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### *Chapter 1*

### *Introduction*

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Chapter 1

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# PRELIMINARY REMARKS*

1. *The paradoxical situation of the law of tort in industrialized countries.* – In most industrialized countries, the law of tort is at the moment in a paradoxical situation. On the one hand, there has been a great increase in the number of civil liability suits, in their variety, in the amounts they involve, and an "abrupt change" of the rules which govern them.[1] This is attributable in part to the enormous increase in the number of accidental personal injuries, as a result of the "industrial revolution"; the safety measures introduced in factories and, to a certain extent, on the roads and in cars only act as a gentle brake on this increase. Every year in the UNITED STATES alone 115000 persons die as the result of accidents, more than 11 million suffer temporary disablement, and more than 50 million others (making a total of one person out of four) suffer some kind of injury. The cost of accidents is permanently increasing and must be in the neighbourhood of US $ 30 billion *per annum*.[2]

The present importance of civil liability is also due to a greater intolerance of misfortunes. In a welfare state anybody who has suffered damage by reason of another's act feels more or less justified in suing him for compensation. The imagination and skill of the lawyers in finding new grounds for actions in tort or new heads of recoverable damages has enabled compensation to be recovered which, by its nature or amount, would never have been conceived of a few decades ago.[3] Malpractice suits against physicians and surgeons have become so common in the UNITED STATES that many insurance companies

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[1] On the accelerated expansion of liability, see *Keeton*, Justice 56; on the "abrupt change" of the rules, see *ibidem* 1–10, 169–179. Whereas hardly more than a century ago, an author could not find a publisher for a manuscript on the law of tort, two leading journals of comparative law have recently devoted special issues to the law of tort: Rev.int.dr.comp. 1967, 757–932, 18 Am.J.Comp.L. 1–168 (1970), 19 Am.J.Comp.L. 1–38 (1971). *Chloros* has also remarked that in 1804 the FRENCH codifiers thought it adequate to cover delicts in five short articles (1382–1386), that at the turn of the century the GERMAN CC devoted 31 provisions to the matter (823–853), and that the ETHIOPIAN Code of 1962 covers it in 133 articles (2027–2161) (Principle, Reason and Policy in the Development of European Law: 17 I.C.L.Q. 849–877, 867 (1968)). The AMERICAN Restatement of the Law of Torts had 503 sections in its first version and additional ones in the second.

[2] From *National Safety Council*, Accidents Facts (Chicago, annual). Automobile accidents create a problem of special magnitude: see *infra* ch. 14 s. 1. It has been shown that, during World War II, the toll of industrial accidents alone was nearly as heavy (even though a true comparison is difficult) as the toll of war itself for such countries as the UNITED KINGDOM and the USA.

[3] *Cf. Mazeaud and Mazeaud (-Tunc)* I no. 13–14. In the UNITED STATES, in personal injury cases, many awards above $ 1 million have been made in cases of death (including the death of a boy) or severe injury; for severe injury an award reached $ 3650000 ($ 3 million to the injured person, $ 500000 to his wife and $ 50000 to each of his children) and another $ 4025000 (25000 against the city and the district of the school where the accident occurred and 4000000 against the hospital and the physician who failed to give him the proper treatment). Furthermore, a claim of $ 110 million in respect of a fatal accident has been made by a widow against a car manufacturer. An award of $ 50000 has also been made for 'insatiable desire for sex" as a result of an accident and one of $ 6000 for humiliation when a portable lavatory toppled over. On the size of awards in personal injury cases, see more generally *infra* ch. 9 s. 173–179, 270–276.

In the field of defamation, the plaintiff's claim is often expressed in millions of dollars, sometimes in hundreds of millions.

Present-day newspapers often give accounts of strange tort suits. During 1970 and a part of 1971 the following ones were reported (the amount recovered being expressed in US dollars): by a commuter against a railroad for "commuter neurosis": 50000; by a customer afraid during a bank security test: 453000; by an actress whose double played a scene in the nude:

now hesitate to cover medical liability.[4] Disappointed shareholders bring suits against stockbrokers.[5] Manufacturers are threatened, not only by an enormous increase of individual claims based on product liability,[6] but also by collective claims derived from a greater awareness of the

2 million; by a magazine against the telephone company which had listed it in the phone book with a wrong number: 2 million; by a husband against two sex researchers he accused of having used his wife, with her consent, for treatment of two men: 750000; by a negro claiming his skin turned white as a result of treatment: 500000; by an anti-vivisectionist group against a scientist accused of "savagery" in causing the death of a monkey: 2 million; by a philosopher accusing a university of denying him a chair because of his age (69): 1 million; by survivors of a Viet-Nam massacre against an army officer and the US Government: 400 million; by a person charged $ 2 to rent headset to hear airborne movies in economy class: 100 million; by an actor whose name had been used without authorization: 1 million; by a telephone user for the time lost in waiting for the dial tones: 306.25; by a woman against an insistent suitor: 1 million; by the Rolling Stones against their former manager for misrepresentation: 29 million; by an actress against a film producer for misrepresentation on the artistic value of the production: 3.3 million; by an actress for imitation of her voice in commercial advertising: 4 million; by a woman against her husband who changed his sex: 1.5 million; by an actor against a film producer who, in a documentary, depicted him as a hawk when he actually was a dove: 25 million; by an animal lover suffering "severe mental anguish" because his pet collie was not buried in a coffin four feet deep, as promised, but only ten inches deep: 10000; by an actress against a store selling at cheap price false eyelashes bearing her name: 3 million; by a manager against his principal who had dismissed him: 25 million for loss of reputation and humiliation and the same amount in punitive damages. On actions for "wrongful birth", see *infra* ch. 8 s. 13 and n. 63–65. On exemplary and multiple damages, see *infra* ch. 8 s. 107–116.

Everywhere, branches of the Bar have done their utmost both to extend the types of case suitable for compensation and also to increase the amounts of the awards. In the UNITED STATES, a National Association of Claimant's Compensation Attorneys (NACCA) was formed in 1946, and has now become the American Trial Lawyers Association (ATLA). It now numbers over 25000 members. It publishes a magazine (*Trial*) and an annual Journal (JATLA), and gives as much publicity as possible both to the techniques by which imaginative lawyers (*Belli*, of CALIFORNIA, being a notable example) obtain "adequate" awards and also to the success obtained before generous courts, large awards being an "example" for the more conservative courts.

[4] *Cf.*, the statement issued on 12 Nov. 1970 by the Regents of the American College of Surgeons:

"The Regents of the American College of Surgeons feel obligated to inform the public that the rising number of lawsuits against physicians is seriously threatening the quality of surgical care and increasing its costs to patients.

Some surgeons feel compelled to treat patients under a concept which stresses avoidance of litigation rather than the application of their best clinical judgment.

Instead of attempting procedures which may cure the patient, but have a higher risk of failure and exposure to the threat of a lawsuit, some surgeons may prefer to use standard, proved, conservative methods which might bring relief to the patient, but will not cure him.

The rash of lawsuits has driven many other surgeons to still another extreme. To protect themselves against possible litigation, they are being forced to order costly tests and elaborate x-rays which under normal conditions would not be required.

