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A CASEBOOK ON

TORT

SEVENTH EDITION

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TABLE OF STATUTORY INSTRUMENTS

TREATY OF ROME & EC DIRECTIVES

RULES OF THE SUPREME COURT

INTRODUCTION

IN almost all the cases in this book the plaintiff is claiming money (damages); only occasionally does he ask the judge to stop the defendant doing something (injunction). In almost every case the plaintiff claims this money as compensation for harm he has suffered, though sometimes the defendant is required to pay more, as a punishment (*Rookes* v. *Barnard*, below, p. 327). The plaintiff's claim is that the defendant (or someone for whom he is responsible) did wrong to cause this harm. Thus the law of torts determines when one person must pay another compensation for harm wrongfully caused. At any rate that is its primary function. Other functions will be mentioned later.

A tort suit, then, is very unlike an action of debt, which is a claim for a specific sum, rather than for damages equal to the plaintiff's loss (*e.g.* a tax claim, or an action for the price of goods or the repayment of a loan). It is unlike an action on a property-insurance policy, where the claim *is* limited to the plaintiff's loss, because in such an action it is not claimed that the insurance company *caused* the loss. It is not like a claim for compensation after an expropriation; for there it is not claimed that the loss was *wrongfully* caused (*e.g. Burmah Oil Co.* v. *Lord Advocate* [1965] A.C. 75). But a tort suit is quite like an action for damages for breach of contract, for there, too, the amount claimed is claimed as compensation for harm which the defendant has caused wrongfully, namely, by breaking his word. Indeed many actions for damages may be based indifferently on contract or on tort.

A contractual claim can arise only where there is a transaction of some kind between the parties, such as sale, employment, carriage and so on: if there is no transaction, but only a collision between strangers, then any claim must be in tort. But a collision may well take place between the parties to a transaction, and it has long been the law that in such a case the victim may have both a tort and a contract claim. Now people involved in collisions usually suffer *physical* harm, that is, they actually get hurt, whereas the normal outcome when a transaction goes sour is that the affected party is just worse off, that is, suffers merely *economic* harm. The law of tort used to concern itself mainly with physical harm but recently it has become increasingly ready to redress purely economic harm, and the result is that more and more breaches of contract simultaneously constitute torts as well. Already judicially regretted (Mustill L.J. in *Bell* v. *Peter Browne & Co.* [1990] 3 All E.R. 124, 134), this is going to present major problems in the coming years, especially if the law reformers have their way and allow A to sue B for breach of B's contract with C, which is not yet possible.

The law of tort is at bottom common law, the work of judges reacting, in the light of what has already been laid down, to the grievances of individuals. But a great deal of it has been replaced or overlaid by statute, the work of Parliament responding to social problems in the light of what is desirable and under pressure from

various lobbyists, such as law reform bodies. Often Parliament has intervened to reverse specific rules laid down by the judges. Thus whereas the judges used to reject all claims when a person was killed, Parliament came to the aid of widows and orphans in 1846 with the Fatal Accidents Act (now in its 1976 version, last amended in 1982). Again, at common law a claim for personal injuries expired if the tortfeasor died (as he commonly did in motor accidents), so the Law Reform Act 1934 allowed the living to sue the dead (and *vice versa*). Until legislation in 1945 a victim couldn't sue if he himself was at all to blame for his injuries (as people often are) even if the defendant was much more greatly to blame; until 1947 no one could sue the central government in tort (though local authorities were sitting ducks). Much legislation emanates from Brussels, now that national legislatures are no longer sovereign. Thus a Directive already provides that a person injured by a defective product need no longer prove that its manufacturer was at fault, and a Directive on Services will soon lay down that the supplier of a service must pay for any physical harm it causes to individuals unless he can prove that he was not to blame. Again, thanks to Brussels, motorists must now insure against liability for damaging property as well as people, as if Audis and BMWs were as valuable as our *concitoyens* and although it would make much more sense for people to insure their own property and not sue others for damaging it.

Sometimes, instead of changing specific rules, legislation has tried to tidy up an area of the law. Examples would be the Occupiers' Liability Act 1957, the Animals Act 1971 and the Torts (Interference with Goods) Act 1977. There has, however, been no serious proposal to codify the whole of the law of tort. National codes may well be a thing of the past, given the unremitting flow of pragmatic and unprincipled mandates from Brussels, but that aside, the wisdom of codification turns on two considerations: whether the area of law is coherent and its rules general enough, and whether the draftsmen possess the requisite technique. In both regards the present situation in England is unpropitious: while it is true that judicial synthesis of principle and legislative excision of anomalies have rendered the rules of tort much more general and abstract (and thereby reduced their number), tort as a whole is still far from homogeneous, thanks to the presence in it of eccentric native bodies such as defamation and conversion; and if the drafting technique displayed in the Animals Act 1971 (a product of the Law Commission itself) were adopted for codification, our code of tort alone would be nearly as long as (and less readable than) the American Restatement, whose 951 sections occupy four whole volumes.

