

Foundations of the LAW of TORT

Glanville Williams

B. A. Hepple

Butterworths

Foundations of the Law of Tort

GLANVILLE WILLIAMS, Q.C., LL.D., F.B.A.

*Honorary Bencher of the Middle Temple;
Rouse Ball Professor of English Law
in the University of Cambridge*

B. A. HEPPLE, M.A., LL.B.

*of Gray's Inn, Barrister;
Professor of Comparative Social and Labour Law
in the University of Kent at Canterbury*

LONDON

BUTTERWORTHS

1976

ENGLAND:

Butterworth & Co. (Publishers) Ltd.
London: 88 Kingsway, London WC2B 6AB

AUSTRALIA:

Butterworths Pty. Ltd.
Sydney: 586 Pacific Highway, Chatswood, NSW 2067
Also at Melbourne, Brisbane, Adelaide and Perth

CANADA:

Butterworth & Co. (Canada) Ltd.
Toronto: 2265 Midland Avenue, Scarborough, M1P 4S1

NEW ZEALAND:

Butterworths of New Zealand Ltd.
Wellington: 26-28 Waring Taylor Street, Wellington 1

SOUTH AFRICA:

Butterworth & Co. (South Africa) (Pty.) Ltd.
Durban: 152-154 Gale Street, Durban

USA:

Butterworth & Co. (Publishers) Inc.
Boston: 19 Cummings Park, Woburn, Mass. 01801

© Glanville Williams & B. A. Hepple 1976

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

ISBN Cased 0 406 68384 0
Limp 0 406 68385 9

This book is sold subject to the Standard Conditions of Sale of Net Books and may not be re-sold in the UK below the net price fixed by Butterworths for the book in our current catalogue.

Reprinted November 1980

Foundations of the Law of Tort

Preface

We hope that this book may prove useful to three classes of reader: the beginner who wants to know something about the scope, purposes and basic concepts of the subject he is about to study; the student who has progressed some way but wishes to test rules critically in the light of the law's purposes; and those ordinary members of the public who would like some understanding of the legal framework in which such topical issues as the thalidomide tragedy and the reform of the law relating to compensation for personal injuries are being debated.

Almost twenty-five years have elapsed since the essay entitled "The Aims of the Law of Tort" was published ((1951) 4 Current Legal Problems 137). Its purpose was to show that the law of tort pursued conflicting purposes, inevitably with no more than partial success. Towards the end of the 1950s a trickle of writings continued the discussion; these turned into a flood in the 1960s and they were joined by a series of official and unofficial inquiries and reports in both civil law and common law countries. In the 1970s legislation in the United States and New Zealand has curtailed or abolished an important part of the law of tort. (Even more far-reaching proposals in Australia have been affected by the change of Government in that country.) Nor has the case law stood still. The time is ripe for a re-examination of the theme. This book does so in a form both more extended and more elementary than the original essay.

Chapters 5 and 6 are the work of the second-named author; the earlier Chapters represent the joint work of the authors.

G.L.W.

B.A.H.

March 1976

ACKNOWLEDGMENTS

We wish to thank the Guardian Royal Exchange Assurance Group for permission to quote the extract from one of their liability policies on p. 131; and the copyright holders for permission to quote the lines from Anthony Shaffer's *Sleuth* (published by Calder and Boyars) on p. 123.

Table of Statutes

References in this Table to "*Statutes*" are to Halsbury's Statutes of England (Third Edition) showing the Volume and page at which the annotated text of the Act will be found.