It is not generally appreciated by the public that hazards are inherent even in well established surgical procedures. The practice of medicine is a combination of art and science. Even though medicine as a science is highly advanced, a precise result in treatment never can be guaranteed. Although the physician may demonstrate the highest possible knowledge and skill so that a jury would not be expected to find fault with his actions, it still might find against the doctor, simply because the doctor has insurance and the patient had a bad result.

To protect himself against unexpected litigation, a surgeon, like an automobile driver, must have adequate liability insurance. Because insurance companies are being required to pay out larger and larger compensation, they are finding it necessary to raise their premiums for doctors. Several insurance companies have ceased to issue professional liability insurance. In Hawaii, as well as in certain south-western and western states, many surgeons are faced with non-renewal of their policies even though they never have been involved in any medico-legal action. This may force some surgeons to give up their practice, thereby aggravating the problem of an already deficient supply of physicians.

The Regents of the American College of Surgeons believe the problem extends beyond the profession and requires increased public awareness for its solution."

Comparable warnings have been issued by medical associations at least in FRANCE and in the UNITED KINGDOM. *Cf.* also *infra* ch. 6 s. 61 and *Havighurst*, Medical Progress and the Law (Dobbs Ferry 1969).

[5] See, *e.g.*, *Chasins v. Smith, Barney and Co.*, 438 F.2d 1167 (2 Cir. 1970), Note, 45 Tul.L.Rev. 668 (1971).

[6] See *infra* ch. 5. In the UNITED STATES, a car manufacturer had to pay more than $ 1 billion to the victims of a defect of one of its models. On the possibilities of insurance as seen from a EUROPEAN point of view, *cf.*, *Muller*, L' assurance "responsabilité civile produit": Rev. gén. ass. terr. 1970, 576–593.

evils of pollution,[7] which have now taken on an international dimension.[8] The complexities of business law explain in part why the big industrial firms are permanently involved, either as plaintiffs or defendants, in law suits each involving hundreds of millions, if not billions, of dollars.[9] The increased role of tort litigation has created a real problem for the administration of justice in many industrialized countries,[10] as well as a permanent problem for the insurance companies covering tort liability.

On the other hand, the principles and functions of tort liability are at present unsettled,[11] and indeed the very applicability of the law of tort itself, at least in certain fields, is often disputed. In a welfare state personal injuries are compensated, at least in part, by some social security scheme. Furthermore, in an affluent society, the personal injuries of many citizens will be covered by a personal insurance policy which they will have taken out.[12] The need for tort liability is, therefore, smaller than it used to be.[13] In fact, in the industrialized countries, tort liability is no longer the main source of indemnification for personal injuries;[14] and it even plays a very secondary role in the compensation of industrial accidents, *i.e.*,

[7] In the UNITED STATES, in 1969, a woman filed a $ 30 billion suit against the principal manufacturer and distributors of DDT; in April 1971, the Heart Disease Research Foundation filed a $ 675000 billion suit for air pollution against four car manufacturers.

[8] See, *e.g.*, *du Pontavice*, La pollution des mers par les hydrocarbures (à propos de l'affaire du Torrey Canyon) (Paris 1968).

[9] In 1969, an industrial firm of the UNITED STATES was the object of a $ 12 billion law suit; in the same year, another one was the object of five law suits for a total of more than $ 5 billion.

[10] In ENGLAND, personal injury cases account for 70–80 per cent of all actions in the High Court of Justice: Report of the Committee on Personal Injuries Litigation ("Winn report", London 1968) no. 37–43. See also *Atiyah* 217–219.

[11] *Selmer* has remarked that, while in most fields of law, court decisions have an effect of clarification, "in the law of tort compensation, the opposite seems to be the case: the more frequently it is applied, the more acute become the inherent conflicts and the involved problems. And this is a universal trend. No legal system can compliment itself on having established a definite set of solutions" (Personal injury 54). Some basic reasons of this phenomenon are given below, in the text. For a more detailed explanation, see *ibidem* 54–55, quoted *infra* n. 199.

[12] The premiums collected every year by private insurers (excluding the insurance organizations of the SOCIALIST countries) more than doubled from 1955 to 1965, increasing from $ 33.6 billion to $ 72.5 billion in 1965. The amount collected is a higher percentage of the national income in the industrialized countries than in the developing ones: it drops from 7.9% in the UNITED STATES and 8.3% in GREAT BRITAIN to 1.1% in INDIA. In absolute amounts, of course, the differences are still larger. In 1965, private insurers collected $ 44.7 billion in the UNITED STATES ($ 72.5 billion in 1970), $ 6.6 in GREAT BRITAIN, $ 5 in WEST GERMANY, $ 2.8 in JAPAN, $ 2.7 in FRANCE, $ 0.5 in INDIA. On the average, life assurance collects 40% of the premiums, the proportion varying widely from 72.6% in INDIA and 71.8% in JAPAN to 41.1% in the UNITED STATES, 21.6% in FRANCE, 7.8% in SPAIN, and 7.5% in ARGENTINA. In the UNITED STATES, the amount of life assurance purchased increased from $ 48 billion in 1955 to $ 142 billion in 1965; and the assurance policies already in force increased from $ 372 billion to $ 900 billion ($ 1 345 billion in 1970). Also in the UNITED STATES, 85% of all persons under 65 years of age are protected by private health insurance; 1.1 million persons over 65 are eligible for Medicare, and are also protected by group major medical policies; 54 million are insured against loss of daily income in the event of sickness or injury (from various professional journals and from the Division of Statistics and Research of the Institute of Life Insurance). See also the figures given by *Gregory and Kalven* 632–634.

[13] In ENGLAND, social security benefits in cases of industrial injury or sickness for periods of no more than a year usually exceed, sometimes significantly, the net loss of earnings (*i.e.*, the loss when reduction in tax and other savings are considered): *Atiyah* 365.

[14] In the UNITED STATES, in 1960, tort liability only provided 7.9% of all benefits paid for injury and illness by the principal loss-shifting systems, while private loss insurance accounted for 36.5%, social insurance 18.1% and social insurance, public health service facilities, veterans benefit, public assistance, workmen's compensation, sick leave payments taken together as various forms of social compensation amounted to 50.6%: *Conard a.o.* 48–49; *Keeton and O'Connell* 236–240. As regards traffic accidents in 1967, tort liability provided 32% of the compensation received by the victims, private loss insurance under various forms 39% and social compensation 29%: *Department of Transportation*, Motor Vehicle 9. In ENGLAND, in 1966, the victims of sickness and injury received £ 310 millions of National Insurance benefits (roughly 56% of all net amounts received which seem in the neighbourhood of £ 550 millions), from £ 103 to 122 millions (est.) as a result of personal injury claims (perhaps 20% of all net amounts received), £ 91 or 92 millions (est.) of sick pay, less than £ 26 millions (est.) of personal accident insurance, £ 7.8 millions from Trade Unions and Friendly Societies: *Ison*, Lottery 53 (see also 212–213). For NETHERLAND, see *Bloembergen and van Wersch*, Verkeersslachtoffers en hun schade (with a summary in English: Victims of traffic accidents and their losses) (Deventer 1973).