Continental lawyers are more concise. Until it had to incorporate the EC Directive on Products Liability, the French law of delict was contained in a mere five articles of which the first reads: "Every act whatever of man which causes damage to another binds the person whose fault it was to repair it" (French Civil Code (1804), Art. 1382). The German Civil Code of 1900 deals with the law of unlawful acts in 31 paragraphs, whose principal one reads: "A person who on purpose or carelessly injures another contrary to law in his life, body, health, freedom, property or other right is liable to compensate that other for the resulting damage" (§ 823). Of course, these legislative provisions have received very many judicial glosses since their promulgation, but there has been no major legislative reformulation despite the vast changes in social structure and physical environment which have taken place since their enactment. Students might well test the results of the cases in this book against the words of these statutes.

If there is no demand for codification of tort law in England, there have been and continue to be plenty of proposals for reform. The Pearson Commission in 1978 made 188 of them (Cmnd. 7054), and a few of them have been adopted. Though the Commission was concerned only with personal injury, and not even all of that, it did thoroughly review the rules and roles of tort law in that very important area. Its primary recommendation was that tort law be seen in the context of the other existing methods of alleviating harm resulting from injuries and death, the most important of which is the social security system. The Commission proposed to tilt the balance even more in favour of the social security system, first, by giving those injured on the highway automatic benefits like those injured at work (which has not been done), and secondly by refusing damages for pain and suffering for the first three months (this has not been done either) and deducting the full amount of any social security benefits received by the victim (which has now been done for other reasons; see below, p. 631).

This was the Commission's way of resolving the tension between the moral basis of tort law, that only wrongdoers pay for the harm they cause, and the rationale of social security, that all those who suffer harm should be helped, regardless of how it occurs. The Pearson Commission's proposals disgratified those who think it wrong to discriminate between people who suffer similar injuries according to whether it is someone else's fault, or no one's fault or their own fault, while others were relieved that even in the Welfare State some role should be allowed to the view that everyone should conduct himself with due regard for the physical well-being of his fellow-citizens, on pain of a monetary sanction proportioned to the harm he causes if he does not, even if this means that the victim of bad luck gets less than the victim of bad management.

It is one thing to say that victims are entitled to payment: it is another to see that they receive it. Here the law has several devices. First, it makes employers liable for the harm their employees cause in the course of their business. Secondly, as every motorist knows, it often imposes on those likely to incur liability an obligation to take out insurance which will benefit the victim. Two other important institutions are also designed to procure that those entitled to payment actually receive it. Victims of negligence on the highway can ultimately look to the Motor Insurers' Bureau, which has agreed with the Minister to meet claims against which the tortfeasor should have been insured; and the victims of crimes of violence can look to the Criminal Injuries Compensation Board, for which a statutory framework now exists (see below, p. 177), though it is not yet in force.

Mostly, however, a person who cannot look to a tortfeasor must look to his own insurer, especially for property damage. In cases where

insured property has been tortiously damaged the courts have resolutely held that the owner's claim against the tortfeasor is unaffected by the fact that the owner has insurance. Of course the owner cannot keep both the insurance proceeds and the tort damages: he must refund the insurance proceeds out of the tort damages or, as most often happens, allow the insurance company to prosecute his claim against the tortfeasor. The unsatisfactoriness of the result is concealed from us by the fact that the insurance company, by "subrogation," sues in the name of the insured owner: we therefore fail to realise that money is being claimed by a company which was paid to take the risk of losing it. Insurance has another role, however, for liability in tort is one of the hazards one can (and should) insure against. The prevalence of such insurance induces the judges to impose liability on defendants whom they would be very reluctant to make pay out of their own pockets. As Lord Denning said in 1967 "We assume that the defendant in an action of tort is insured unless the contrary appears." (*Post Office* v. *Norwich Union Fire Ins.* [1967] 1 All E.R. 577, 580.)

The law of tort covers a wide range of situations, from the tragic to the trivial. In this book one will come across an urchin who was blown out of a manhole (p. 221), a politician riled by criticism (p. 529), a credulous advertising agent (p. 63), a television mogul miffed at being photographed (p. 354), and a tycoon piqued at being pipped to the post (p. 597). Every situation, however, can be broken down into just a few structural elements which affect the outcome, and it would be right to say a preliminary word about each of them. They are (i) the victim's loss, (ii) the actor's behaviour, (iii) the relationship between the loss and the behaviour, (iv) the relationship between the plaintiff and the actor or defendant and (v) the plaintiff's behaviour. As each case in this book is read, its facts should be classified under each of these heads; and then the conceptual devices which are used to justify the decision should be studied.

