AN INTRODUCTION TO THE LAW OF TORTS

JOHN G. FLEMING

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BY

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CONTENTS

I

THE TASK OF TORT LAW

THE toll on life, limb, and property exacted by today's industrial operations, methods of transport, and many another activity benignly associated with the 'modern way of life' has reached proportions so staggering that the economic cost of accidents represents a constant and mounting drain on the community's human and material resources, calculable as a significant fraction of the gross national product. The principal, nay paramount, task of the law of torts is to play an important regulatory role in the adjustment of these losses and the eventual allocation of their cost. It is thus part and parcel of our system of social security. This perspective, with its attendant problems, is of course essentially one of our own age, because until the emergence of the welfare state the law of torts provided, besides charity, the only source for alleviating the plight of the injured; in contrast to the self-styled affluent society of the post-war period whose immensely ampler and more broad-gauged provision for the underprivileged and handicapped has reduced the share of tort law in furthering the cause of social justice to correspondingly more modest proportions.

1. EARLY LAW: CRIME, TORT, AND TRESPASS

Over far the longest span of its history, the law of torts was content to regard itself as seized of the relatively modest task alone of determining only whether a particular loss sustained by one individual should be left to lie where it fell or be shifted to someone else branded a 'tortfeasor'. Its field of vision did not encompass any process of further adjustment beyond the formal loss allocation between the two adversaries—not that some other focus would have refracted any different image, for the good and sufficient reason that ordinarily the effect of the legal adjudication was indeed fully spent once the burden of the loss had been allotted to the one or the other. Its absorption beyond that point was neither a matter of interest nor one

which would have repaid concern. Against this background the law's bent was understandably conservative. Nothing short of truly reprehensible misconduct would warrant the drastic intervention of the legal system in order to transfer the loss from the victim to someone else, especially in a milieu inured to personal hardship and adventitious adversity.

Indeed, at the dawn of the common law and for long thereafter, crime and tort covered much the same ground, both stemming from a common desire for vengeance and deterrence and distinguishable only by the nature of their respective sanctions. Crime was and is an offence so serious to the maintenance of public security and the interests of society as a whole that it will, at its own instance, vindicate them by prosecuting and punishing the offender. Tort liability, on the other hand, provided a means whereby the victim of wanton aggression could be inveigled into abstaining from retaliation by the prospect of being able to compel the perpetrator to render him monetary compensation for the wrong done. The dereliction against which the primitive legal process of that time, dispensed in the name of royal justice, in assertion of emergent central authority, was prepared to intercede was closely identified with public disorder, threats to the King's peace. The writ of trespass as it was known issued against those charged with direct and immediate aggression to the person, chattels, or land of the plaintiff. From this fertile source sprang in time the nominate torts of assault, battery, and false imprisonment, trespass to goods, and what is still in common parlance understood by 'trespass', viz. an intrusion upon someone else's land.

A common characteristic of these trespass wrongs, which has successfully weathered the erosion of time, is that actual damage or injury is not 'of their gist'; for, considering their origin, what was crucial was the tendency of the offensive conduct to evoke retaliation and an affray. Thus it came about that so sophisticated an interest as personal dignity was accorded legal protection at such an early age: there need have been no flowing of blood nor lesion; the mere touching of another without consent and in circumstances in which he or she might take umbrage was sufficient to warrant redress, whether it be done in an offensive manner or in merely paying tribute to feminine charm as by stealing a kiss from a pretty damsel on a spring

morning in the park. Indeed, so solicitous was the law in this respect in protecting the human psyche that merely placing another person intentionally in apprehension of imminent physical contact was deemed an actionable wrong: known as assault, it remains to this day the only instance in English jurisprudence of a mere offensive sensation unaccompanied by any untoward psychosomatic symptoms, let alone external trauma, giving a cause of action for damages. Whether, by analogy, the mere touching of someone else's goods and chattels, without in any way impairing their value or depriving him of their use, is also actionable may perhaps be doubted, no similar dignitary interest being involved, though it has been commended as a useful weapon for safeguarding museum treasures against the wanton impulses of the undisciplined multitude. In the context of trespass to land, however, it has clearly survived as almost indispensable for the action's function, among others, of trying title to a disputed parcel of land, in so far as a mere symbolic intrusion suffices for allowing the issue of title to be raised.