injuries suffered by workers in connection with their employment (see *infra* s.28). Furthermore, the spreading of liability insurance has completely changed the meaning of what is called tort liability. When the driver of a car is "liable" for the damage he has caused, perhaps by serious recklessness, his "liability" is purely nominal provided he is insured. Criminal courts may, of course, impose a punishment on him; but civil court are powerless towards him. Whatever may be the amount of the damages awarded to the victim, he will have no part whatsoever in its payment if he is fully insured. In fact, he is no longer liable. He is no longer responsible for the consequences of his behaviour, except to the extent to which he may incur an increase of the insurance premiums. Similarly, the liability of directors and officers in large companies has more or less disappeared: it is currently covered by insurance – at the cost of the company itself.[15]

The law of tort, therefore, is in a state of "crisis".[16] It may have reached its zenith: at the very moment where it occupies a position without precedent, it is impregnated and surrounded by institutions which deeply modify its traditional working and put into question its functions and its domain. Inherited from a time when there was neither social security nor insurance, it is now threatened by the rise of these institutions of loss distribution.[17] Furthermore, it has been designed to govern individuals and it now mainly applies to private and public enterprises. The notions according to which western societies have lived for centuries are no longer true: it is no longer true that we are liable for the harm we have done by a tort, since it is likely that we will be either employed or insured; by reason of social security it is no longer true that no-one can recover for the damage he suffers as a consequence of his own fault. In certain respects man is more responsible than ever: his power to cause harm (as is his power to help his fellow men) is multiplied by increased industrialization and by the general development of technology. In other respects, as a result of the emergence of social security and insurance, his responsibility disappears.

Clearly, the law of tort needs a deep reconsideration. Undoubtedly there are fields where it should survive, fields where it should wither away, and fields where it needs to be remodelled with due regard to its interplay with insurance and social security.

2. *Developing countries.* – In the developing countries the problems encountered by the law of tort are equally deep, if of a different nature. The law has been adjusted to suit rapidly changing activities and situations.

The consequences of personal injuries used to be covered, not by a scheme of social security, but by familial solidarity. This solidarity is, however, threatened by personal mobility, by the impact of more individualistic philosophies, and even by statutes which, in order to give an incentive to work, restrict the scope and strength of the family unit. It is doubtful whether social security will, in the foreseeable future, be able to replace it. Because of this the law of tort is likely to take on an increasing importance.

On the other hand, since collective liability is rapidly declining, most tortfeasors are insolvent and the ones who are solvent usually enjoy such a social status that the ordinary citizen will not dare to sue them before a court or has no means of doing so (see also *infra* ch. 14 n. 10).

In the developing countries, therefore, the importance of tort liability will probably increase in the years to come, but no more rapidly than the institutions which contribute to its decline in the industrialized countries: insurance and workman's compensation laws.

3. *Content of this introduction.* – Everywhere, therefore, the law of tort appears to be at a critical stage and deserves attention.

Before embarking on its comparative study, some introductory investigations appear necessary.

The four sub-chapters of this introduction will concern: (a) the concept of tort and the delimitation of the law of tort; (b) the historical development of the law of tort and the present position of the law of tort in the main legal systems; (c) the proper place of fault in a modern law of tort; (d) the functions of the law of tort.

[15] *Cf.*, Liability Insurance for Corporate Executives: 80 Harv.L.Rev. 648–669 (1967); *Committee on Continuing Legal Education* A.L.I. – A.B.A. Course of Study on Insuring Corporate Personnel and Professional Advisers Under Expanding Concepts of Responsibility (Philadelphia 1970).

[16] *Jolowicz: Winfield and Jolowicz* v (*cf.* 1–11).

[17] See *infra* s. 31 and 82, s. 148; ch. 11 s. 63–76. *Cf., Winfield and Jolowicz* 2–11; *Hellner,* Développement 805: "The role of tort law will then be chiefly to take care of the losses that are not covered by these two primary sources of reparation."

# I. THE CONCEPT OF TORT AND THE DELIMITATION OF THE LAW OF TORT

4. *The problem.* – Before embarking on any further research, logic demands an attempt to try to define and delimit the subject matter of the study undertaken. Unfortunately, such an endeavour is not an easy one.

## A. THE CONCEPT OF TORT

### i. *Some Definitions in the Common Law Countries*

5. In the COMMON LAW world reference is often made to *Winfield's* definition: "Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages."[18]

A contemporary scholar reminds us that the word "tort" derives from the Latin "*tortus*", meaning twisted or crooked, and that it has found its way into the English language as a general synonym for "wrong".[19] The same author defines tort in very general terms as "a civil wrong, other than a breach of contract, which the law will redress by an award of damages."[20] He is prompt to underline, however, that this definition is neither very informative nor strictly accurate in view of the existence of remedies other than damages, like self-help and equitable relief by injunction, which may be available under certain circumstances.[21]

In a more pragmatic approach, another contemporary scholar writes: "With the warning... that what follows is not exact, the law of tort may be said to be concerned with the allocation or redistribution of these losses which are bound to occur in our society."[22]

6. *The three elements of a tort.* – Whatever may be its practical value, the last definition may not (yet?) reflect the generally accepted idea of a tort. If one considers the present, it may be suggested that there are three elements in the concept of tort, two positive ones and one more negative: (a) an injury inflicted; (b) which the law will redress; and (c) which does not constitute a breach of contract or, more precisely, which exists independently of any contractual relation.

Even thus reduced to its fundamentals, however, the concept is far from clear.[23]

7. *An injury inflicted.* – One may dispute, for instance, whether the first element should be "an injury inflicted" or, as suggested by certain writers, a "wrong". The word "wrong" is the precise translation of "*tortus*". For this very reason, however, it might be advisable not to use it to describe a mere factor in the concept of tort. This approach is substantiated by the fact that the word "wrong" implies a judgment, whether moral or at least social: "wrong" is opposed to "right".[24] It implies at the same time damage suffered by someone and faulty or abnormal behaviour by somebody else who has caused the dam-

[18] *Winfield,* Province 32, reproduced in *Winfield and Jolowicz* 77 ("such duty" being replaced by "this duty"). But see *Jolowicz's* comments on this definition, and also earlier comments: *Seavey,* Review of *Winfield*: 45 Harv.L.Rev. 209–212 (1931); *Denning,* Review of *Winfield* (ed. 3), 63 L.Q.R. 517 (1947): "In these days, the form of remedy is hardly an appropriate way to define substantive rights and liabilities. The province of torts is to allocate responsibility for injurious conduct."

[19] *Fleming,* Torts 1. See also *Winfield,* Province 8–9. In ancient FRANCE, "*tortum*" or "*tort*" was a breach of the law: *Ourliac and de Malafosse,* Droit romain et ancien droit. Les obligations (Paris 1957) 290. Today "tort" has disappeared from French legal language. The word, however, still primarily designates conduct of a reprehensible or mistaken nature ("*être dans son tort*" or "*avoir tort*"), or the harm resulting from such conduct ("*faire tort*" or "*faire du tort*"), even though, by extension, it may simply refer to any harm, even harm resulting from a natural event ("*la pluie a fait tort aux récoltes*").