	PAGE		PAGE
Accident Compensation Act 1972 (New Zealand)	161, 167, 169	Factories Act 1961 (13 <i>Statutes</i> 400)	102
Administration of Justice Act 1969—		s. 14 (1)	99, 101
s. 22	73	28	100
Animals Act 1971 (41 <i>Statutes</i> 84)—		29 (1)	100
s. 1 (1)	110, 111	Forcible Entry Act 1381 (18 <i>Statutes</i> 405)	10
2	11	Forcible Entry Act 1623 (18 <i>Statutes</i> 412)	10
4	110	Guard Dogs Act 1975 (45 <i>Statutes</i> 27)	10
5 (3)	10	Health and Safety at Work etc. Act 1974 (44 <i>Statutes</i> 1083):	103,
7	110		169
(1), (2)	9	s. 47 (1)	97
9 (3)	10	71 (1)	97
11	9, 10	Law Reform (Contributory Negli- gence) Act 1945 (23 <i>Statutes</i> 789)	122, 157
Carriage by Air Act 1961 (2 <i>Statutes</i> 604)—		Law Reform (Limitation of Actions, &c.) Act 1954 (19 <i>Statutes</i> 99):	15, 35
Sch. I	121	Law Reform (Miscellaneous Pro- visions) Act 1934 (13 <i>Statutes</i> 115)—	
Chancery Amendment Act 1858 [Lord Cairn's Act] (25 <i>Statutes</i> 703)	63, 64	s. 1 (1)	77
Civil Evidence Act 1968 (12 <i>Statutes</i> 910)—		(2)	70
s. 11	4	Law Reform (Miscellaneous Pro- visions) Act 1970 (35 <i>Statutes</i> 553)—	
Coal Mines Act 1911—		s. 5	70
s. 102 (8)	100	Law Reform (Miscellaneous Pro- visions) Act 1971 (41 <i>Statutes</i> 1028)—	
Common Law Procedure Act 1852: 28, 44		s. 4	74
Control of Pollution Act 1974	170	Law Reform (Personal Injuries) Act 1948 (35 <i>Statutes</i> 548)—	
Defamation Act 1952 (19 <i>Statutes</i> 34)—		s. 1	157
s. 11	125	(3)	121
Employers' Liability Act 1880	152	2 (1)	156
Employers' Liability (Compulsory Insurance) Act 1969 (40 <i>Statutes</i> 553)	128, 131		
Employer's Liability (Defective Equipment) Act 1969 (40 <i>Statutes</i> 551)—			
s. 1 (2)	121		
Employment Protection Act 1975 (45 <i>Statutes</i> 316)—			
Sch. 16, Pt. III	66		

	PAGE		PAGE
Limitation Act 1939 (19 Statutes 60)—		Representation of the People Act	
s. 2	34	1949 (11 Statutes 543)—	
(1)	35	s. 50.	57
Limitation Act 1975 (45 Statutes 847):	35	Reserve and Auxiliary Forces (Pro-	
Manchester Ship Canal Act 1897 . .	20	tection of Civil Interests) Act	
Mineral Workings (Offshore Instal-		1951 (29 Statutes 708)—	
lations) Act 1971 (41 Statutes		s. 13 (2)	68
940)	97	Road Traffic Act 1930 (28 Statutes	
s. 11.	97	146)	132
Mines and Quarries Act 1954 (22		Road Traffic Act 1934 (28 Statutes	
Statutes 279)—		146)	132, 133
s. 48.	99	Road Traffic Act 1972 (42 Statutes	
157	100	1633)—	
Misrepresentation Act 1967 (22		s. 145	131
Statutes 675)—		(4)	134
s. 4	121	148	127
National Insurance Act 1971 (41		(1)	127, 133
Statutes 976)—		(3)	121
Sch. 5	156	(4)	132
National Insurance (Industrial Injur-		149	127, 133, 138
ies) Act 1943 (23 Statutes 473):	154	(2), (3)	133
Norris La Guardia Act 1932		150	135
(U.S.A.)	65	Road Traffic Act 1974 (44 Statutes	
Nuclear Installations Act 1965 (37		1339)—	
Statutes 430)	170	s. 20.	139
s. 16 (1)	129	Sex Discrimination Act 1975 (45	
Nuclear Installations Act 1969 (37		Statutes 221)	172
Statutes 466)	170	Social Security Act 1975 (45 Statutes	
Offences against the Person Act 1861		1071)	154
(8 Statutes 147)—		s. 52, 55	162
s. 45.	3	Solicitors Act 1974 (44 Statutes	
Offices, Shops and Railway Premises		1478)—	
Act 1963 (13 Statutes 584) . .	102	s. 37.	131
Policyholders Protection Act 1975		Suicide Act 1961 (8 Statutes 519)—	
(45 Statutes 784)	135	s. 1	126
Post Office Act 1969 (25 Statutes		Supreme Court of Judicature Act	
470)—		1873	16, 28, 62
s. 29 (1)	15	Third Parties (Rights against In-	
Powers of Criminal Courts Act 1973		surers) Act 1930 (3 Statutes	
(43 Statutes 288)	5	175)—	
s. 38.	5	s. 1	135
Public Health Act 1936 (26 Statutes		Trade Disputes Act 1906 (37 Statutes	
189)	92	1001)—	
Race Relations Act 1968 (40 Statutes		s. 4	60
103)	59, 172	Trade Union and Labour Relations	
Rent Act 1965 (18 Statutes 620)—		Act 1974 (44 Statutes 1766)—	
s. 32.	10	s. 14.	15, 66
		17.	66