1. The Victim's Loss

A judge once said "It is difficult to see why liability as such should depend on the nature of the damage." The difficulty is not apparent. Liability "as such" never exists; liability is always liability *for* something, and in tort it is liability to pay for the harm caused. To cause harm means to have an adverse effect on something good. There are several good things in life, such as liberty, bodily integrity, land, possessions, reputation, wealth, privacy, dignity, perhaps even life itself. Lawyers call these goods "interests." These interests are all good, but they are not all *equally* good. This is evident when they come into conflict (one may jettison cargo to save passengers, but not *vice versa*, and one may detain a thing, but not a person, as security for a debt). Because these interests are not equally good, the protection afforded to them by the law is not equal: the law protects the better interests better. Accordingly, the better the interest invaded, the more readily does the

law give compensation for that harm. In other words, whether you get the money you claim depends on what you are claiming it for. It would be surprising if it were otherwise.

The kinds of damage most frequently complained of are personal injury, property damage and financial loss, *i.e.* damage to three of the best things of life, namely, health, property and wealth.

As between health and wealth, the priority would seem to be clear: it is better to be well than wealthy. But people who are poorly soon become poor, because they cannot earn their living and have to buy medicaments: personal injury has economic consequences. Is it *because* of those economic consequences that we protect people's bodies, seen as units of production and consumption rather than as sources of pleasure? If the question appears cynical, one should ponder the recommendation of the Pearson Commission that victims of personal injury should receive a full indemnity in tort for their lost earnings and extra expenses, but nothing for their pain and suffering for the first three months.

That people are more important than things has been said often enough. But are things more important than money? The question is topical, because the law of tort has recently started to extend to money interests the protection it has long given to tangible property, and it is serious, for its answer may tell us something about the values of our society.

Things, unlike people, can be bought and sold, that is, they can be exchanged for money. Things are "money's worth." But there are valuables, *e.g.* stocks and shares, which are not things. Things are defined as objects which can be touched: if it is invisible and intangible, it isn't a thing. Thus things appeal not only to economists but also to the human senses. The car which is merely an asset to the finance house which owns it is a positive pleasure to the hire-purchaser who drives it. The point is clearer with regard to immovables: a house has a human value to the family who live in it and make their home there, but to the building society which has lent the money to buy it, its value is purely economic. A legal system which was concerned with human values would be right to give greater protection to tangible property than to intangible wealth. This is what the law has done until recently: claims for property damage have been welcomed while claims for mere financial loss have been rejected; and the law has been much readier to grant a claim to the possessor of a chattel—the person who is enjoying it—than to the owner out of possession—the person who only profits from it. Of course there is one class of person, the artificial or legal person, to which this distinction between a thing and a disembodied asset can have no meaning whatever: that is because artificial persons have no senses. For companies it is immaterial whether there is one item less on the stock book or one item less on the credit side of the ledger. For people without senses, things are merely values, and a society without sensibility would so treat them. Our society is showing signs of doing so.

The differing values of the interests in health, things and wealth may be illustrated by three disasters which struck Britain in 1987–88. On October 15–16, a hurricane destroyed about 15 million trees. On

October 23 the stock market collapsed, and the "value" of shares fell by nearly a quarter. The following July, 166 workers on the Piper Alpha oil-rig in the North Sea were killed, almost a third of the normal annual total of industrial deaths. Piper Alpha was a tragedy, matter for mourning; the hurricane was a great pity, for trees are beautiful and growing things—"*Ombra mai fu*" and so on; but to all right-thinking people the stock-market crash was a matter of relative, if not absolute, indifference. Note that the true importance of these events is in *inverse* proportion to the ratings economists would accord them. This obvious point has to be made because people's thinking is grossly corrupted by Marxists and marketeers alike, for both Communists and Capitalists appear equally to believe that money is the root of all good.

The point is not that the legal system should not protect money values at all: it is that they should be protected less well than more important interests. If you want your wealth preserved, you should pay a stockbroker to look after it, and sue him in contract if he fails. There may be a few other people, unpaid but very close to you, on whom you can properly count to be careful of your pelf. But of others you can demand only that they not be wicked, dishonest, fraudulent or otherwise criminal: you cannot expect that they should behave reasonably just to keep you rich.

