions may be made liable in contract: *Bonsor* v. *Musicians' Union*, [1955] 3 All E. R. 518; [1956] A. C. 104.

(*l*) A friendly society is, however, a proper defendant: *Longdon-Griffiths* v. *Smith*, [1950] 2 All E. R. 662; [1951] 1 K. B. 295.

(*m*) *Marshal Shipping Co.* v. *Board of Trade*, [1923] 2 K. B. 343, 355; *per* Scrutton, L.J.

(*n*) See *Mercantile Marine Service Association* v. *Toms*, [1916] 2 K. B. 243; *Hardie and Lane, Ltd.* v. *Chiltern*, [1928] 1 K. B. 663.

(*o*) R. S. C. Ord. 15, r. 12. And see *Campbell* v. *Thompson*, [1953] 1 All E. R. 831; [1953] 1 Q. B. 445 (Club).

(*p*) *The Bearn*, [1906] P. 48.

(*q*) The immunity of unions was partially removed by the Trade Disputes and Trade Unions Act, 1927, but that Act was repealed by the Trade Disputes and Trade Unions Act, 1946 (25 Halsbury's Statutes (2nd Edn.) 1280), thus leaving s. 4 of the 1906 Act in full operation.

"an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court" (*r*).

Thus, although a trade union may *sue* in its registered name (*s*) it (as distinct from its individual members) may not *be sued* in tort. Whether the wording of the section is such as to prevent the court from issuing an injunction to restrain a trade union from committing an apprehended tort is open to doubt (*t*).

3. JOINT TORTFEASORS

It will be convenient to discuss this topic under three heads (*u*).

(a) JOINT AND SEPARATE TORTS

A plaintiff may have cause to complain of torts committed against him by more people than one. In this case there are three possibilities. First, the torts may be entirely separate; as where B slanders A, and then later and independently, C similarly slanders A. Secondly, the torts may be such that B and C acting independently each contribute to cause the same damage; as where two motorists by their negligence between them injure the same pedestrian. Thirdly, the torts may be truly "joint" in the sense that the tortfeasors act together in furtherance of a common design and thereby injure the plaintiff.

The first possibility requires no further mention; in such a case A will have entirely separate rights against B and C; two torts have been committed and two actions may therefore be brought or not as A pleases.

The second and third possibilities require consideration. Let us

(*r*) See *Vacher & Sons* v. *London Society of Compositors*, [1913] A. C. 107.

(*s*) *National Union of General and Municipal Workers* v. *Gillian*, [1945] 2 All E. R. 593; [1946] K. B. 81; *Willis* v. *Brooks*, [1947] 1 All E. R. 191; *British Motor Trade Association* v. *Salvadori*, [1949] 1 All E. R. 208; [1949] Ch. 556.

(*t*) In *Ware and De Freville, Ltd.* v. *Motor Trade Association*, [1920] All E. R. Rep. 387; [1921] 3 K. B. 40 SCRUTTON and ATKIN. L.JJ., expressed the opinion that no injunction would lie and this view is supported in *Boulting* v. *Association of Cinematograph, Television and Allied Technicians*, [1963] 1 All E. R. 716; [1963] 2 Q. B. 606 and in *Camden Exhibition and Display, Ltd.* v. *Lynott*, [1965] 3 All E. R. 28; [1966] 1 Q. B. 555 by Lord DENNING, M.R. But UPJOHN and DIPLOCK, L.JJ., expressed the contrary view in *Boulting's Case*, as did FENTON ATKINSON, J., in *F. Bowles & Sons, Ltd.* v. *Lindley*, [1965] 1 Lloyd's Rep. 207. And see *Torquay Hotel Co., Ltd.* v. *Consins*, [1968] 3. See E. R. 43, 63 [STAMP, J.]. Whether an injunction will lie against individuals where s. 3 of the 1906 Act is invoked is a separate question: see *Camden Case* at p. 32; *per* Lord DENNING, M.R.