List of Cases

	PAGE
A	
Ackworth <i>v.</i> Kempe (1778) . . .	143
Adams <i>v.</i> Andrews (1964) . . .	138
Albert <i>v.</i> Motor Insurers' Bureau (1972) . . .	139
American Cyanamid Co., Ltd. <i>v.</i> Ethicon, Ltd. (1975) . . .	66
Armory <i>v.</i> Delamirie (1721) . . .	67
Asbby <i>v.</i> White (1703) . . .	56, 57, 58, 59
A.-G. <i>v.</i> Canter (1939) . . .	8
A.-G. for Dominion of Canada <i>v.</i> Ritchie Contracting and Supply Co., Ltd. (1919) . . .	63
Austin <i>v.</i> Dowling (1870) . . .	41
B	
Bagot <i>v.</i> Stevens, Scanlon & Co., Ltd. (1966) . . .	15, 16
Bailey <i>v.</i> Bullock (1950) . . .	60
Beals <i>v.</i> Hayward (1960) . . .	48
Benham <i>v.</i> Gambling (1941) . . .	78
Best <i>v.</i> Samuel Fox & Co., Ltd. (1952) . . .	36
Beswick <i>v.</i> Beswick (1968) . . .	139
Bolton <i>v.</i> Stone (1951) . . .	105
Bourhill <i>v.</i> Young. See Hay (or Bourhill) <i>v.</i> Young . . .	
Brown <i>v.</i> Boorman (1844) . . .	16
Brown <i>v.</i> National Coal Board (1962) . . .	99
Buchanan <i>v.</i> Motor Insurers' Bureau (1955) . . .	140
Button <i>v.</i> Elliott Machine Tools (1974) . . .	156
Byrne <i>v.</i> Boadle (1863) . . .	96
C	
Calliope, The (1891) . . .	29
Cassell & Co., Ltd. <i>v.</i> Broome (1972) . . .	68, 69, 70, 71, 80
Cassidy <i>v.</i> Ministry of Health (1951) . . .	111

	PAGE
Chesworth <i>v.</i> Farrar (1967) . . .	15
Clark <i>v.</i> Kirby-Smith (1964) . . .	16
Close <i>v.</i> Steel Co. of Wales, Ltd. (1962) . . .	101
Cole <i>v.</i> Turner (1705) . . .	54
Constantine <i>v.</i> Imperial London Hotels, Ltd. (1944) . 15, 53, 58, 59, 172	
Corfield <i>v.</i> Groves (1950) . . .	139
Coward <i>v.</i> Baddeley (1859) . . .	54
D	
Denny <i>v.</i> Supplies and Transport Co., Ltd. (1950) . . .	90
Dering <i>v.</i> Uris (1964) . . .	54
Dickenson <i>v.</i> Watson (1682) . . .	45
Dicks <i>v.</i> Brooks (1880) . . .	54
Dies <i>v.</i> British and International Mining and Finance Corpn., Ltd. (1939) . . .	29
Digby <i>v.</i> General Accident Fire and Life Assurance Corpn. (1943) . . .	130
Donoghue <i>v.</i> Stevenson. See M'Alister (or Donoghue) <i>v.</i> Stevenson.	
Dutton <i>v.</i> Bognor Regis U.D.C. (1972) . . .	92
E	
Eaves <i>v.</i> Morris Motors, Ltd. (1961) .	101
Edwards <i>v.</i> Mallan (1908) . . .	11
Entick <i>v.</i> Carrington (1765) . . .	52
Esso Petroleum Co., Ltd. <i>v.</i> Mardon (1976) . . .	16
F	
Fire and All Risks Insurance Co., Ltd. <i>v.</i> Powell (1966) . . .	126, 128
Fletcher <i>v.</i> Rylands (1866) . . .	109
Flint <i>v.</i> Lovell (1935) . . .	77
Forrest <i>v.</i> Sharp (1963) . . .	78
Fowler <i>v.</i> Lanning (1959) . . .	45, 47, 48
Francis <i>v.</i> Cockrell (1870) . . .	