We have spoken thus far as if damage were requisite and as if the question whether there were damage or not was a pure question of fact. But suppose that I am locked up for five minutes. It would be difficult for me to show that this outrage had caused me any actual harm, unless I broke my leg trying to escape or missed an important engagement. Yet the person responsible should be made to pay. It is possible to hold him liable by saying that he has interfered with my right to liberty, and that my right to liberty is so important that to invade it is to cause me damage *ipso facto*. By using the concept of "right" we can gloss over the fact that no damage need be proved. It might, however, be better to admit that in addition to its more obvious function of redressing harms the law of tort also vindicates rights: it has a constitutional as well as a compensatory function.

2. The Actor's Behaviour

(a) *The act*

Positive acts trigger liability more easily than omissions to act: the duty not to cause harm precedes the duty not to let it happen, for it is worse to set fire to Rome than to fiddle while it burns. The thief and vandal are always liable; not so those who merely fail to forestall or deter them. The occupier of premises must certainly bestir himself for the safety of his visitors, and parents must try to protect children from themselves and from others (as well as others from them), but generally at common law if you want someone to do something for you, you must pay him, and then if he doesn't do it you can sue him for breach of contract. Duties to act are not readily imposed by the common law. The legislature, however, is constantly imposing such duties on people,

usually on public bodies. Those bodies do not always live up to their obligations, and it is one of the urgent questions of tort law how far they may be made liable for failing to do so. We have come a long way from the view that "not doing is no trespass," but it remains true that one is more likely to be liable for creating a danger than for failing to remove one.

Thus we can oppose acts to omissions. We can also oppose acts to activities. A Lord Justice of Appeal once said: " ... our law of torts is concerned not with activities but with acts" (*Read* v. *Lyons* [1945] 1 K.B. 216, 228 (Scott L.J.)), and he was apparently right. So if a person is run down in the street, he cannot say to the driver: "When you started driving, you enhanced the risk of people being hurt; I have been hurt, so you must compensate me." The victim must show that the defendant drove badly, that in the activity of driving just before the impact the defendant did some particular act he ought not to have done. But although this is generally true, there are areas of the law where liability is imposed because the defendant was running an activity, and although he himself has acted quite properly. Suppose the careless driver was employed by a firm and was on the firm's business at the time of the collision. The victim can sue the firm if he establishes the fault of the driver. The firm responds for careless conduct in its activity, though the firm itself is otherwise free from fault (p. 259).

After scrutinising our common and statutory law the Pearson Commission thought they could descry an embryo principle which "can be broadly stated as one of strict liability for personal injury caused by dangerous things or activities." One of their proposals was to implement and expand this principle by having a statute which would lay down a framework of liability and a series of statutory instruments which would specify the activities and things to which it would apply. The proposal is unlikely to be adopted, though the Law Commission is still toying with it.

The behaviour of things, as opposed to human acts, is of importance to the tort lawyer because most people who are hurt are hurt by things, especially by metal things. The French Civil Code says: "A person is responsible not only for the damage caused by his own act, but also for the damage caused by the act of those for whom he is responsible, or of the things which he has in his control" (Art. 1384). There is no such principle in the law of England, but there are instances in which a thing may involve liability. *Donoghue* v. *Stevenson* itself, the keystone of the tort of negligence, was a case where the plaintiff was injured by a thing—a bad bottle of ginger-beer. Nowadays Mrs. Donoghue would not have to allege or prove that Stevenson was negligent, for when a product—a thing which has been manufactured or processed—injures or kills a person, the producer is liable even if he was not to blame at all: attention has moved from the conduct of the maker to the condition of the thing. Again, if I am hurt by a thing under the control of the defendant, and the damage would not have occurred if the thing was properly controlled, then the behaviour of the thing, in the absence of explanation by the defendant, may bespeak carelessness on his part in looking after it. *Res ipsa loquitur* is the Latin form (p. 163). Again, if

the defendant has brought an unusual thing on to his land, and it escapes and does damage to mine, he is liable as a matter of law (p. 444). If the defendant keeps a savage beast, and it gets out of control and bites me, then again, as a matter of law, the defendant is liable (p. 467). The rule is the same, in this regard, if the defendant's cattle escape and eat my tulips (p. 467).

Further, we can oppose acts to words. Lawyers have a tendency to confuse them (*Acts* of Parliament, *deeds* of individuals), and not only lawyers, since a Yuppie or a skinhead is said to "make a statement" when he drives his Porsche at breakneck speed or wears his skull bare. Nevertheless, we should try to keep acts and speech distinct, even if both can have harmful effects. First, speaking is an exercise of a specifically guaranteed freedom, in the way that driving a car, for example, is not; one must therefore be chary of unduly restraining verbal communication by too ready an imposition of liability if something goes wrong. Secondly, it is technically rather easy to impose liability for words, because one can *prove* the falsehood of what was said whereas one can only *argue* for the wrongfulness of what was done: it is not easy to remember that being wrong is not necessarily doing wrong. Finally, acts commonly impinge directly on the person hurt, whereas words operate by indirection, by inducing him to hurt himself or inducing others to hurt him. The concept of reliance is important here.