Reverting again to the main line of argument after this brief digression into the mysteries of trespass, the law of torts was, then, for quite a long time little more than a shadow in the wake of criminal law, concerned with the grosser delicts which almost always must have consisted in some form of *intentional* aggression rather than accidental harm. This was probably so because, in the first instance, people rarely came into close contact with each other in the absence of urban, industrial, and transport conditions which have made random collisions so familiar a feature of the latterday scene. What injury was suffered at the hands of a neighbour was therefore more likely than not the result of deliberation; and at an age when life was notoriously 'brutish and short' the very idea of unintentional harm seemed pardonably a little extravagant. No wonder that scant time was lost on legal discourse concerning the defendant's state of mind—its futility being underscored by the contemporary faith that even 'the devil knoweth not the mind of man'—rather than on the distinction, elusive though it may be to the modern mind, and even trifling, between immediate and direct injury on the one hand, which would alone support a writ of trespass, and harm indirectly

flowing from the defendant's conduct, for which redress was at first less readily forthcoming under the writ of 'case'. In sum, responsibility was based on causation rather than fault, and what headway the latter notion made was in the context of the yet unambitious action on the case, especially that branch which eventually came to bloom as the action for negligence but which, until the industrial revolution, was largely confined to complaints of carelessness against persons like surgeons, apothecaries, solicitors, carriers, and innkeepers who were pursuing public callings and thus more vulnerable to legal scrutiny.

2. THE INDUSTRIAL REVOLUTION AND THE RISE OF ECONOMIC LIBERALISM

Viewed in the broad perspective of history the law of torts entered its second stage around the turn of the nineteenth century as turnpike and burgeoning industry were vastly accelerating the pulse of human activity and confronting society with an accident problem of hitherto unprecedented dimensions. The legal response to this dramatic challenge was neither disoriented nor timid. In one respect it stimulated an expansion of legal protection, in another a contraction.

To speak of the first, the proliferation of novel and manifold perils on country roads and city streets, along railroad tracks and in factories presented the courts with problems to which the antiquated and stunted doctrinal heritage proved rather unequal. However, not yet bowed by the blight of the extravagantly rigid modern doctrine of precedent, and attentive to what experience might teach by trial and error, the courts addressed themselves with vigour to the exigent task of fashioning an essentially new accident law, finding but scant assistance in the unpromising legacy (a little nuisance, less negligence) of the past. In substance it meant breaking the narrow compass within which the embryonic law of negligence had been gestating, extending it beyond the time-hallowed consensual relations of doctor and patient (and so forth) into the vast range of informal situations symbolized by collisions at intersections or level crossings, open coal-chutes in public streets, and bags of flour dropping from warehouses on to

passing pedestrians below. It involved over the years a vast expansion of the area of legal control, a persistent probing of the frontiers of protection against accidental, i.e. unintended, harm which is even yet in progress. For here was a veritable Pandora's Box which called for careful handling lest, in the familiar legal phrase destined to become the shop-soiled badge of the timorous, 'the floodgates of litigation' would engulf us all. Thus not until past the threshold to the twentieth century was any countenance lent to liability for negligence in causing mental shock or in releasing upon the market dangerous commodities defective in workmanship or design, and not before yesterday to responsibility for negligent information in which another placed justifiable reliance to his pecuniary detriment.

In truth, much concern was devoted, and still is if in diminishing degree, to the problem of suitably harnessing the volatile concept of negligence liability. Let us remember that this was an epoch socially conservative and far from sentimental. Prominent among the most hazardous activities were precisely those enterprises, like mining, construction, and the railways, whose prosperity was intimately associated in the public mind with the seemingly fabulous growth of the economy and general welfare in the Victorian age. Who but one indifferent to the very success of private enterprise would not shrink from imposing upon it too heavy a burden such as would undoubtedly be involved if it were exposed to the bracing wind of an unmitigated duty of care? Since everybody participated in the benefits of the system to greater or lesser extent, was it so unfair to expect its occasional casualties to shoulder the loss themselves as their own, admittedly involuntary, contribution to the general welfare? This train of thought seemed particularly plausible in countering claims by injured workmen against their employers, and it was in no context more strikingly than this that the human sacrifice demanded for capital formation was so rigorously exacted. Thus, whatever the law's theoretical demands on management for ensuring safe working conditions in practice they were reduced to an empty gesture by a number of ruses designed to baulk recovery and so reduce the overhead cost of industrial operations. Most effective in this regard was the 'unholy trinity' of common law defences: contributory negligence, assumption of risk, and the nefarious doctrine of

common employment which exempted the master from vicarious liability for any injury a servant inflicted on a fellow servant as distinct from a stranger. In effect it was not until the belated adoption of workmen's compensation in 1897 that a modest measure of security was first assured to the English working class as a hedge against disabling accidents 'arising in or out of the course of employment'.