(*u*) On the whole subject Glanville Williams, *Joint Tortfeasors and Contributory Negligence*, should be consulted.

first examine the third. B and C acting in concert (*v*) injure A, or, for here the law also treats the liability as joint, a servant or agent acting on behalf (*w*) of a master or principal injures some third person. In this case a *single cause of action* arises against the two or more people responsible for the tort and the injured party has, and always has had, his election to sue all, each or any number of the joint tortfeasors. If he sues all and recovers judgment, judgment for the full amount of the damages awarded must be entered against each, and each is liable to have execution levied against him for the whole or any part of that amount, though the total amount recovered cannot exceed the amount awarded (*x*). If he sues one or some only, the plaintiff cannot be compelled to join the others as he can be if he sues one or some only of those who are jointly liable to him on a contract (*y*).

But since there is only *one cause of action* connecting the plaintiff, as it were, with the defendants a theoretical difficulty arises: if the plaintiff proceeds to judgment against one or some only of the joint tortfeasors and this judgment is not satisfied, his cause of action should in theory be merged in the judgment and disappear—hence in theory he should not afterwards be able to recover against those who were omitted from the action. And indeed, the common law did act upon this theory; it held that judgment against one was judgment against all, it destroyed the right of action, and the remaining tortfeasors could not therefore subsequently be sued (*a*). This rule obviously worked injustice, so it has now been abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (a), which provides that

> "where damage is suffered by any person as a result of a tort . . . judgment recovered against any tortfeasor *liable in respect of that damage* shall not be a bar to an action against any other person who *would, if sued,* have been liable as a joint tortfeasor in respect of the same damage" (*b*).

Judgment against one is therefore no longer a bar to an action against the rest; but of course the total amount recovered from any actions that the plaintiff may bring in respect of the joint tort must not exceed the total amount awarded in the first action (*c*);

(*v*) See, *e.g. Brooke* v. *Bool*, [1928] 2 K. B. 578.
(*w*) For the law governing vicarious responsibility, see Part III, Chapter 1.
(*x*) *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A. C. 15, 31–2.
(*y*) This is now done under R. S. C. Ord. 15, rr. 6, 8.
(*a*) *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547. (*b*) Italics ours.
(*c*) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (b) (25 Halsbury's Statutes (2nd Edn.) 359), as amended by the Fatal Accidents Act, 1959, s. 1 (4) (39 Halsbury's Statutes (2nd Edn.) 942).

and multiplicity of claims is discouraged by a provision that the plaintiff will not be entitled to costs in any but the first action unless the court is of opinion that there were reasonable grounds for bringing the subsequent claim or claims (*d*).

It must also be added that the Act left untouched another rule of the common law in respect of joint tortfeasors; namely, that *release or satisfaction* of one operates as a release of all so as to bar any claims against the rest (*e*). On the other hand a *covenant not to sue* one joint tortfeasor does *not* operate to preclude the plaintiff from suing the rest (*f*).

The second possible situation—where two persons contribute independently to cause the same damage (as where by separate and independent negligence two ships collide with another and damage it (*g*))—like the first, requires little notice. In such a case there are two causes of action, and the liability is not joint, but purely "several". Hence even at common law judgment against one was no bar to a later action against the other or others, though of course the aggregate amount recovered could not exceed the amount awarded in the first judgment.

(b) Contribution between Tortfeasors

The rule at common law was "no contribution between tortfeasors" (*h*); if X who was injured by a joint tort committed by Y and Z chose to sue Y and recovered against him in full, Y had no right to claim against Z for his share of the damages.

> "It was left to the claimant to choose his victim. The person sued, whether he was a joint tortfeasor or a separate tortfeasor, if he was implicated as being partly responsible . . . had to abide by that choice" (*i*).

This injustice has now been removed by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c) which provides that

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(*d*) Law Reform (Married Women and Tortfeasors) Act, 1935, s.6(1)(b).