It should be stressed that the contrast between acts, on the one hand, and omissions, activities, words and things on the other, is drawn not to suggest that the former alone should or do attract liability, but to emphasise that one should be conscious of which is involved in a particular case, and that the law is probably right to have developed rather differently with regard to them.

(b) *Quality of the act*

In most cases it is not enough to show simply that the defendant caused the damage. His conduct must be appraised and evaluated before liability follows. The pre-eminent test is whether the defendant acted *reasonably*. On the whole, a defendant who has acted reasonably is not going to have to pay damages. But there are exceptions, and it is very important to mark them when they occur. Sometimes the plaintiff's interest is so important that it is protected even against reasonable behaviour which infringes it. Thus a person's land is protected against persons who reasonably but erroneously believe themselves entitled to enter it (p. 348); a person's liberty may be protected against officials acting bona fide but in excess of their powers (p. 335); a person's stolen chattels are protected against persons who reasonably buy or sell them in the normal channels of commerce (p. 488); a person's reputation is protected even against imputations unintended by the writer (p. 519). These are also the cases where no damage need be proved—and there is a connection between these facts.

Sometimes a person is not liable for acting unreasonably, even though he meant to cause the harm. This is especially true where the harm is purely financial. After all, businessmen are supposed to compete with

vigour, that is, to beggar their neighbour, and labour is expected to wrestle with management: no one said they saw much wrong when the National Union of Mineworkers deliberately caused a loss of £6,000,000,000 by a strike in the year ending March 1985, though the associated sabotage and mayhem were, by reason of the kind of harm in issue, sternly discountenanced. Special protection is afforded to officials empowered by law to make decisions, often harmful in their results, as their freedom to decide would be inhibited if they were liable just because their decision could be described as unreasonable: they are liable in damages only if they have acted outside their powers, or at least very unreasonably indeed. Again, freedom of speech should not be unduly curtailed (though it is); Members of Parliament and those involved in litigation may say hurtful things with impunity, without liability for defamation, and even the private citizen may sometimes be free from liability unless he spoke with "malice," which means that good faith is protected (below, p. 524). Again, since it is for the public good that suspected criminals be brought to book, the person who unreasonably brings a prosecution is not liable unless he was also in bad faith (below, p. 605).

3. Relationship Between Behaviour and Damage

A person is not in general responsible for damage unless he has both caused it and been to blame for it. "Cause" and "blame" are not synonymous, yet as the component elements of responsibility they are not easily dissociated. On the one hand, even a person who is blameworthy does not have to pay for damage if it would have occurred anyhow; a person is not liable unless he "caused" the damage (below, p. 201). On the other hand, a blameworthy person is not necessarily liable for all the damage he can be said to have "caused."

What is "to cause"? Many words—often quite short, brutal Anglo-Saxon verbs like "kill," "burn," "break" or "stab"—contain causal notions, and designate an act, perhaps of a specific kind, which produces a result, possibly a special one, maybe in some particular manner. But where the effect of conduct is less typical or direct, especially outside the physical sphere, even the English language may have no single word to indicate the composite. Helena drew the distinction: "And though I kill him not, I am the cause His death was so effected" (*All's Well* III.ii). Causation at large is not a simple notion, and lawyers use it not simply in an explanatory manner but with the aim of fixing or denying responsibility.

In human affairs, present, past or fictional, effects result from a concatenation of causes, so one must not look for *the* cause, as if there were only one. One should rather ask "Did the conduct contribute to the harm?" Now it might be supposed that a person whose conduct had merely contributed to harm need only contribute to its compensation, that is, pay in proportion to his causal contribution. This is not the law. The causal contributor is liable to pay for the full effects to which his

conduct conduced. It is not easy for the student to realise that a gallon of cause may go into the pint-pot of effect. But consider. If two people kill a third, neither has half-killed him: both have killed him. All each can say is that though he killed the deceased, another did so too. But that other may be penniless or hiding. So each contributor is held liable in full until the victim is fully paid.