	PAGE		PAGE
G		L	
Gibbons <i>v.</i> Pepper (1695)	39	Launchbury <i>v.</i> Morgans (1971) . . .	142
Glasgow Corpn. <i>v.</i> Muir (1943) . . .	95	Leeds Industrial Co-operative Society, Ltd. <i>v.</i> Slack (1924). . .	63
Godefroy <i>v.</i> Jay (1831)	55	Letang <i>v.</i> Cooper (1965)	29, 30, 35, 44, 45, 53
Gorely <i>v.</i> Codd (1967)	45	Lister <i>v.</i> Romford Ice and Cold Storage Co., Ltd. (1957)	142
Gray <i>v.</i> Barr (1971)	125, 127	Livingstone <i>v.</i> Rawyards Coal Co. (1880)	67
Gregory <i>v.</i> Piper (1829)	43	Lloyd <i>v.</i> Grace Smith & Co. (1912)	143
Griffiths <i>v.</i> Earl of Dudley (1881) . .	152	Long <i>v.</i> Hepworth (1968)	35
Groom <i>v.</i> Crocker (1939)	145		
Gurtner <i>v.</i> Circuit (1968)	139, 140		
H		M	
Hadley <i>v.</i> Baxendale (1854)	14	M'Alister (or Donoghue) <i>v.</i> Stevenson (1932)	90, 92
Hall Bros. S.S. Co., Ltd. <i>v.</i> Young (1939)	21	McHale <i>v.</i> Watson (1964)	48
Hardy <i>v.</i> Motor Insurers' Bureau (1964)	126	McKinnon <i>v.</i> E. W. Woolworth & Co., Ltd. (1968)	68
Hargreaves <i>v.</i> Bretherton (1959) . . .	2	Martin <i>v.</i> Dean (1971)	136
Harman <i>v.</i> Crilly (1943)	142	Matthews <i>v.</i> Bechtel Corpn. (1959) . .	15
Hartley (R. S.), Ltd. <i>v.</i> Provincial Insurance Co., Ltd. (1957)	134	May <i>v.</i> Burdett (1846)	111
Haseldine <i>v.</i> Daw & Son (1941)	87	Merest <i>v.</i> Harvey (1814)	69
Haseldine <i>v.</i> Hosken (1933)	125	Mitchil <i>v.</i> Alestree (1676)	89
Hay (or Bourhill) <i>v.</i> Young (1943) . .	108	Monk <i>v.</i> Warbey (1935)	136, 139
Hinz <i>v.</i> Berry (1970)	81	Morgans <i>v.</i> Launchbury (1973): . . .	114, 143
Hiort <i>v.</i> London and Northwestern Rail. Co. (1879)	55	Morris <i>v.</i> Ford Motor Co., Ltd. (1973)	145
Holmes <i>v.</i> Mather (1875)	46	Morris <i>v.</i> National Coal Board (1963)	99
Home Office <i>v.</i> Dorset Yacht Co., Ltd. (1970)	91		
Houston <i>v.</i> Buchanan (1940)	136		
Huckle <i>v.</i> Money (1763)	68		
Hulton <i>v.</i> Hulton (1917)	7		
Hunt <i>v.</i> Dowman (1618)	55		
J		N	
James <i>v.</i> British General Insurance Co. (1927)	126	National Coal Board <i>v.</i> J. E. Evans & Co. (Cardiff), Ltd. (1951) . . .	48
Janvier <i>v.</i> Sweeney (1919)	36	Nettleship <i>v.</i> Weston (1971)	95
Jarvis <i>v.</i> Moy, Davies & Co. (1936) . .	16	Newstead <i>v.</i> London Express News- paper (1940)	53
Jarvis <i>v.</i> Swan Tours, Ltd. (1973) . . .	14	Nicholls <i>v.</i> Ely Beet Sugar Factory, Ltd. (1936)	55
Jefford <i>v.</i> Gee (1970)	73	Nova Mink, Ltd. <i>v.</i> Trans-Canada Airlines (1951)	107, 108
John Summers & Sons, Ltd. <i>v.</i> Frost. See Summers (John) & Sons, Ltd. <i>v.</i> Frost.			
Johnson <i>v.</i> F. E. Callow (Engineers), Ltd. (1971)	101		
K		O	
Keates <i>v.</i> Woodward (1902)	24	Oakley <i>v.</i> Lyster (1931)	28
Kenny <i>v.</i> Preen (1963)	13	Oliver <i>v.</i> Ashman (1962)	80
Koufos <i>v.</i> Czarnikow (1969)	13, 14, 15		
Kruber <i>v.</i> Grzesiak (1963)	48		
		P	
		Parry <i>v.</i> Cleaver (1970)	76
		Phillips <i>v.</i> Britannia Hygienic Laundry (1923)	115
		Post Office <i>v.</i> Norwich Union Fire Insurance Society, Ltd. (1967): . . .	135, 141