(*e*) *Cocke* v. *Jennor* (1614), Hob. 66; *Howe* v. *Oliver and Haynes* (1908), 24 T. L. R. 781. *Cutler* v. *McPhail*, [1962] 2 All E. R. 474; [1962] 2 Q. B. 292.

(*f*) *Duck* v. *Mayeu*, [1892] 2 Q. B. 511; *Apley Estates Co., Ltd.* v. *De Bernales*, [1947] 1 All E. R. 213; [1947] Ch. 217; *Gardiner* v. *Moore*, [1960] 1 All E. R. 365. The distinction between a release and a covenant not to sue is, however, somewhat subtle; it might be "reconsidered with advantage"; see *Cutler's Case*, [1962] 2 All E. R. 474; [1962] 2 Q. B. at p. 298, *per* Salmon, J.

(*g*) *The Koursk*, [1924] P. 140.

(*h*) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186. Even before the 1935 Act, however, the rule did not apply to general average contribution: see Maritime Conventions Act, 1911 (23 Halsbury's Statutes (2nd Edn.) 830).

(*i*) *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corporation*, [1954] 3 All E. R. 661, 666; [1955] A. C. 169, 181; *per* Lord Porter.

"Where damage is suffered by any person as a result of a tort (whether a crime or not)—any tortfeasor liable in respect of that damage *may recover contribution* from any other tortfeasor who *is, or would if sued have been*, liable in respect of the same damage, whether as a joint tortfeasor *or otherwise*, so, however, that no person shall be entitled to recover contribution under this section from any person *entitled to be indemnified* by him in respect of the liability in respect of which the contribution is sought" (*k*).

The general intent of this section is simple enough. Now the harsh rule of the common law has gone, and Y in the example given may claim contribution from Z, thus partially (or in some cases, as will be seen, even wholly) recouping himself for his loss.

It should be noticed that, perhaps a little strangely, the section makes it no bar to a claim that the tort was also a crime: one would have thought that public policy would have decreed otherwise. And it is also to be noted that contribution may be had where the defendant is "liable in respect of the same damage, whether as a joint tortfeasor *or otherwise*"; and it is therefore available between separate tortfeasors contributing to cause the same damage (*l*) as well as between joint tortfeasors proper.

Grave difficulty has, however, arisen in cases where one or more of a number of tortfeasors is entitled to the protection of a special period of limitation (*m*) in respect of the time in which the action against him must be brought by the injured plaintiff, which special period is not available to the other tortfeasors. It is clear that in truth the framers of the Act did not envisage this difficulty (*n*) and in fact failed to provide for it. Put simply and purely hypothetically the situation is this. X has a claim, say in negligence, against Y and Z; Z is for some reason entitled to rely upon a shorter period of limitation (*o*) (say one year as opposed to six) than Y. If X sues Y after two years from the time the cause of action accrues, can Y then claim contribution from Z? On the one hand

(*k*) Italics ours. A person who has obtained a previous judgment in his favour against a co-tortfeasor where the facts in issue (though arising out of the same circumstances) are different from the facts in issue at the trial is not a "person entitled to be indemnified": *Randolph* v. *Tuck*, [1961] 1 All E. R. 814; [1962] 1 Q. B. 175. But where the facts are identical he is: *Bell* v. *Holmes*, [1956] 3 All E. R. 449; *Wood* v. *Luscombe*, [1964] 3 All E. R. 972; [1966] 1 Q.B. 169.

(*l*) See *e.g. Croston* v. *Vaughan*, [1937] 4 All E. R. 249; [1938] 1 K. B. 540.

(*m*) On limitation of actions generally and as between joint-tortfeasors see Part III, Chapter 6.

(*n*) See *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corporation*, [1954] 3 All E. R. 661, 672; [1955] A. C. 169, 190–1; *per* Lord REID.