Once a causal connection between the defendant's conduct and the plaintiff's harm is established in the sense that the harm would probably not have occurred without it, one must ask whether this connection is sufficient for it to be fair to impose liability on the defendant, for it is clear that one does not always have to pay for all the consequences of one's misconduct. A legal system might require that the harm be the *direct*, the *typical* or the *foreseeable* result of the conduct, or that it be a *proximate* consequence, not *too remote*, or that it be of the kind which the rule infringed was designed to guard against. All these formulae, and more, have been used. But their use should not conceal the fact that underneath the apparent factuality of causal vocabulary lurk value-judgments. This can be seen from the fact that the more reprehensible behaviour is, the more causally potent it tends to be, whether it is the behaviour of the defendant, the plaintiff or some third party.

4. Relationship Between Plaintiff and Defendant

Whether you get the money you are claiming depends on whom you are claiming it from. In other words, the relationship between the plaintiff and the defendant is a material consideration in every tort suit. For example, suppose that the defendant is doing construction work under statutory powers in a main street, and that his crane is defective for want of repair. A load being lifted by it drops from a height on to a workman. Two people suffer shock at the sight of this tragedy, the craneman and a passer-by who has stopped to stare. It is probable that the craneman can sue and that the passer-by cannot (p. 88). Yet the behaviour of the defendant, the nature of the damage and the relationship between the damage and the behaviour are identical. The reason is that the defendant is in a protective relationship to the craneman, his employee, and is in no relationship with the pedestrian, save that constituted by physical proximity. Take another case. Antony is giving Brutus his second driving lesson, when, owing to lack of expertise, Brutus runs into a pedestrian, Cleopatra, and both Antony and Cleopatra are injured in the collision. The matter is controverted (since some people want just one rule for the road—see below, p. 107), but the better view is that Cleopatra will recover and Antony will not.

In order to accommodate such difficulties the law has the device of "special relationship" which may either heighten or lower the duty which is owed when the relationship is merely spatial. But in many cases where the concept of "special relationship" is not mentioned, the results can only be rationalised on the basis that one exists. If one takes as standard the relationship, miscalled "neighbourhood," which is said to

exist merely because the defendant should have been thinking of the plaintiff as a possible victim of his carelessness, then there are some relationships which are very different. Take actual neighbourhood, for example, the relationship between those who live next door to each other, or whose properties are adjacent. No legal system could treat such people as it treats those who collide on the highway. In England, the special regime for real neighbours is called "nuisance." Relationships differ widely, and the use of general terms should not conceal the fact. For instance, plaintiff and defendant may be parties to a contract, and a contract is a very special relationship indeed—there are whole books about it—because the parties have chosen to do business with each other.

In France the law of tort applies only in the absence of a contract; in other words, it applies only between strangers. The English law of tort applies between contractors, too, except in so far as it has been effectively excluded by the terms of the contract itself (effective exclusion now being difficult—see below, p. 248). This concurrence of tort and contract leads to some difficulties. You bring the same action of trespass against the burglar as against the landlord who evicts you. You bring the same action against a thief as against the vendor who by mistake delivers to someone else the thing he sold to you.

Two factors at least distinguish the voluntary from the involuntary relationship. On the one hand, where persons have come together, they must know that they expose themselves to the risk of harm from the other. On the other hand, the coming together of the parties may throw on one of them a higher liability because he knows that the other party is relying on him; the best example of this is master and servant.

5. The Plaintiff's Behaviour

A person who "has only himself to blame" for an accident cannot claim from anyone else (except his insurer or social security). It would be monstrous if he could. Sometimes one feels that the plaintiff has only himself to blame even though the defendant is at fault in some way. One feels this mainly where the plaintiff's behaviour has been particularly unreasonable in comparison with that of the defendant. In such cases, the plaintiff's behaviour will be referable either to his relationship with the defendant, or to the relationship between the defendant's behaviour and the damage—one will say either. "The defendant doesn't have to pay *him*" or "The defendant doesn't have to pay him for *that*." These points therefore can be dealt with in terms of duty or causation. If the plaintiff's behaviour was not very unreasonable, then the loss may be shared (below, p. 239).

While Western systems of law rather flatter themselves on paying no heed to the personal merits or demerits of claimants, it is really undeniable that good guys get more and villains less. Rescuers and other altruists are favoured by the law of tort (below, p. 89), burglars and other criminals disfavoured (below, p. 250).

6. The Duty Concept

These are aspects of the facts of all cases which cannot fail to be relevant to an acceptable decision; but the grounds of decision must be stated in terms of legal concepts, which may or may not reflect the differences in the facts. We have already seen how the concept of "right" may be used to conceal the fact that the plaintiff has really suffered no damage; it may also be used to make the defendant's act seem wrongful in law when it is socially irreprehensible. Here it must suffice to deal briefly with the very important concept of "duty."