[20] *Fleming,* Torts 1. *Cf. Salmond and Heuston* 15: "A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation"; *Street,* Torts 1, refusing to attempt a definition; *Prosser* 2: "Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages"; *Morris,* Torts 1: "If a quick phrase is needed torts can be called the law of private wrongs." *Harper and James* do not consider the question of a definition. See other definitions in *Winfield,* Province 229–244.

[21] *Cf., Winfield,* Province 231–233; *Winfield and Jolowicz* 14.

[22] *Jolowicz: Winfield and Jolowicz* 1.

[23] *Cf., Tedeschi,* On the Concept of Tort: 3 Israel. L.Rev. 161–183 (1968).

[24] On the necessary caution with which the ideas of "right" and "wrong" should be used in the law of tort, see *Wright,* Introduction 244–245.

age. It may be that when both factors cannot be found there will usually be no tort. However, this may not always be true. Furthermore, even if faulty or abnormal behaviour was required as an element of a tort, this element might be covered by the second requirement: "which the law will redress". Essentially the first element seems to be merely "an injury inflicted".

8. *Redress by law*. – The second element is most vague.

First, is it not to a certain extent to beg the question to state that a tort supposes damage "which the law will redress"? In the COMMON LAW world, of course, this statement has strong historical support. But today, and from a practical point of view, it would appear to be a mere platitude. The first question which comes to the mind of a person who has suffered damage through the act, or by reason of the chattel, of another is whether the law will afford him compensation. To reply that he is entitled to compensation if a tort has been committed and that there is a tort if there is redress by law is clearly not to offer him a satisfactory answer.

Furthermore, the answer is not even an accurate one. The beneficiary of a social security scheme may be entitled to compensation under the scheme when he has suffered an injury from someone or someone's property even if no tort has been committed. Taken literally, the expression "redress by law" covers at the same time redress by the law of tort and redress by social security law. Thus, if it is to refer only to the law of tort, the definition needs to be more precise. Is it possible to draw the distinction between these two methods of compensation? Probably it is, if recourse is had to their various philosophies. This question will be considered later on (*infra* s. 21–25). For our present purposes, however, it suffices to recognise that the criterion of "redress by law" is an ambiguous one.[25]

9. *Not a breach of contract*. – Equally ambiguous is the third of the elements which go to constitute a tort: the availability of a remedy for the damage exists independently of any contractual obligation.

This negative condition may be found in nearly all legal systems. By tradition there is a law of contract and a law of tort. The situation of the debtor who refuses to pay his creditor, or that of a person who refuses to carry out a promised act, seems clearly different from that of a man who has assaulted another, or who has negligently run him over with his car. In the first instance the two persons were already in an existing relationship with one another: the creditor would not have suffered any damage if the debtor had not first assumed an obligation either to pay or to do something for him. In the second case damage is inflicted and objectively suffered; the parties were strangers to each other up to the time of the infliction of the damage (see also *infra* s. 32, 45).

However, even if tort and contract are two fields of law which are traditionally distinguished, their spheres may overlap. A tort *as such* is not the breach of a contract. In that sense, *Prosser* may say that "a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy..."[26]. But the same act may constitute at the same time a tort and a breach of contract. If an injured party has a remedy in tort, he may exercise it even though contractual remedies are also available to him (see *infra* ch. 12). It may be more correct, therefore, even though the sentence has little positive meaning, to state that "no civil injury is to be classed as a tort if it is solely a breach of contract"[27]. Furthermore, and subject to the preceding *caveat*, it is often difficult to say whether or not the infliction of a certain injury falls within the realm of the contractual relations between the parties. Thus, liability of a professional man to his client will normally be regarded in ENGLAND as arising out of the contract between them, whereas in the UNITED STATES such liability would in many circumstances fall within the law of tort [28]. The borderline cases are numerous: some examples will be given later on (*infra* s. 35, 38, 41).[29]

10. *Duty primarily fixed by the law towards*

[25] Equally ambiguous is the criterion of "lawfulness" or "unlawfulness": *idem*, Introduction 245–246.

[26] *Prosser* 2. *Cf.*, *Fleming*, Torts 1.

[27] *Salmond and Heuston* 12.

[28] *Cf. infra* at n. 97. The divergences are more striking if the comparison is extended to legal systems other than the COMMON LAW. Thus, liability of physicians is considered as a problem of tort in the COMMON LAW countries (*infra* ch. 6). This is no longer true in FRANCE since 1936, when the *Cour de Cassation* decided that the liability of physicians towards their clients was a contractual one (*infra* ch. 6; *Mazeaud and Mazeaud* (- *Tunc*) I no. 148; *cf. infra* s. 44). *Cf.* also *Winfield and Jolowicz* 17.

[29] See also *Salmond and Heuston* 13; *Winfield and Jolowicz* 12; *Prosser* ch. 16. The difficulty of ascertaining the respective fields of tort and contract may constrict the unification of the law: see, *e.g.*, Note *Reese*, 16 Am.J.Comp.L. 589 (1968) on the Draft Convention on the Law Applicable to Traffic Accidents.

*persons generally.* – Two other elements often appear in the definition of a tort.[30]

One is the idea that tortious liability arises from the breach of a duty "primarily fixed by the law". The expression is meant to exclude the liability arising from a contract or a bailment. It does not seem to refer to anything else than the idea previously discussed that the breach of a contract is not a tort. It does not seem to throw any new light on the actual relationship between tort and breach of contract or to help in the definition of their respective fields. In particular, in many countries, for instance in FRANCE, the content of the most basic contracts (labour contracts and leases) is fixed by law much more than by the will of the parties (*infra* s. 44 (4)).

Similarly, the idea that the duty broken by a tortfeasor is "towards persons generally" has no other purpose than that of marking off tort from contract, bailment and quasi-contract. Again, the idea is correct, but cannot be used as a criterion.[31] An industrial firm, for instance, assumes contractual obligations towards its thousands of employees. On the other hand, a person who has only one neighbour has duties towards him alone and he commits a tort if he breaches them.

11. *Conclusion.* – To the extent to which a conclusion may be derived from these observations, it must be admitted that it is clear to the jurist, and even to the man in the street, that there is a law of tort. In many cases it is clear that a tort has been committed. There is a central traditional concept of tort, as clear in itself as the concept of contract.

A closer approach, however, reveals that it is impossible to analyse the concept into factors which remain indisputable under all circumstances and which allow one to define it sharply. The content of the law of tort has been developed historically by the courts in their response to changing social needs, and today it constitutes a "hodge-podge".[32]

ii. *In the Continental Countries*

12. *France.* – The non-socialist CIVILIAN jurists do not seem to have been able to provide a more satisfactory definition of a tort.

It is true that the CIVILIAN jurists do not have exactly the concept of a tort. They speak rather in terms of "liability".