(*o*) It is not overlooked that the repeal of the Limitation Act, 1939, s. 21, by the Law Reform (Limitation of Actions, etc.) Act, 1954 (34 Halsbury's Statutes (2nd Edn.) 463), will make cases of this kind less common than formerly; but they may still arise (*Harvey* v. *R. G. O'Dell, Ltd.*, [1958] 1 All E. R. 657; [1958] 2 Q. B. 78).

it can be argued that since X could not then sue Z, therefore Z should go free; on the other hand it can be said that Y's right to contribution from Z should not be capable of being prejudiced (*p*) by X's failure to sue Z in due time. The point was much debated by the House of Lords in *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corporation* (*q*) but no conclusion can be drawn from the speeches, and it is a decision that must rank among the most unhelpful. However, the view that seems to predominate at the present time is that the words in the section "if sued would have been liable" must be taken to mean "if sued at any time would have been liable" (*r*); hence in such a case, since Z would have been liable to X *if sued in time*, provided that X did sue Y within the time appropriate to *him*, Y may within the time after X has recovered from him appropriate to a claim against Z (*i.e.* in the hypothetical instance one year), sue Z for contribution. The effect of this construction of the section (which is in fact clearly strained) is, of course, that the legislature has been taken to have extended the law as to limitation against Z by a side-wind; but justice has probably been done, at any rate to Y.

The assessment of the *amount* of contribution to be made by each particular tortfeasor is a matter of discretion, for the Act (*s*) provides that

> "In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be *just and equitable* having regard to the extent of that person's responsibility for the damage: and the court shall have power to exempt any person from liability to make contribution . . ." (*t*).

This leaves the court (*u*) a free hand to assess the contribution to be made upon the merits (*a*) of each case.

(*p*) It has been pointed out that there are practical ways in which Y might avoid this result: see *Hordern-Richmond, Ltd.* v. *Duncan*, [1947] 1 All E. R. 427; [1947] K. B. 545. But there is no reason why the onus of taking such steps should lie upon Y.

(*q*) [1954] 3 All E. R. 661; [1955] A. C. 169.

(*r*) *Harvey* v. *R. G. O'Dell, Ltd.*, [1958] 1 All E. R. 657, 670; [1958] 2 Q. B. 78, 109; *per* McNAIR, J. Following *Morgan* v. *Ashmore, Benson, Pease & Co., Ltd.*, [1953] 1 All E. R. 328. See also *Hordern's Case* (last note); *Littlewood* v. *George Wimpey & Co., Ltd.*, [1953] 2 All E. R. 915; [1953] 2 Q. B. 501 (C. A.). Contrast *Merlihan* v. *A. C. Pope, Ltd.*, [1945] 2 All E. R. 449; [1946] K. B. 166.

(*s*) Section 6 (2).

(*t*) Italics ours. The assessment is made only as between persons who are found liable in the action, possible but unproved blameworthiness of others is not taken into account: *Maxfield* v. *Llewellyn*, [1961] 3 All E. R. 95.

(*u*) In cases where there is a jury this appears to mean the judge to the exclusion of the jury: *Ceramic S.S. Owners* v. *Testbank S.S. Owners*, [1942] 1 All E. R. 281, 283; *sub nom. The Testbank*, [1942] P. 75, 80–1; *per* GODDARD, L.J.

(*a*) The barren argument as to whether contribution is to be assessed upon

(c) INDEMNITY

After the passage from s. 6 (2) of the Act last quoted, the subsection continues

> ". . . For the court shall have power to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

And this has sometimes been done where it seemed "just and equitable" to the court (*b*). But it always was and still is also possible to obtain indemnity (as opposed to contribution) from a joint-tortfeasor *at common law* in certain circumstances (*c*).