The word duty is used for two distinct purposes—to establish a relationship in law between the defendant and the plaintiff and to state the standard of behaviour which the law requires of the defendant in a question with that plaintiff. But in certain cases liability is so clear that we bypass the notion of duty. If A tells lies to B, we know that this is wrong, and do not take the intermediate step of saying "A was under a duty to be honest." People always are. So also we do not talk of a duty not to trespass, because it is elementary that trespassers are liable. It is when liability is not clear and when it is clear that there is no liability that we use the notion of "duty," either by stating it p. 63) or denying it (p. 74).

For example, where the plaintiff has suffered damage as a consequence of the defendant's behaviour, and the courts are unwilling for one reason or another to impose liability on the defendant but are yet unable to deny that what the plaintiff is complaining of is "damage" or that the defendant acted unreasonably or that that unreasonable behaviour caused the damage, then they say that the defendant did not owe the plaintiff any duty to take care. Thus, although the defendant has acted without care, his act is not a breach of duty to the plaintiff, because that duty is said not to exist. This was one of the grounds on which the Court of Appeal dismissed the claim of a congenitally deformed child who, but for the defendant's negligence, would never have been born at all (*McKay* v. *Essex Area Health Authority* [1982] Q.B. 1166). This was the reason given for absolving a barrister whose negligent advocacy allegedly led to his client's conviction (*Rondel* v. *Worsley* [1969] 1 A.C. 191). No other reason can be given for preventing a wife suing for her undoubted personal loss resulting from the negligent emasculation of her husband (*Best* v. *Samuel Fox* [1952] A.C. 716). Similarly, where the plaintiff is complaining of financial loss only, and the court is unwilling to shift the burden of that loss to a merely negligent defendant, the court may use the duty device to deny recovery by holding that no duty was owed (p. 71). The courts cannot say "This kind of damage cannot be compensated," because in other circumstances it can; nor can they say "such behaviour in a defendant does not involve him in liability," because in other circumstances it does; nor can the courts deny causation, because frequently all the tests of causation are satisfied (*e.g.* the defendant negligently damages a car insured by the plaintiff).

When does a duty exist? The question has been much discussed, though it is perhaps too generally phrased for the discussion to be

useful. A duty should not be imposed unless it is "just and reasonable" to do so (*per* Lord Keith in *Peabody* [1984] 3 All E.R. 529, 534). In fact, a duty to take care to avoid causing foreseeable physical harm invariably exists, since one must not needlessly endanger people or their property; a duty to take positive steps to save others from such harm is found less commonly (below, p. 57) and a duty to take care with regard to merely economic harm is rarely imposed in the absence of a special relationship.

Given that a duty exists, it must be a duty with a content. The duty fixes not only the relationship between the parties, but also the standard of behaviour to be required of the defendant. Here there is great flexibility. The flexibility can come either in the formulation of the duty or in its application to different sets of facts. Thus one can say that the person who hires out a ladder owes a duty to his contractor's employees to take reasonable care that it is not defective, whereas if they borrow a ladder from a neighbour, the neighbour's duty is only to disclose known defects. It is, however, just as satisfactory to say that both suppliers owe the same duty to take reasonable care, but that more extensive precautions are required to satisfy that duty in the one case than in the other. One expects both to take reasonable care, but one does not expect the housewife to test every rung; more is looked for in a business man that in a person doing a kindness. But this is satisfactory only so long as it is remembered that "reasonable care" means "reasonable care *in all the circumstances*." Otherwise one quickly goes wrong. (For a list of relevant circumstances, see Occupiers' Liability Act 1957, s.2, below, p. 130.) The present tendency of the common law is to state the duty generally as being the duty to take reasonable care; "gross negligence" is not required.

The "duty to take reasonable care" is a very satisfying one, because "duty" calls up a picture of a standard of behaviour, measured by the possible; we do not in private life stigmatise someone for breach of a duty unless it was within his power to fulfil it. But not all duties at common law are of a level such that a person acting reasonably satisfies them, and duties under statute usually are not. Cases will be found in this book where the courts say "The defendant's contractor was negligent, so the defendant's duty was not fulfilled." The defendant is accordingly in breach of his duty although he himself has done nothing wrong. The content of the duty, then, is not a pattern for behaviour, but a list of facts which must exist to exonerate the defendant. For example, when the legislature requires that dangerous parts of machinery be securely fenced (Factories Act 1961, s.14), it is no excuse for a defendant, if a dangerous part is not securely fenced, that the machine could not be operated if it were. Thus there are duties which are broken only if the *defendant* was at fault (the duty owed by one user of the highway to another). There are duties which are broken only if *someone* was at fault—and the range of persons whose fault may involve a breach of duty by the defendant is infinitely extensible (*e.g.* liability for independent contractors), and there are duties which are broken although *no one* was at fault (*e.g.* some statutory duties, and the vendor's liability to the purchaser of defective goods).