But the twin defences of voluntary assumption of risk and contributory negligence, much-vaunted stimulants to the virtues of self-reliance and individualism, were by no means confined to the industrial context alone. In company with other stratagems like the facile denial of causal relationship between negligence and harm (that came to be identified as the issue of 'remoteness of damage' or 'proximate cause'), they rendered yeoman service in generally keeping the incidence of liability in check, the more so for being manipulated with greatest dexterity by judges in often withholding cases from the jury and thus preventing participation in the decision-making process by the 'lay gents' who could not be consistently trusted by the professional guardians of public policy. Other notorious devices subserving the same policy of reducing industry's accident bill were the doctrine of 'privity', which (until 1932) screened negligent manufacturers from claims for injury by an ultimate consumer, and the minimal responsibility laid on occupiers for the safety of persons who came on their premises.

3. NO LIABILITY WITHOUT FAULT

Intimately connected with the hedging process just described was the second notable contribution of the nineteenth century, the virtual erosion of strict liability in deference to the prevailing postulate of 'no liability without fault'. As previously mentioned, English law had in the preceding centuries displayed no marked disposition to hitch liability to any particular frame of mind by the actor who had caused the harm, provided his external conduct and the injury resulting from it met the formal conditions for the issue of one of the conventional writs. Subject to the reservation already voiced that almost invariably the culpable defendant would have intended the injury or have been guilty of socially deficient conduct such as we would

today label as negligent, it could fairly be claimed that in theory liability was strict. Exculpatory considerations only grudgingly gained acceptance, so much so that until about 1400 even one who slew another in self-defence had to seek a royal pardon to escape the legal penalty for murder. Though it became increasingly more ambiguous to what extent the plea of inevitable accident would be an answer to a charge of trespass, the issue was not finally resolved until the second half of the nineteenth century, when at last official cognizance was taken of the fact that the fault requirement had almost imperceptibly come to permeate all claims for personal injury and, for that matter, property damage, so that a plaintiff was henceforth put to proof of intentional or negligent misconduct by the defendant, however he chose to frame his pleadings. With but few exceptions which could be plausibly dismissed as obstinate relics of a barbarous past, such as the curious liability for cattle trespass and dangerous animals, the triumph of fault liability was well-nigh complete and marked a singular judicial triumph in remoulding ancient precedents in the image of a radically different era.

The axiom of 'no liability without fault' was neatly attuned to the philosophy of individualism and to the economic needs of a rapidly expanding economy. To provide the most propitious conditions for private initiative, which it was fashionable to regard as the catalyst of all human progress, the legal system had to assure freedom of action for the individual by relieving him at least from all concern for the cost of inevitable accidents. Liability for faultlessly caused injuries was feared to impair progress, besides dangerously enfeebling the moral fibre of man, inasmuch as it denied him all chance to avoid liability by being careful and confronted him with the invidious choice between either abandoning his project or assuming the cost of any harm that might incidentally befall. Fault alone justified the interposition of so drastic a legal sanction as the shifting of loss, because in company with the criminal law the primary function of tort recovery was seen in its admonitory or deterrent effect. An adverse judgment against the tortfeasor served at once as punishment for him and a warning for others; the latter, because it must have been perceived, if perhaps more dimly then than it is now, that the disapproval of a particular course

of conduct or failure to adopt a particular safety precaution, implicit in a verdict of negligence, would not be lost on the rest of the particular industry or those pursuing the same activity—that a tort adjudication especially in an industrial or manufacturing context was often, in Polanyi's phrase, 'polycentric' in its effect and, if heeded, served the cause of accident prevention. The significance attached to the element of deterrence assumed of course that the award would be paid out of the defendant's own pocket. Personal fortune was regarded as the primary source of compensation, so that the deterrent lash would be at once real and ineluctable.