This common law right may arise by contract (*d*), as where A undertakes to do something for B, and B, expressly or by implication (*e*), *agrees* to indemnify A against any tortious liability he may incur. It may also arise by statute, as for example under the Partnership Act, 1890, s. 24 (2) (*f*), which imposes an obligation upon the firm to indemnify a partner in certain circumstances. But the commonest instance is the case of principal and agent and master and servant; here the law implies an obligation that the agent or servant shall indemnify the principal or master in respect of liability for any tort the agent or servant may commit in the course of his employment and for which the principal or master may be held vicariously responsible (*g*). But on the other hand, an *innocent* agent or servant who is employed to do something which,

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the basis of "fault" or "causation" appears to be unsettled. See *Weaver* v. *Commercial Process Co., Ltd.* (1947), 63 T. L. R. 466, contrast *Collins* v. *Hertfordshire County Council*, [1947] 1 All E. R. 633; [1947] K. B. 598: but moral blame seems to be the criterion chosen in *Maxfield* v. *Llewellyn* (n. (*t*), above).

(*b*) See *Whitby* v. *Burt, Boulton and Hayward, Ltd.*, [1947] 2 All E. R. 324; [1947] K. B. 918. See also *Lister* v. *Romford Ice and Cold Storage Co., Ltd.*, [1957] 1 All E. R. 125; 135, 138; [1957] A. C. 555, 580, 586.

(*c*) The discretion given to the court under s. 6 (2) would seem to empower it to grant indemnity in circumstances in which it would *not* have been available at common law: but see s. 6 (4) (c).

(*d*) The existence or extent of the right to indemnity thus depends upon the terms of the contract. See, for example, *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640; *Sims* v. *Foster Wheeler*, [1966] 2 All E. R. 313; *Arthur White (Contractors), Ltd.* v. *Tarmac Civil Engineering, Ltd.*, [1967] 3 All E. R. 586; *Hadley* v. *Droitwich Construction Co., Ltd.*, [1967] 3 All E. R. 911; *Wright* v. *Tyne Improvement Commissioners*, [1968] 1 All E. R. 807; *A.M.F. International Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789.

(*e*) *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208.

(*f*) 17 Halsbury's Statutes (2nd Edn.) 592; see also Companies Act, 1948, s. 43 (4) (3 Halsbury's Statutes (2nd Edn.) 493).

(*g*) *Green* v. *New River Co.* (1792), 4 Term Rep. 589; *Honeywill and Stein, Ltd.* v. *Larkin Bros., Ltd.*, [1934] 1 K. B. 191; *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*, [1957] 1 All E. R. 125; [1957] A. C. 555.

though apparently lawful, turns out to be a tort, will have a right of indemnity against his principal or master (*h*).

And the right to indemnity is, in general, a right accorded to *innocent* parties, so that it will never be enforceable by one who, as the case may be, *knowingly* does or authorizes the doing of an unlawful act. For example in *W. H. Smith & Son* v. *Clinton and Harris* (*i*) a printing firm which had been sued in respect of a libel they had published were held not entitled to enforce an express indemnity against the newspaper firm responsible for the publication. The reason for this was that printers are presumed to know the nature of the material they print. Since the Law Reform (Married Women and Tortfeasors) Act, 1935, it might be that in such a case the plaintiffs, being in fact innocent, might be awarded *contribution*; but the point is doubtful though it is clear that they could still not sue on the express indemnity (*k*).

It remains to note that the Crown is bound by the contribution provisions of the Law Reform Act (*l*).

ILLUSTRATION 16

Where one person is employed by another to do something which is apparently lawful he will have a right of indemnity against the other if, in the result, the act proves to be a tort.

Adamson v. Jarvis (1827), 4 Bing. 66.

The plaintiff, an auctioneer, sold some goods for the defendant who had represented that they were his. The representation was untrue and the real owner recovered from the plaintiff in conversion. *Held:* The plaintiff was entitled to complete indemnity from the defendant. As BEST, C.J. said, "A contrary doctrine would create great alarm".

(*h*) *Adamson* v. *Jarvis* (1827), 4 Bing. 66 (Illustration 16).