Dangers lurk, however, in the use of the word "duty." One such danger, recently made manifest, is the danger of supposing that tort liability *must* attach to behaviour which can be characterised as a breach of "duty." It is tempting but misleading to say "You ought to have done that, *i.e.* you were under a duty to do it, so you must pay damages for not doing it." As Lord Edmund-Davies has observed: "In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort. Liability has to be based on a legal duty not to be careless, and I can find none in this case." (*Moorgate Mercantile Co.* v. *Twitchings* [1977] A.C. 890, 919).

Thus if A has promised B to do something, A clearly "ought" to do it, and do it properly or carefully. His failure so to do it may injure C; but it does not follow that C should be able to sue A, though we may be misled into thinking that A is under some "duty" to C just because there is a sense in which A "ought" to have done what he promised. Likewise, it is elementary that public officials "ought" to perform their functions properly: that is what they are there for and what they are paid for, and no one would deny that they have "duties" to perform. However, it is not at all clear that tort liability in damages is invariably the proper or sensible sanction for their failure to perform them. Here again it is dangerously easy to infer from the proposition that tort liability depends on breach of duty that every breach of duty must lead to tort liability. It does so only if the relationship between plaintiff and defendant is of a certain sort and if the damage is of a certain sort and is caused in a certain way.

7. Functions of the Law

We have said that compensation is the principal function of tort law, not in the sense that the function is best performed when most compensation is awarded, but in the sense that its function is to determine when compensation is rightly payable. The very concept of compensation entails the notion of harm or damage, since only harm or damage can be compensated. But we have also seen that sometimes damages are awarded even though no harm has been suffered, its absence being concealed by the statement that the plaintiff's rights were infringed.

That is the other function of the law of tort: to vindicate the rights of the citizen and to sanction their infringement. The flagship of the fleet is not negligence, but trespass, protecting as it does the rights of freedom of movement, physical integrity, and the land and goods in one's possession. The citizen's right to his reputation and good name is also protected, perhaps unduly, by the law of defamation. Further rights may qualify for protection under continental influence, such as the moral rights of the artistic creator, and the less moral rights of the international tradesman.

There has been a certain conflict between the functions of compensation and vindication, which presents itself as a dialectical

conflict between the torts of negligence and trespass, and there have been disagreeable signs that vindication has not been the clear winner.

A third function has been proposed: deterrence. Is it the function of the law of tort to compensate the plaintiff or to deter the defendant? The question has some practical significance, since if one concentrates on the defendant's conduct one may downplay the need for the plaintiff to establish anything other than the defendant's fault. Thus, for example, a person paid in full by his insurer needs no compensation, and the insurer which pays him should receive none (because it paid the money pursuant to a risk it was paid to take). But many people still think it right that the defendant should pay, just to teach him to behave better in future and avoid causing another loss, which after all may not be insured the next time. Again where a doctor has negligently done something which makes death more likely, and death then supervenes, one might make him pay even if the death would probably have supervened anyway, that is, though the causation remains unproven. One might make the local authority pay for allowing a builder to build a dangerous house which might collapse, rather than hold it liable only if the house does actually fall on someone and hurt him. And if the defendant has negligently damaged property in the ownership and possession of X, but Y suffers the loss (because he is the buyer, or the charterer) one might make the defendant pay just as if it were Y's property that was damaged, as it so well might have been.

In the three situations just mentioned, the House of Lords has quite recently denied liability, so one can conclude that in England this deterrence approach has not had the effect of extending liability. Rather the reverse. Sometimes the courts deny liability because to impose it might make the defendant overcautious. Indeed, so concerned were the courts at the effect of tort liability on the operation of local government that they brought themselves to say that it was an abuse of the system to sue the government in tort in respect of an unreasonable decision which caused harm: the party aggrieved had to use a special procedure for challenging decisions.

Two Illustrative Cases

THOMAS v. NATIONAL UNION OF MINEWORKERS (SOUTH WALES AREA)

Chancery [1986] Ch. 20; [1985] 2 W.L.R. 1081; [1985] 2 All E.R. 1; [1985] I.C.R. 886; [1985] I.R.L.R. 157

Action to stop harassment of working miner by fellow-miners on strike

The plaintiff coal-miners decided to defy a strike but found it difficult and unpleasant to go to the pit because each morning several score of their striking colleagues gathered round the colliery gates and greeted them with vilification and abuse as they drove in under police escort. They sought an injunction against the union, and obtained it.