List of Cases

XV

	PAGE
Price <i>v.</i> Hilditch (1930)	55
Pride of Derby and Derbyshire Angling Association <i>v.</i> British Celanese, Ltd. (1953)	65, 173

R

Randall <i>v.</i> Motor Insurers' Bureau (1969)	140
Rapier <i>v.</i> London Tramways Co. (1893)	106
Read <i>v.</i> Coker (1853)	53
Read <i>v.</i> J. Lyons & Co., Ltd. (1947)	106
Redland Bricks, Ltd. <i>v.</i> Morris (1970)	62
Reynolds <i>v.</i> Clarke (1725)	42
Roe <i>v.</i> Minister of Health (1954)	120
River Wear Commissioners <i>v.</i> Adamson (1877)	46
Rivoli Hats, Ltd. <i>v.</i> Gooch (1953)	29
Rookes <i>v.</i> Barnard (1964)	13, 68, 69
Rose <i>v.</i> Ford (1937)	78
Rylands <i>v.</i> Fletcher (1868)	41, 45, 87, 109, 110, 112, 170

S

S.C.M. (United Kingdom) Ltd. <i>v.</i> Whittall & Son Ltd. (1971)	142
Schwan, The (1892)	47
Scott <i>v.</i> Shepherd (1773)	39
Seager <i>v.</i> Copydex, Ltd. (1967)	17
Seager <i>v.</i> Copydex, Ltd. (No. 2) (1969)	18
Sedleigh-Denfield <i>v.</i> O'Callaghan (1940)	105
Simpson <i>v.</i> Crowle (1921)	62
Slater <i>v.</i> Swann (1730)	54
Smith <i>v.</i> Stone (1647)	39
Sparrow <i>v.</i> Fairey Aviation Co., Ltd. (1964)	101
Spartan Steel and Alloys, Ltd. <i>v.</i> Martin & Co. (Contractors), Ltd. (1973)	142
Stanley <i>v.</i> Powell (1891)	47, 48
Stonedale, The (No. 1) (1956)	20
Stratford (J. T.) & Sons, Ltd. <i>v.</i> Lindley (1965)	66

	PAGE
Summers (John) & Sons, Ltd. <i>v.</i> Frost (1955)	99

T

Tattersall <i>v.</i> Drysdale (1935)	132
Thurston <i>v.</i> Todd (1966-67)	74
Tinline <i>v.</i> White Cross Insurance Association (1921)	126
Tsouvala <i>v.</i> Bini (1966)	48

U

Uddin <i>v.</i> Associated Portland Cement Manufacturers (1965)	102
United Australia, Ltd. <i>v.</i> Barclays Bank, Ltd. (1941)	30, 32
Uren <i>v.</i> John Fairfax & Sons (Pty.), Ltd. (1966)	68, 80