In FRANCE, the field of the law of tort is called "*la responsabilité civile délictuelle*". Etymologically, *responsabilité* (liability) is the obligation to answer for damage. "*Civile*" is opposed to "*pénale*", "*délictuelle*" to "*contractuelle*". Therefore, one finds again the idea of an injury inflicted which the law will redress and which does not constitute a breach of contract. Each of these elements is, however, as disputable under FRENCH law as it is in the COMMON LAW.

According to the traditional view liability implies the existence of three factors: (a) fault (a factor which, in the traditional view, included in turn two elements: behaviour different from that of a good *pater familias*, and blameworthiness)[33]; (b) damage; and (c) a causal connection between the fault and the damage. The provisions on which this view of *responsabilité civile* is based are CC art. 1382 and 1383:

"*Art. 1382*: Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."

"*Art. 1383*: Everyone is liable for the damage he caused not only by his acts, but also by his negligence or imprudence."[34]

[30] See *Winfield's* definition reproduced *supra* s. 5. See also *Winfield*, Province 40–229; *Winfield and Jolowicz* 11–13.

[31] See *Winfield*, Province 229–231. *Cf. infra* s. 38 (*Prosser*) and s. 44.

[32] *James*, Midstream 315.

[33] The requirement of blameworthiness was disputed. A statute of 1968 has introduced in the FRENCH CC art. 489-2 stating the liability of insane persons. The discussion is thus narrowed to *infantes*. See *infra* ch. 2.

[34] Translation *von Mehren*, Civil Law 339. The FRENCH text reads as follows: Art. 1382: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*" Art. 1383: "*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.*"

Art. 1382 and 1383 of the BELGIAN CC are identical with the FRENCH ones.

CC art. 2315 and 2316 of LOUISIANA are very close to them, even in the 1870 version. Art. 2315: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of..." (as amended in 1932). Art. 2316: "Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill."

Art. 1053 of the 1865 CC of the PROVINCE OF QUEBEC is an interesting variation of them. Art. 1053: "*Toute personne capable de discerner le bien du mal, est*

Under the traditional view, then, the FRENCH equivalent of a tort would be a fault which has caused damage. The foundation of liability on fault, even in the Civil Code, is, however, disputable. The Code itself contains provisions for vicarious liability (*infra* ch. 3 and 4). These provisions are based in part on the presumption that the fault of the children or the servants implies a lack of control on the part of their parents or masters, or else that the parents have failed in the upbringing of their children, or that the masters have exercised a negligent choice in the selection of their servants, but they are based also on various reasons of policy. Furthermore, as far as the liability of masters is concerned the presumption is irrebuttable. Similarly, the Code imposes liability for damage caused by the fall of a building, and this is a stricter liability than would have been the case had a rigid adherence to the concept of fault been maintained (see *infra* ch. 5 s. 110). And, on the basis of art. 1384, the courts have created a general liability for "damage caused by inanimate things," which cannot be explained entirely in terms of fault (see *infra* ch. 5 s. 24–26). Therefore, even without considering special statutes, it is clear that in many cases a person will be liable even though he has not committed any fault. Fault should not, therefore, be regarded as a necessary ingredient of liability. From a psychological point of view, however, the traditional view of liability based on fault still carries great weight in the minds of many jurists.

13. *West Germany.* – The situation seems approximately the same in other WESTERN EUROPEAN legal systems.

If, however, the FRENCH Code has been a model for many nations, the GERMAN Civil Code has also been one for many others. The GERMAN counterpart to the concept of tort is *unerlaubte Handlung* or *Delikt*. It is defined as an unlawful (*rechtswidrig*) and faulty (*schuldhaft*) violation of the interests of others which not only offends against a special duty but also against a general one.[35] The GERMAN Civil Code differs from the FRENCH Civil Code in two respects. First, in order not to give the courts too broad a discretionary power, its draftsmen have preferred to avoid the adoption of any one single rule comparable to art. 1382 of the *Code Civil*.[36] Instead they have used three basic clauses, supplemented by a number of special provisions. These general grounds of personal liability, based on the concept of fault, are as follows:[37]

§ 823 par. 1: "A person who, wilfully or negligently, without legal right injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising therefrom."

Par. 2: "A person who infringes a statutory provision intended for the protection of others incurs the same obligation. If, according to the purview of the statute, infringement is possible even without any fault on the part of the wrongdoer, the duty to make compensation arises only if some fault can be imputed to him."

§ 826: "A person who wilfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage."[38]

Those clauses, as may be seen, deal separately with: (a) injury to the physical integrity of the person (life, body, health, freedom) and to so-called "absolute" rights (property, and other rights derived from ownership; and, more recently, the right to a continued existence of an established business and the right of privacy), and to values and rights which enjoy a protection against any unlawful infringement, and in relation to anybody who might cause such an infringement (*absolut geschützte Güter und Rechte*); (b) the wrongful infringement of a statutory rule intended for the protection of the citizens and their goods; and (c) wilful and antisocial misconduct.

This somewhat sophisticated approach does not constitute the only difference between the FRENCH and the GERMAN bases of personal liability. Another lies in the concept of unlawfulness (*Rechtswidrig-*

*responsable du dommage causé par sa faute à autrui, soit par son fait, soit par son imprudence, négligence, ou inhabilité*" or "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill."

*Cf.* also ITALIAN CC art. 2043: "*Reparation for wrongful act.* Any malicious or negligent act which causes unjustifiable damage to another obliges the person who has committed the act to make good for the damage."

[35] See, *e.g.*, *Esser* § 106 II; *Deutsch.*

[36] *Von Caemmerer* 65 ss; *Cohn* I 154–163; *Serick* 562–563; *Weitnauer* 808; *Holleaux*; *Deutsch*; *Opoku*. See also *infra* ch. 2.

[37] Translation *von Mehren*, Civil Law 340. The original text is reproduced in ch. 2.

[38] Translation *von Mehren*, *ibidem* 341. *Winfield*, Province 39 suggests to translate "*gegen die guten Sitten*" by: "by an unsocial conduct." For a translation of other provisions of the GERMAN CC, see *von Mehren*, *ibidem* 340–348; *Lawson*, Negligence 199–210.

*Cf.* the 1911 SWISS *Code des Obligations* (CO) art. 41 ss. (English transl. *Lawson*, Negligence 210–213).