This image of loss adjudication under the aegis of the law of torts was therefore critically balanced on two central assumptions, first, an identification in large measure of legal responsibility with moral blameworthiness, and secondly, the belief that compensating a plaintiff could not be accomplished without correspondingly impoverishing the defendant, since the effect of tort recovery was merely to shift the loss from one individual to another. With the passage of the present century, this view of the functioning of tort law has become gradually distorted, if not by now actually falsified, as a result of the second assumption being overtaken by a better understanding of the manner in which the accident cost is in fact being absorbed in society and the inescapable effect this insight has had in weakening the erstwhile conviction that moral dereliction alone would warrant a shifting of the loss.

4. LOSS SPREADING

The decisive factor in this reorientation, which is destined ultimately to recast much of contemporary accident law, is the growing realization that tort law can, and often does, perform the function not merely of shifting, but also of spreading the loss; that the defendant instead of having to foot the bill single-handed is in actual fact more often than not only a conduit through which the cost is channelled so as eventually to be disseminated in minute and almost imperceptible fractions among the whole or an appreciable section of the community. This occurs whenever the defendant, by virtue of the position he occupies in the economy or through the additional device of liability insurance, is able to pass on the outlay in the manner

suggested. A manufacturer, for example, will treat expenditures incurred in meeting injury claims by third parties, no less than those by his own work force, as part of the inescapable overhead of his operations—a cost item, albeit small, that will enter into the calculation of the price he will charge for each unit of his product and that will eventually be defrayed in negligible amounts by all ultimate consumers of the particular line of product.

Further spreading of the cost may be achieved through insurance. Very large enterprises, notably governments, their subdivisions, agencies, and some public corporations, consider it economically preferable to operate as self-insurers and absorb the cost of compensation claims, with reference to certain kinds of risks at any rate, from current revenue or special reserve funds maintained for the purpose. Most others, however, have recourse to professional underwriters who are in the business of indemnifying the insured against their legal liability to third parties. Indemnity, liability, or third-party insurance, as it is variously called, has made tremendous strides since its modest beginnings in the declining years of the nineteenth century, gradually permeating the economy to the point where today it is widely looked upon as an indispensible prerequisite for doing business or for engaging even in many private activities, like driving the family car. In an increasing number of instances prudence has been backed by legislative compulsion, most notably in the case of motor vehicles, whose owners in Great Britain, throughout the European continent, most parts of the Commonwealth, but as yet in only a slender minority of American states, are by criminal penalties enjoined from driving or allowing others to drive without carrying insurance cover in a prescribed amount against liability for personal injury or death to third parties.[1] Likewise in the industrial sphere insurance has long been a corollary of workmen's compensation throughout the world and in some jurisdictions is mandatory also for employers with respect to any surviving tort liability.[2] Most important for the present context is the fact that insurance, besides offering a relatively inexpensive hedge against the risk in question, performs the vital social function of spreading it—this time horizontally rather than

[1] *Infra*, p. 176. [2] *Infra*, p. 99.

vertically, so to speak—among those engaged in the same kind of activity and hence paying premiums against the same type of risk, thereby making it possible for the cost to be widely and painlessly absorbed even in regard to hazard-creating activities, like private motoring, pursued by most of us who, unlike purveyors of goods and services, are not in a position to 'pass the buck'.

This change of emphasis from loss-shifting to the loss-spreading function of tort law is bound to modify much of the conventional thought concerning the so-called attribution of legal responsibility. And this in at least three respects. First, it saps most of the strength from the argument, once so appealing, that the burden of an adverse judgment would have a crushing and debilitating effect on enterprise generally and the defendant's in particular, now that it has become apparent that the cost can usually be absorbed without in the least impairing his competitive position or otherwise discouraging the activity that produced the hazard. Secondly, it radically challenges the long-accredited argument that, in order to justify the trouble and expense of shifting the loss, only misconduct by a defendant manifestly deserving society's disapproval would be sufficient. For, if it be true that it is socially beneficial in itself to compensate the injured when this can be accomplished without correspondingly impoverishing another individual, we should be much readier to countenance a plaintiff's verdict that would not so much connote disapproval of the defendant as an opportunity for financially assisting an accident victim's rehabilitation by drawing on the resources not of society as a whole but of that particular section alone which participated in the benefits of the risk-creating activity. Thirdly, it will increasingly divert attention from social deficiency as the paramount criterion for legal responsibility to a quest for who of the parties concerned occupies the most strategic position for distributing the compensation cost in the fairest and most economical manner. Let me elaborate a little on each of these points.