V

Vacwell Engineering Co., Ltd. <i>v.</i> B.D.H. Chemicals, Ltd. (1971)	14
Vandepitte <i>v.</i> Preferred Accident Insurance Corp. of New York (1933)	132

W

Wagon Mound (No. 2), The (1967)	105
Walmsley <i>v.</i> Humenick (1954)	48
Weaver <i>v.</i> Ward (1616)	45, 49
Wells <i>v.</i> Cooper (1958)	95
West (H.) & Son, Ltd. <i>v.</i> Shephard (1964)	79
Westwood <i>v.</i> Post Office (1974)	102
White <i>v.</i> London Transport (1971)	140
White <i>v.</i> White (1950)	120
Wilkinson <i>v.</i> Downtown (1897)	36
Williams <i>v.</i> Holland (1833)	43
Williams <i>v.</i> Humphreys (1975)	44
Williams <i>v.</i> Peel River Land and Mineral Co., Ltd. (1886)	55
Williams <i>v.</i> Morland (1824)	55
Wise <i>v.</i> Kay (1962)	79

Y

Yates <i>v.</i> Whyte (1838)	76
Yorkshire Electricity Board <i>v.</i> Naylor (1968)	78

Contents

<i>Preface</i>	v
<i>Table of Statutes</i>	xi
<i>List of Cases</i>	xiii

1: THE SCOPE AND FUNCTION OF TORT

The meaning of "tort"	1
The overlap between tort and crime	2
The action for damages and other civil remedies	6
Extra-judicial remedies	8
Tort and breach of contract	10
Tort and equitable wrongs	16
Tort and quasi-contract	18
Claims for statutory compensation	20
Summary of the definition of tort	22
The aims of the law of tort	23

2: THE GHOST STORY

Old rules as to the forms of action	27
The abolition of the forms of action	28
The influence of the forms of action on legal categories	33
Their surviving importance in pleading	34
The action of trespass	37
The action upon the case	39
The element of fault in trespass	44
The burden of proof	48

3: DAMAGE

Damage and injury	51
Nominal damages and the forms of action	52
General and special damage	60
Injunctions	61
Aims of damages: the case of exemplary damages ..	67
Compensation for personal injury and death	72
Glossary	82

4: FAULT

The forms of fault: intention, recklessness and in- advertent negligence	85
Negligence as an independent tort	88
Negligence as a conflict of values	93
The standard of the reasonable man	95
Negligence and strict statutory duties	97
Negligence and nuisance	104
Hazards and strict liability	108
Vicarious liability	112
An evaluation of the fault principle	115

5: INSURANCE

Social justification	123
Intentional torts an exception	125
Limits of liability insurance	128
Types of liability insurance	129
Compulsory insurance	131
Third-party rights	132
Failure to insure	135
The Motor Insurers' Bureau	137
The gaps that remain	139
The effect of liability insurance on the law of tort ..	141
The effect of insurance on the bringing of actions ..	144
Evaluation	146

6: TORT AND ADMINISTRATIVE LAW

Industrial injuries	150
No-fault insurance for automobile accidents in		
Canada and the U.S.A.	158
Comprehensive social insurance—New Zealand and		
Australia	161
Market deterrence	165
Administrative sanctions	168
Residual role of tort law	170
APPENDIX: FURTHER READING	174
<i>Index</i>	177

The Scope and Function of Tort

*It was complained that thou hadst done great tort
Unto an aged woman, poore and bare.*

Spencer, *Faerie Queene* II v 17

THE MEANING OF "TORT"

There is no branch of English law the name of which conveys so little meaning to the average layman as tort. What is a tort? The word comes to us from the Norman-French; etymologically, it signifies any wrong, and springs from the Latin *tortus*, meaning "twisted" or "wrung". And the very word "wrung" is merely another form of the word "wrong". In the loose and untechnical sense of "wrong", the word "tort" was in quite general use; in that sense it is found in literature as late as the eighteenth century, and of course it is still so used in the French language. In England, however, it is now purely technical. A tort is a wrong recognised by law.¹