*keit*) considered, independently of the concept of fault (*Verschulden*), as a factor of liability. While most FRENCH scholars take unlawfulness as an element of "fault", GERMAN law sees it as a separate element. An act or omission is unlawful if it involves (in a purely objective sense) a contravention of the legal order: in the case of CC § 823 par. 1, any infringement of a value or right mentioned there is presumed to be unlawful and the tortfeasor has the burden of alleging and proving that he had a legal right to act as he did, for instance, by virtue of self-defence, consent or of some special privilege. Fault is an attitude: the attitude of a man who wilfully or negligently has committed an unlawful act or omission. This, at least, is the traditional view. In modern theories ("*finale Handlungslehre*" and related theories), intention and the lack of the care required by the circumstances are taken as elements of unlawfulness; fault (*Verschulden*) is understood in the sense of imputability (*Vorwerfbarkeit*); thus, the realm of unlawfulness is narrowed considerably.[39] The traditional approach to the law is more or less imposed by the two paragraphs of CC § 823. The first one separately enunciates "wilfully or negligently" and "without legal right"; the second one considers in two separate sentences the infringement of a statute and the wrongful nature of this infringement.[40]

In practice the differences between the FRENCH and the GERMAN approaches to liability are, however, much less fundamental than it might appear at first glance.[41] In GERMANY, as in FRANCE, while there are many instances of liability without fault, especially in special statutes which have established a liability for risks created by some dangerous activity (*Gefährdungshaftung*),[42] and while some influential writers (especially *Esser*) draw a sharp distinction between liability for *Unrecht* (illegal conduct) and distribution of losses caused by *Unglück* (mishap), the traditional view of liability based on unlawfulness and fault still carries a great weight.[43] Contrary to the views advanced by some writers, the courts reject a general rule that any ultra-hazardous activity entails liability without fault.

14. *Tort and contract within the law of obligations.* – In all countries of WESTERN EUROPE, contracts and torts are closely linked: they constitute the two main sources of "the obligations", a legal category ignored in the COMMON LAW and still currently defined as a *juris vinculum quo necessitate adstringimur alicujus solvendae rei* (a legal bond by necessity of which we are compelled to some prestation toward somebody).[44] Other sources of obligations which are generally recognized are: unjust enrichment, *negotiorum gestio*, unilateral declaration, a statute, a judgment. The content or the effects of the "obligations" are basically the same whatever be the source of the obligation. Still, they differ on points of detail which, in concrete cases, may have great importance for the parties.

The distinction between contractual and tortious liabilities, therefore, is still very evident in contemporary positive law, even though one may question whether the differences which separate them have any justification other than the weight of tradition (see *infra* s. 36, 39, 41, 46), and even though the distinction is not any clearer in the CIVIL LAW countries than anywhere else (see *infra* s. 41).

15. *Conclusion.* – The conclusion of this survey of the law of WESTERN EUROPEAN countries can hardly be different from the conclusion derived from the observation of the COMMON LAW countries (see *supra* s. 11). One knows roughly what is a tort. But no one is able to analyse the concept of tort or tortious liability into factors which would be indisputable. It has even been already remarked that tortious liability continues to be thought of as being the consequence of a fault while most plaintiffs every day recover damages against a defendant whose fault has not been proved or who has not committed any fault.

[39] *Enneccerus* (*-Nipperdey*), Allgemeiner Teil des Bürgerlichen Rechts (ed. 15 Tübingen 1960) s. 209 ss. – *Contra*: *Niese*, Die moderne Strafrechtsdogmatik und das Zivilrecht: JZ 1956, 457 ss; *Esser* §§ 9, 37, 38.

[40] For comparative studies on the concept of unlawfulness in its relation to fault, see: *Limpens*, La faute et l'acte illicite en droit comparé: Mélanges Jean Dabin (Brussels, Paris 1963) II 723–774; *Marty*, Illicéité et responsabilité: Etudes juridiques Julliot de la Morandière (Paris 1964) 339–350; *infra* ch. 2.

[41] See *von Caemmerer* 69 ss.; *Zweigert* 12–13; *Weitnauer* 811–814.

[42] The field covered by this liability for danger created includes operation of automobile, railroad, streetcar, plane or any other self-propelled vehicle, and use of gas, electricity and nuclear energy. See *Weitnauer* 808–809; *Esser* §§ 114–116; *Larenz* no. 71; *Cohn* 163–167. See also *infra* s. 80–85.

[43] *Cf.*, *Esser*, Responsabilité et garantie dans la nouvelle doctrine allemande des actes illicites: Rev. int. dr. comp. 1961, 481–493.

[44] *Cf.*, *Lawson*, Common Lawyer 161–163; *Winfield and Jolowicz* 18.

iii. *In the Socialist Countries*

16. *The provisions of the recent codes.*[45] – If the law of tort in the SOCIALIST countries reveals a certain degree of originality (see *infra* s. 100), the manner in which it is approached is similar to the ROMANO-GERMANIC one. This is apparent from the reading of recent codes and text-writers.

In the 1959 Civil Code of the HUNGARIAN PEOPLE'S REPUBLIC, for instance, § 339 states that:

"The person who causes damage to another unlawfully is bound to compensate it. He is absolved from liability if he proves that he has acted as could generally be expected in the situation."

In his recent handbook on the law of tort, *Eörsi* studied as the conditions of civil liability: damage, unlawful conduct and blameworthiness, and causation.[46]

This appears again in the 1961 Fundamentals of Civil Legislation in the USSR art. 88, and in the 1964 Civil Code of the RSFSR art. 444. The latter, the two first paragraphs of which reproduce the two first paragraphs of the former, provides that:

"Injury caused to the person or property of a citizen, as well as injury caused to an organization, is subject to compensation in full by the person who has caused such injury. – A person who has caused injury is relieved of the duty to make compensation if he proves that the injury was not caused through his fault. – Injury caused by lawful acts is subject to compensation only in cases specified by law."[47]

Again the 1964 Civil Code of the *Czechoslovakian Socialist Republic* art. 420 reads as follows:

"Every citizen is liable for the damage he has caused by the breach of a duty provided by law. – The citizen exonerates himself of any liability if he proves that he has not caused the damage by his fault."

Comparable provisions as regards the liability of organizations may be found both in CC art. 421 and in the 1964 Economic Code art. 145.[48]

Finally, the first clause of the Title of the 1964 Civil Code of the PEOPLE'S REPUBLIC OF POLAND devoted to torts (illicit acts), art. 415, states:

"Whoever by his fault causes damage to another shall be liable to repair it."

Fault remains the main basis of the law of torts.[49]

Due reservation being made again for the originality of the SOCIALIST laws of tort, the concept of liability on which they are based does not therefore seem to differ from that which is applicable in the countries of WESTERN EUROPE. The similarity is such that if in the USSR, CZECHOSLOVAKIA, BULGARY, HUNGARY and EAST GERMANY, distinction is made, as in WEST GERMANY, between unlawfulness and fault, the distinction, on the other hand, is rejected in POLAND,[50] while in YUGOSLAVIA, authors are divided between the FRENCH and the GERMAN analyses.[51]

17. *The place of fault.* – To a great extent, the discrepancy which exists in the WESTERN EUROPEAN countries between the theory according to which liability derives from fault and the practice of subjecting to liability a person or an organization who has not in fact committed any fault may also be observed in the SOCIALIST countries.

However, perhaps it is less prevalent. Among the functions of civil liability, SOCIALIST countries give more importance than NON-SOCIALIST ones to prevention and deterrence of anti-social conduct, perhaps as a means of mobilizing the energies of the citizens (see *infra* s. 53, 100, 155). Furthermore, as far as personal injuries are concerned, social security, social institutions and the possibilities in a state-planned economy of offering a different job to someone who has been victim of an accident are factors which make tort compensation somewhat less necessary, from a humane point of view, than in NON-SOCIALIST countries – or at least less necessary than in NON-SOCIALIST countries where private insurance is

[45] CZECHOSLOVAKIA: Code civil: Bull. dr. tchécosl. 21 (1964) 47–155; Code du commerce international: Bull.dr.tchécosl. 21 (1964) 157–298; Code économique: Bull.dr.tchécosl. 22 (1965) 43–162; Code du travail: Bull.dr.tchécosl. 23 (1966) 59–170.