5. ECONOMIC BURDEN OF TORT LIABILITY

In one sense it is true enough that a verdict of negligence spells disapproval of the particular course of conduct that

resulted in injury and, to the extent that it deters repetition, might be said to tend toward fettering freedom of action. Yet this argument, appealing though it may be at first blush to a generation that often fancies itself over-regimented, must not be given credit beyond its rather modest deserts. At the outset we should take heed to remember that civilized existence in its very essence is predicated on a large measure of subordinating self-interest to that of one's fellows and therefore requires abandoning of projects that would ask from others an incommensurate sacrifice in life, limb, or property. Next, the inhibiting effect of a negligence verdict on enterprise and initiative is in truth negligible, because rarely is negligence law concerned with condemning a whole activity as distinct merely from a particular manner of carrying it on. It may admittedly call for the adoption of safety precautions and thus involve financial outlay, but in the typical situations (of industrial operations) the person or industry upon which the duty is thus laid will be able to pass on the cost to the consuming public. If a whole activity or enterprise is highly hazardous however carefully conducted, the legal disposition has rather been to subject it to the régime of strict liability which, as we shall see anon, casts no aspersion whatever on its social utility and claim to tolerance, even though it be asked to pay its way for any mishap that might occur.

The burden on enterprise of an adverse judgment, in its tendency of either inhibiting it directly or weighting it with inordinate financial charges, is therefore today largely illusory. This insight strikes very sharply at the root of a certain number of immunities whose claim to survival has in the past been rested primarily on apprehensions lest the burden of tort liability would otherwise be financially or socially intolerable. Perhaps the most poignant of these is that which at common law precluded actions in tort between husband and wife and was conventionally attributed, besides appeal to the metaphysically intriguing doctrine of the identity of spouses ('husband and wife are one, and the husband is *the* one'), to a fear that marital adversary litigation was calculated to disrupt the tranquillity of the home. Though this explanation always had a somewhat hollow ring in view of the fact that husband and wife were free to sue each other for any cause of action other than

tort and some torts, like assault and battery, seemed by their very nature to belie the assumption that there was still a domestic peace to be saved, yet the immunity survived the social and proprietary emancipation of married women only to become the most prominent casualty of the very success of liability insurance. First within the Commonwealth the State of South Australia acknowledged that the primary function of marital immunity under modern conditions was less to restrain interspousal litigation properly so called than to provide an undeserved loophole for insurance companies to escape from their commitments to the insured and through him to those he had unhappily injured. This aspect of the matter was brought to the fore by the relatively high incidence of family members travelling together in the same car, thus multiplying many times the chance of one becoming instrumental in hurting another; in combination with the advent of compulsory third-party risks insurance which, though a form of indemnity insurance and therefore conditional on the insured being legally liable to the claimant, was obviously based on the social judgment that the victims of at least negligently driven vehicles could confidently look to the owner or driver for compensation. The South Australian measure was accordingly content merely to enable a spouse injured by the negligent driving of the other to claim from the latter's insurer, without thereby technically trenching upon the immunity and yet giving it the go-by for most practical purposes. In England more drastic surgery prevailed when the whole doctrine was eventually excoriated in 1962, subject only to a reservation of judicial power to stay proceedings if it appears that no 'substantial benefit' would accrue to either party from continuing them—a safeguarding evidently aimed at complaints which should more properly be addressed to domestic relations courts.[1]

Another stubborn immunity which only recently (in 1961)[2] fell to the axe of reform was that enjoyed by highway authorities as regards claims for negligence or nuisance founded on failure in the maintenance and repair of roads. Unlike the categorical immunity from tort liability of the Crown, which was deeply rooted in political theory ('the King can do no wrong')

[1] Law Reform (Husband and Wife) Act, 1962.
[2] Highways (Miscellaneous Provisions) Act, 1961.