But torts are not the only wrongs recognised by law. The

1. So well established is the technical meaning of the word at the present day that it is easy for us to forget how recent this meaning is. Although the department of law that we now call "tort" is ancient, and although the word "tort" in the sense of wrong is ancient, the word was not generally used as a term of art designating this department of law until the second half of the nineteenth century. Blackstone had foreshadowed its use (*Commentaries* iii 118), but the first treatise bearing the name "Torts" was issued in 1859 by Hilliard, an American author. The first English treatise under this name was by Addison (1860). As late as 1870 a judge noticeably avoided using the word "tort", and expressed the contract-tort dichotomy as "contract-duty" (*Francis v. Cockrell* (1870), L.R. 5 Q.B. 501 at 509).

reader will probably know the names of the major torts, such as negligence, nuisance, defamation, conversion, trespass to goods, trespass to the person (assault, etc.) and trespass to land; but he may still need guidance on the distinction between torts and other legal wrongs. The great cleavage is between criminal wrongs, variously called *crimes* or *offences*, which may result in a prosecution and punishment, and *civil wrongs* which lead not to a criminal prosecution but to a civil proceeding for damages or other private redress. To explain in detail the distinctive features of the criminal prosecution is the task of the criminal lawyer: suffice it here to say that all legal proceedings that are not criminal are civil. Civil proceedings are the residuary class.

THE OVERLAP BETWEEN TORT AND CRIME

The distinction between torts and crimes is rendered slightly difficult by an area of overlap. We generally think of murder as a crime, because the criminal punishment is dramatic; but murder is at the same time a tort to the person killed and to his dependants. So also is manslaughter. Theft is a crime, but it is also the tort of conversion of property. As a crime, it can be prosecuted and punished. As a tort, it gives rise to an action for the value of the property stolen. It is broadly true to say that all crimes are torts if they amount to a physical interference with the plaintiff or his property, at least if they cause actual damage to him. But a crime is not generally a tort if, although potentially dangerous, it has not yet caused damage (dangerous driving where no injury has been inflicted, or attempted murder, where the victim fortunately remains unaffected by the abortive attempt). Also, a crime consisting in a violation of general public order is not a tort if no ascertainable individual is affected: an example is treason.¹

1. If treason caused actual harm to the State, as represented by the Crown, it might amount to a tort; but the question has never been argued. An action for damages will not lie at the suit of a person who has suffered damage as a result of perjury (a crime): *Hargreaves v. Bretherton*, [1959] 1 Q.B. 45; [1958] 3 All E.R. 122.

Just as there are crimes that are not torts, so there are torts that are not crimes. The traditional example is trespass to land, which is a tort but is a crime only in certain circumstances. (The courts have been adding to the list of criminal trespasses, but still the ordinary trespass on a farmer's field is not a crime, though it is a tort.)

What underlies this distinction between crime and tort? The answer is that the object of the criminal law is broadly different from that of the civil law (of which the law of tort forms a part). The criminal law aims at controlling conduct, and this chiefly by threatening punishment if undesirable behaviour is indulged in. In modern times punishment does not occupy the whole of the picture, because criminal courts have other orders at their disposal, such as a probation order, a community service order, or (if the offender is a driver convicted of one of specified offences) an order disqualifying him from driving. But, whatever order is made by the court, the criminal law is principally directed towards influencing behaviour. In contrast, the aim of the law of tort is principally to compensate the victim of wrongdoing. The typical outcome of an action in tort is the award of damages to the plaintiff against the defendant, and these damages are intended to be roughly equivalent to the plaintiff's loss.

When an act is a crime as well as a tort, both the criminal and the civil remedy may be pursued. The wrongdoer may both be prosecuted as a criminal and sued as a tortfeasor; he may both be punished and made to pay damages to his victim. Generally it does not matter which proceeding is brought first, although the court will usually stay a civil action while a prosecution is actually proceeding.

A few statutes provide that prosecutions under them shall bar a civil action. The most important of these is the Offences against the Person Act 1861, s. 45, by which acquittal or conviction of assault and battery by a court of summary jurisdiction (a magistrates' court) bars a subsequent civil action. There are some qualifications upon the operation of this section which need not be