HUNGARY: Civil Code of the Hungarian People's Republic (Budapest 1960); Loi IV de 1960 portant le Code civil de la République Populaire Hongroise: Revue de Droit Hongrois 1960, 5–176.

For POLAND see List of Principal Works *sub* 21; for the UNION OF THE SOVIET SOCIALIST REPUBLICS see List of Principal Works *sub* 27 (b).

[46] *Eörsi*, Felelősség 119–308 (*cf.* Fundamental 116–124). On the concept of fault, see *Eörsi*, Fundamental 56–59; *Czachórski*, Faute.

[47] Transl. *Gray and Stults*. See *Rîasentsev a.o.* (*-Panaiotov*) II 334.

[48] *Kanda* 897–898, 901.

[49] *Czachórski and Wasilkowski* (ed.) 40; *Szpunar*, Tort 87; *idem*, La place 864–865; *Czachórski*, Faute.

[50] *Czachórski*, Faute 45–46. It also seems to be rejected in RUMANIA: *Cadere* 77–101.

[51] *Blagojević*, Essai 172; *cf.*, *idem*, Délits 402–408. *Konstantinović* takes the FRENCH approach while *Jaksic* takes the GERMAN one. *Cf.* for POLAND, *Szpunar*, La place 865.

not in widespread use.[52]

In fact, however, there are many instances in SOCIALIST laws where liability without fault may be established.

First, most SOCIALIST laws impose a presumption of fault on the person who has caused damage (see *infra* s. 100). Such a person is, therefore, liable for the damage unless he can prove he was not at fault. In all SOCIALIST codes, furthermore, a stricter liability even though not an absolute one, is imposed on organizations and citizens whose activities or instrumentalities (motor vehicles) involve extra hazards for the citizens. They are usually bound to make good all damage suffered by someone as a consequence of their activity unless they prove that it occurred as a consequence of *vis major* or the intent of the victim, or at least that it was his fault (see *infra* s. 100 and ch. 5 s. 36).

Other examples of strict liability may also be found in all SOCIALIST codes. A YUGOSLAV scholar has even written recently that if the trend of penal liability was toward individualisation and subjectivism the trend of civil liability was toward compensation and objectivism.[53] Even if this view may appear questionable to the majority of scholars in other SOCIALIST countries,[54] at least it shows that fault does not impose its limits to liability.

Finally, an organization may be held liable for the consequences of a fault committed by one of its members while it was properly organized and working perfectly, and no fault had been committed by anyone other than the tortfeasor. Obviously the phenomenon is not special to SOCIALIST countries, but has received more attention there.[55] Without entering into philosophical discussions on the nature of a legal entity, one may see as a fact that the fault of one member of the organization will reduce the organization's incentive funds and therefore have negative consequences virtually for all the organisation's members.

18. *Tort and contract.* – In SOCIALIST countries as in NON-SOCIALIST countries, tortious liability is usually distinguished from contractual liability.

Thus, the 1959 Civil Code of the HUNGARIAN PEOPLE'S REPUBLIC, in its fourth part, devoted to "Obligations" (see *supra* s. 14), deals separately with "Contract" (Title I) and "Non-contractual liability for damage inflicted to others and unjust enrichment" (Title II; Title III deals with specific contracts).

The 1961 Fundamentals of Civil Legislation of the USSR contains a Title III dealing with "The law of obligations". Again, while Chapter I contains "General provisions concerning obligations", Chapters II to XI cover specific contracts, Chapter XII relates to "Obligations which arise from the causing of harm", and Chapter XIII to "Obligations which arise as a result of rescue of socialist property". A comparable division of the matter may be found, of course, in the 1964 Civil Code of the RSFSR and Civil Codes of the other Union Republics.

The 1964 Civil Code of the POLISH PEOPLE'S REPUBLIC more or less follows the same division. In the third part (Book III), covering "Obligations", one finds, *inter alia*, Title I, containing "General provisions" (including the law of damages), Title III, containing "General provisions relating to contractual obligations", Titles V and VI, respectively dealing with unjust enrichment and torts ("illicit acts"), Title VII, devoted to the content of contractual obligations and contractual liability (even though the word "contractual" does not appear in the title of the Title), and Titles XI to XXXVI dealing with specific contracts.

However, the situation is different in CZECHOSLOVAKIA. In the 1964 Civil Code of the CZECHOSLOVAKIAN SOCIALIST REPUBLIC, which is novel in form, both types of liability are, as in the 1950 Civil Code, governed by the same rules. One of the eight Parts, the Sixth, devoted to "Pecuniary profit without just cause", and which contains art. 420 and 421 (referred to above, see *supra* s. 16), equally applies to contractual and delictual liabilities. Only the content of the various contracts is provided for in the Fourth Part, which deals with "Services", while other duties are dealt with in the Fifth Part of the Code, which covers "Rights and duties arising from other juridical acts," including civic assistance, the contracts not covered in the Fourth Part, and public competition.[56] Similarly, the general rule of the 1964 Economic Code art. 145 also governs both types of liability.[57] A distinction between them in the CZECHOSLOVAKIAN legislation is to be found only in the fact that the 1963 International Commerce Code deals only with contractual obligations and liability.[58]

[52] *Cf.*, *Hazard*, Personal Injury and Soviet Socialism: 65 Harv.L.Rev. 545–581 (1952); *Eörsi*, Quelques problèmes 749–751; *infra* n. 321.

[53] *Blagojević*, Essai 171.

[54] *Cf.*, *Knapp*, Responsabilité 655.

[55] See *ibidem* 656–657.

[56] *Kanda* 896; *Knapp*, Responsabilité 655; *Ovečková and Steiner*.

[57] *Kanda* 901; *Knapp*, Responsabilité 655.

[58] *Kanda* 903–904.

Even outside CZECHOSLOVAKIA, however, the distinction between tortious and contractual liability usually seems to have less practical importance in the SOCIALIST countries than in the NON-SOCIALIST ones and to give rise to less discussion.[59]

19. *Conclusion.* – The conclusions to be derived from this short survey are twofold.

On the one hand, the SOCIALIST countries seem to have, to a certain extent, freed themselves from the vexing problem of drawing the borderline between tortious and contractual liability. The scope of the law of tort is probably clearer than in NON-SOCIALIST countries.

On the other hand, the concept of tortious liability, if it is sufficiently clear to be a workable one, as in the NON-SOCIALIST countries, is such as to frustrate any attempt to define it with any degree of precision.

## B. THE DELIMITATION OF THE LAW OF TORT

20. *The problem.* – If the concept of tort thus seems to escape any clear and indisputable analysis, the province of the law of tort seems equally hard to define.

At least two distinctions are necessary: the law of tort should be distinguished from social security law on the one hand, and from the law of contract on the other. Finally, the relationship of tort and crime should be briefly considered.