(*i*) (1908), 99 L. T. 840.

(*k*) Section 6 (4) (c) provides that "nothing in this section shall render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed." See also Defamation Act, 1952, s. 11 (32 Halsbury's Statutes (2nd Edn.) 406).

(*l*) Crown Proceedings Act, 1947, s. 4 (2) (6 Halsbury's Statutes (3rd Edn.) 50).

CHAPTER 5

EFFECT OF DEATH OR BANKRUPTCY ON CAUSES OF ACTION IN TORT

1. DEATH

At common law, although latterly there were many exceptions, the rule was that rights of action in tort were extinguished by the death of either plaintiff or defendant. This unfortunate principle was enshrined in the maxim "*actio personalis moritur cum persona*".

The common law rule has, however, been abandoned as the result of the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, which now governs the survival of rights of action. Section 1 (1) of that Act provides that

> "On the death of any person . . . all causes of action *subsisting against or vested in him* shall survive *against*, or, as the case may be, for the *benefit of*, his estate . . ." (*a*).

It is important to appreciate the exact nature of the situation that this governs. It provides for two main possibilities. First the case where A has a cause of action (say, in negligence) against B, and B dies; the Act provides that A's rights survive B's death and may be pursued against B's estate. Secondly the case where, in a similar situation, A dies: then the Act provides that his representatives may prosecute the claim against B, or of course if B is dead, against B's estate.

But the subsection also contains an important proviso, for it continues

> . . . "this subsection shall not apply to causes of action for *defamation* or *seduction* or for *inducing one spouse to leave or remain apart from the other* or to claims . . . for *damages* on the ground of *adultery*" (*b*).

In these cases rights of action are therefore still extinguished by death.

Apart from these excluded torts the position is that where it is

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(*a*) Italics ours. (*b*) Italics ours.

the person who, had he lived, would have been the *plaintiff* in the action, it will be maintainable by his personal representatives just as though he had never died, and it may be prosecuted by them at any time within the limitation period appropriate to the particular claim (*c*). Where it is the actual or potential *defendant* who dies, the Act, however, makes certain qualifications about the bringing of the action; for it provides (*d*)

> "No proceedings shall be maintainable in respect of *a cause of action in tort* which by virtue of this section has survived against the estate of a deceased person, unless either—(a) *proceedings* against him in respect of that cause of action *were pending at the date of his death;* or (b) proceedings are taken in respect thereof *not later than six months after his personal representative took out representation*" (*e*).

The reason for this is, of course, that if the claim were allowed to be outstanding indefinitely it would be impossible for the representatives to wind up the estate (*f*).

Section I (2) of the Act also contains two important provisions. First, where the deceased is the actual or potential *plaintiff* the damages recoverable for the benefit of his estate are *not* to include exemplary damages (*g*). Secondly, where the tort in question causes the death of the actual or potential *plaintiff* the damages

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(*c*) It is clear that the fact that the deceased has committed suicide does not bar a claim in respect of his death under the Fatal Accidents Acts, 1846-1959: *Pigney* v. *Pointers Transport Services, Ltd.*, [1957] 2 All E. R. 807. And the same case seems also to decide that suicide does not bar a claim under the Law Reform (Miscellaneous Provisions) Act, 1934 (9 Halsbury's Statutes (2nd Edn.) 792), though the learned judge's argument (PILCHER, J.) seems addressed purely to the former Acts.

(*d*) Section 1 (3) as amended by Law Reform (Limitation of Actions, etc.) Act, 1954, s. 4, 8 (3) and Sched. (34 Halsbury's Statutes (2nd Edn.) 466, 467, 468).

(*e*) (Italics ours.) It has been held that a claim to contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, is not a "cause of action in tort" within the meaning of this subsection; and therefore the limitation of time does not apply to it: *Harvey* v. *R. G. O'Dell, Ltd.*, [1958] 1 All E. R. 657; [1958] 2 Q. B. 78. (See also *Post Office* v. *Official Solicitor*, [1951] 1 All E. R. 522). Further, the effect of s. 32 of the Limitation Act, 1939 (13 Halsbury's Statutes (2nd Edn.) 1194), is that the six month period of limitation against personal representatives imposed by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934 (9 Halsbury's Statutes (2nd Edn.) 792), being a special period of limitation within the former section, begins to run from the time *representation is taken out*; thus, if representation is delayed, it is possible for an action to be brought at a time when, had the deceased lived, a claim against *him* would have been statute barred: *Airey* v. *Airey*, [1958] 2 All E. R. 571 (C. A.).

(*f*) If necessary, the court will appoint an administrator at the instance of the person bringing the action: *In the estate of Simpson*, [1935] All E. R. Rep. 84; [1936] P. 40. But the person appointed must consent: *Pratt* v. *London Passenger Transport Board*, [1937] 1 All E. R. 473.

(*g*) Section 1 (2) (a).

recoverable are to be calculated *without reference to any loss or gain* to his estate consequent on his death (*h*). This means, for example, that the fact that the estate loses by the termination of a settlement made upon the deceased for his life is not to be considered; and on the other hand that, for example, the fact that the estate gains by the payment of a life insurance policy is not to be taken into account.

Moreover, the fact that damage giving rise to a cause of action is suffered only at the time of the potential *defendant's* death, or after it, will not bar the plaintiff's claim (*i*). And the rights conferred by the Act for the *benefit* of deceased persons' estates are *in addition to* (*k*) rights conferred under the Fatal Accidents Acts, 1846 to 1959 (*l*), and other similar enactments. Thus where the deceased's dependants do *not* gain under his will or intestacy the fact that damages are awarded to his estate under the Law Reform Act does not bar their claim under the Fatal Accident Acts, because this is a separate claim arising from a statutory cause of action (*m*). But it has been held that if the dependants *do* gain under the will or intestacy, although they may claim under both the former Act and the latter Acts, the award of damages must take into account the fact that they are not to be allowed to gain separately under both heads, and the amount awarded under one head must be taken into account in arriving at the aggregate sum to be awarded, so as to avoid duplication (*n*). The reason for this is that the policy of the earlier Acts is to *compensate* dependants for pecuniary loss sustained by the death of a "breadwinner" and thus under them financial gains consequent on death must logically be taken into account to reduce the amount of money due (*o*). Damages awarded under the 1934 Act are such a gain.

It must finally be noted that where the action is brought on behalf of a deceased *plaintiff* it is no bar to the claim that he died

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(*h*) Section 1 (2) (c); but funeral expenses may be recovered.

(*i*) Section 1 (4) (9 Halsbury's Statutes (2nd Edn.) 792).

(*k*) Section 1 (5).

(*l*) For discussion of these Acts the reader is referred to Part III, Chapter 4. The ensuing paragraphs will be best understood if reference is first made to that Chapter at this stage.

(*m*) See *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] 1 All E. R. 657, 658–9; [1942] A. C. 601, 607; *per* Lord RUSSELL OF KILLOWEN. This is now the leading case on this extremely complicated subject.

(*n*) For the difficulties which attend this operation, see, for example, *Feay* v. *Barnwell*, [1938] 1 All E. R. 31; *May* v. *McAlpine & Sons*, [1938] 3 All E. R. 85; *Ellis* v. *Raine*, [1939] 1 All E. R. 104; [1939] 2 K. B. 180; *Williamson* v. *Thorneycroft*, [1940] 4 All E. R. 61; [1940] 2 K. B. 658; *Bishop* v. *Cunard White Star*, [1950] 2 All E. R. 22; [1950] P. 240.