### i. *Tort Law and Social Security Law*

#### a. The Distinction

21. *A first view of the distinction.* – At first sight, the laws of tort and of social security are clearly different.[60]

The law of tort basically concerns damage which is unlawfully inflicted on someone or to his property either by somebody else or by a thing owned by somebody else or a person for whom somebody else is responsible. It aims at compensating for a breach of the social order. Social security affords a broader protection. It concerns only persons, not goods. But it protects them against all damage suffered whether as the result of mere sickness or of someone else's wrongful conduct. It even goes beyond damage in the normal sense of the word: it protects persons against the lack of resources due to unemployment or to old age. It is based on solidarity between men in a given society.

The two fields of law seem easy to distinguish. It may be wise, however, to consider more deeply their respective philosophies.

22. *A first approach to the function of the law of tort.* – The basic justification of the law of tort – to give here a preliminary view of the question (*cf. infra* s. 154–178) – is not any different from the justification of law in general. Tort law, as law in general, is the tool which permits a maintenance of the balance between man's freedom and his social duties and powers.[61]

Man, isolated from a society (assuming we may actually think of man outside any society) would enjoy a freedom without any external restraint. He would act at his pleasure, take the things he desires, realize his destiny at his will. A society of men, however, needs to harmonize the activities of its members: and this is the task of law. The freedom of each man may continually collide with the equal and concurrent freedom of the others.[62] "The coexistence of freedoms" is, as said by *Kant*, a basic aim of law (see also s. 24).

It is the fundamental aim of most legal institutions: property, contracts, succession, the family, *etc.* Most of these institutions, however, concern persons who are bound to each other by contractual or familial ties. Two institutions perform their function in a more objective manner. One is property, which roughly speaking gives to the owner of a thing a power which everyone should respect. The other is tort, which, subject again to necessary qualifications,[63] imposes duties on everyone towards all his fellow citizens.

[59] *Cf.*, *Knapp*, Responsabilité 654–655; *Eörsi*, Felelősség 105–118. See also HUNGARIAN CC § 318.

[60] *Cf.*, *Hellner*, Social Insurance.

[61] See *Prosser* 15 and, on the social importance of the law of tort 14–16; *Fleming*, Torts 7 ("The history of the law of torts has centred around the search for an adjustment between two basic interests of individuals – the interest in security and the interest in freedom of action"); *Holmes* 144; *Winfield and Jolowicz* 1; *Wright*, Introduction; *Stone*; *Calabresi and Melamed*; *Mazeaud and Mazeaud (–Tunc)* I no. 417; *de Naurois*, Obligation. See also the theories of *Nordling and Lundstedt*, Legal Thinking Revised (Stockholm 1956), summarized and discussed by *Hellner*, Legal Philosophy (see esp. 160 on "the method of social welfare" and 169 on the teleological character of the law of tort).

[62] *Cf.* the FRENCH 1791 Declaration of Rights of Man and Citizen art. 4: "Liberty consists in the possibility of doing anything which does not harm others; therefore, the exercise by each man of his natural rights has no other limits than those which assure to the other members of the society the enjoyment of these same rights."

[63] See *Limpens*, La théorie de la "relativité aquilienne" en droit comparé: Mélanges René Savatier (Paris 1965) 559–581; *infra* ch. 2.

In order to balance and harmonize the freedoms of citizens which have no contractual or family ties, the legislator has enunciated a great number of detailed rules: thus, the traffic rules and safety or health regulations. The breach of one of these rules or regulations, if it produces damage, usually constitutes a tort. However, even in the present times of intensive regulation, the legislator cannot and should not prescribe to each of us the proper mode of personal conduct at each and every moment. Even if it were possible, it would no longer be a harmonization of freedoms, but a destruction of them. Therefore, beyond all the precise and detailed rules laid down by the legislator, a general principle must be recognized: we must behave in a social manner, *i.e.*, as persons who recognize that they are members of a society of men with equal rights to the enjoyment of their freedom. One might say that a citizen commits a fault when he does not behave in a social manner, as a man who recognizes the equal rights of the others to the enjoyment of their freedom.[64] Certainly, tortious liability is not limited to the actual commission of fault. Vicarious liability and liability for damage caused by things may oblige a citizen to answer for the fault of someone else or even for injuries which arise when no-one is at fault. However, the basis of tortious liability is certainly the breach of the duty to behave as a member of a society of men with equal rights.

23. *A necessary qualification.* – This does not mean that one is liable for any damage he causes to another.

On the contrary, nobody can live without harming others. "*On existe toujours aux dépens d'autrui*", says a character of *Jean-Paul Sartre*. Nobody can open a business without harming the persons already engaged in this type of business. Nobody can take part in a competition without hurting his competitors. Nobody can get engaged and married without preventing others getting engaged to and marrying the same person. Nobody can at will play the piano in an apartment or listen to the radio or to a record without disturbing his neighbours. Nobody can drive a car without at least creating a risk of injury and death for many citizens. However, within limits, everybody is entitled to open a business, take part in a competition, marry, play the piano and drive a car.

There is, therefore, a certain right to interfere with the interests of others, to cause nuisance to them, and even to cause risk to their lives or their physical integrity, because this is the unavoidable consequence of life in a society, the very condition of the existence of a society. Every citizen may inflict such nuisances and risks on others because he too has in turn to suffer them. He has, so to speak, to abide by the rules of the game. For instance, the businessman in competition with others may hurt them, but only by "fair" means. One may drive a car, but only in accordance with all the safety and traffic regulations and, more generally, subject to the duty not to create an abnormal degree of risk for others.

24. *The function of social security.* – The law of social security works in a different context. The point has just been made that life in society implies restraints on citizens in the enjoyment of their freedom and that it was at least one of the purposes of law to establish "the co-existence of everybody's freedoms." This negative view of law, however, is only a partial one. Life in society is not only a burden for man, an encroachment upon a theoretically complete freedom. Above all, it is a protection for man. Tribal life assures protection against the dangers of nature and enemies. In more developed countries, community life assures not only protection against nature and enemies (even though it creates enemies), but it also assures the cumulative benefits of the scientific, technological, cultural and spiritual efforts made in the community (and even in other communities, since no community is any longer isolated from the others) by the present members of the community and by the generations which preceded them. To a certain extent, the communication of these benefits is a spontaneous one. In other respects, however, it is controlled and even organized by law.

Law, in the primitive stage of a custom which is religious as well as legal in nature, assures the solidarity of the members of the same tribe. In more developed societies, law still assures in many of its fields the solidarity of men. It affectively obliges members of the same family to respect the solidarity which should be natural between them; it provides for the protection of scientific discoveries or literary or artistic creations, and thus it serves to promote the riches of life and their communication; it provides for a system of taxation which permits the establishment of public services, many of them for the sake not only of public peace, but of the general welfare. Finally, in its last stage of development,

[64] This general view should not hide the difficulty of determining the duties and rights of citizens in given situations. See, *e.g.*, *Hughes*, Liability for Loss Caused by Industrial Action: 86 L.Q.R. 181–207 (1970).