(*o*) See *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] 1 All E. R. 657, 663; [1942] A. C. 601, 612 respectively; *per* Lord WRIGHT. But see the Fatal Accidents Act, 1959, s. 2, p. 434, below.

as the result of the tort and at the time of its commission; for at the moment of commission a cause of action becomes "vested in him" (*p*). Thus, for example, in *Morgan* v. *Scoulding* (*q*) the administrator of the estate of a man killed instantaneously in a motor accident was held entitled to recover on his behalf damages for his loss of expectation of life.

2. BANKRUPTCY

Where a person who has a right of action in tort becomes bankrupt or where, having become bankrupt, he acquires a right of action in tort, the right is not affected by the bankruptcy as regards any claim (*r*) that does not affect his estate (*s*). But where the claim is one for loss or damage to the *estate* (as for instance a claim for damages for fraudulent misrepresentation (*t*)) so as to affect the rights of creditors, then the right of action becomes vested in the trustee in bankruptcy for the benefit of the creditors (*u*). Thus where a tort gives rise to separate injuries, partly personal to the bankrupt (as for defamation) and partly to his estate, he may be plaintiff in respect of so much of the claim as is personal, and his trustee in respect of so much as affects the estate (*a*).

A right of action in tort *against* a person who becomes bankrupt is not destroyed by the bankruptcy. But the plaintiff cannot prove in the bankruptcy for compensation (*b*); though if the claim is one that *can* be framed in contract (such as a claim for negligence arising out of a contract of carriage (*c*)) it will be provable.

On the other hand, where the plaintiff has a claim in tort against

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(*p*) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1) (9 Halsbury's Statutes (2nd Edn.) 792); and see *Rose* v. *Ford*, [1937] 3 All E. R. 359; [1937] A. C. 826.

(*q*) [1938] 1 All E. R. 28; [1938] 1 K. B. 786.

(*r*) Such as seduction, defamation, assault, or negligence giving rise to personal injuries: see *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, 604.

(*s*) *Rose* v. *Buckett*, [1901] 2 K. B. 449 (Illustration 17). Moreover, the bankrupt may keep the damages, though it might be that if he were to invest them the trustee in bankruptcy could claim the investments as after-acquired property: *Re Wilson, Ex parte Vine* (1878), 8 Ch. D. 364.

(*t*) *Hodgson* v. *Sidney* (1866), L. R. 1 Exch. 313.

(*u*) Bankruptcy Act, 1914, s. 38 (2) (b) (2 Halsbury's Statutes (2nd Edn.) 373).

(*a*) *Wilson* v. *United Counties Bank, Ltd.*, [1920] A. C. 102.

(*b*) Bankruptcy Act, 1914, s. 30 (1)—"Demands in the nature of unliquidated damages arising otherwise than by reason of contract, promise, or breach of trust shall not be provable in bankruptcy."

(*c*) *In re Great Orme Tramways Co.* (1934), 50 T. L. R. 450.

the estate of a deceased tortfeasor and the estate is insolvent (*d*), he may prove in the administration of the estate for compensation (*e*).

ILLUSTRATION 17

Where the cause of action is one which is purely personal to a bankrupt and does not affect his estate, it remains in him and does not pass to his trustee in bankruptcy.

Rose *v.* Buckett, [1901] 2 K. B. 449.

The plaintiff claimed in respect of wrongful entry to his premises and conversion of his goods whereby he suffered *great personal inconvenience.* It being established that *no substantial damage was done to the premises or goods. Held:* The plaintiff's right of action did not, upon his bankruptcy, pass to the official receiver, but remained in him. In such a case "the primary personal injury to the bankrupt is the principal and essential cause of action" (*f*).

(*d*) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (6) (9 Halsbury's Statutes (2nd Edn.) 792).

(*e*) An injured third party acquires the rights of a bankrupt against an insurer of third-party risks: Third Parties (Rights against Insurers) Act, 1930, s. 1 (2 Halsbury's Statutes (2nd Edn.) 458).

(*f*) [1901] 2 K. B. at p. 456; *per* COLLINS, L.J., citing CRESSWELL, J. *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, 613.