Articles

The Unmysterious Law of Torts

G.H.L. FRIDMAN*

This article addresses the history and development of tort law generally, with particular reference to the Canadian context. The author begins his discussion by setting out the general principles enunciated in Donoghue *v.* Stevenson, *and continues by examining the development of these principles as applied to professional (or solicitors') negligence, intentional torts, compensation for economic loss, interference with contractual relations, intimidation (or duress), breach of statutory duty and conspiracy. The author concludes by discussing the role of "fault" in the evolution and direction of tort law in Canada.*

Cet article étudie l'histoire et l'évolution du droit des délits, surtout en ce qui a trait à la situation canadienne. L'auteur discute d'abord de principes généraux tels qu'énoncés dans Donoghue *v.* Stevenson *et passe ensuite à un examen de l'évolution de ces principes en ce qui a trait à la négligence professionnelle, aux délits intentionnels, à l'indemnisation du préjudice économique, à l'ingérence dans les relations contractuelles, à la contrainte, aux manquements à une obligation légale et au complot. L'auteur termine par une discussion de l'importance de la notion de la "faute" dans le développement du droit des délits au Canada.*

There is a solid core of tort law which has become firmly established. From time to time there may be some slight development; gaps in the law become filled by a decision; a dispute between courts is settled. For the most part, the law functions smoothly and moves in the direction in which it was pointed years ago as a consequence of centuries of evolution. The principle of inertia applies here as elsewhere. Beyond the core are instances of liability in

*Professor of Law, University of Western Ontario

tort which have reached us in an incomplete or unsettled state, affording scope for action by the courts. This could result in the expansion of liability in respect of the particular tort in question. Alternatively, it could result in the contraction of such liability.

One area where enlargement of the scope or range of liability has occurred is the tort of negligence. The famous "neighbour" principle of Lord Atkin in *Donoghue* v. *Stevenson*[1] may have come under attack in recent years:[2] but the essential idea underlying his remarks still holds sway in the courts of England, Canada, Australia and New Zealand. Fundamental to liability for negligence is the notion that the defendant must have owed a duty of care to the plaintiff, and this requires the prospect of foresight of harm to the plaintiff as a reasonable consequence of some act or omission on the defendant's part. In this sense, as Lord Atkin explained more than fifty years ago, the plaintiff is the defendant's "neighbour". In *Anns* v. *Merton London Borough Council*,[3] Lord Wilberforce summarized what had developed since *Donoghue* v. *Stevenson* by stating that for there to be liability in negligence there had to be a duty of care in Atkinian terms, and there had to be no policy reason for denying the possibility of liability. Cases since 1932 had shown that the potential limits upon Lord Atkin's version of liability did not exist. There were indeed virtually limitless possibilities for such liability. Rarely would the law come face to face with a situation in which, given that the prerequisites for liability in negligence could be established, a court could deny, negate, or refuse liability. This could only happen if some different policy of the law operated, such that a party injured by reason of the negligence of another should be validly deprived of a remedy.

As is well known, there were such situations. For example, prior to 1963 it was considered that for economic loss resulting from a misrepresentation made carelessly, not fraudently, there was no liability, in the absence of a contractual relationship between the parties.[4] This was because of the long-enunciated policy of the law against giving damages for an innocent misrepresentation.[5] So, too, various public bodies could not be held responsible for acts of negligence in carrying out the duties with which they were invested by statute.[6] These exceptions to Lord Atkin's formulation of the tort of negligence have been swept away by decisions of the courts.[7] The scope of negligence has been broadened.

---

[1] [1932] A.C. 562 at 579.

[2] See Smith & Burns, *Donoghue* v. *Stevenson — The Not So Golden Anniversary* (1983) 46 M.L.R. 147.

[3] [1978] A.C. 728 at 751-752.

[4] *Candler* v. *Crane, Christmas & Co.* [1952] 2 K.B. 164.

[5] *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30: see now the *Misrepresentation Act*, 1967.

[6] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74.

[7] *Hedley, Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465; *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004; *Anns* v. *London Merton Borough Council* [1978] A.C. 728. See, also, Little, *Erosion of No-Duty Negligence Rules in England, the United States and Common Law Commonwealth Nations* (1983) 20 Houston L.R. 959.

Even more recently, the House of Lords has gone further. In two powerful and crucial decisions, their Lordships have taken the tort of negligence much further than it has ever been permitted to go. It might almost be said that the House has taken the originally wide-ranging conception of Lord Atkin further than even he might have wished it to go, bearing in mind his later modification or qualification of his first statement in 1941 in the case of *East Suffolk Rivers Catchment Board* v. *Kent*.[8] There, Lord Atkin spoke of liability in negligence arising in certain circumstances and under certain conditions. From the context of his remarks it would seem that even Lord Atkin was perturbed as to the lengths his original statement might be carried were no rational limits to be placed upon his earlier language. One should remember that he was one of the members of the Court of Appeal which took a restrictive view of liability for nervous shock in *Hambrook* v. *Stokes*[9] and adopted a severely physical approach to remoteness of damage in *Re Polemis*.[10] He made a sharp distinction between what was required for a finding of culpability or primary liability, and what was involved with respect to compensation or the extent of such liability. It may well be thought that even Lord Atkin might be amazed, and even disturbed, by the evolution of the tort of negligence in recent years.

In saying this, I have in mind the decisions in *Junior Brooks Ltd.* v. *Veitchi*[11] and *McLoughlin* v. *O'Brian*.[12] The former was a case in which the majority of the House of Lords (over the dissent of Lord Brandon of Oakbrook, who took a more restrained view of what the law should be doing) held that liability in negligence for purely economic loss could be imposed where the act of negligence consisted of the breach of a contract made between the defendant and a third party, not the plaintiff. The latter was one in which the House of Lords, this time unanimously, held that the wife who suffered nervous shock when she heard about an accident in which members of her family were seriously injured in consequence of the defendant's negligence (but did not witness the accident personally, nor hear it occur, while out of sight, as in *Hambrook* v. *Stokes*) could successfully sue the negligent defendant. Although both these decisions could be said to be based upon, and drawn out of, earlier decisions, they were nonetheless innovative.

The scope of liability for negligence has been widened in other ways. First of all, the range of activities which can attract the possibility of such liability has been extended, to cover professionals who, previously, were thought of as being beyond the reach of the tort of negligence. Secondly, courts have been prepared to extend the area of liability for the *consequences* of negligent acts. Both these points are well illustrated by recent decisions involving lawyers.

---

[8] *Supra*, footnote 6, at 88-89.

[9] [1925] 1 K.B. 141.

[10] [1921] 3 K.B. 560.

[11] [1982] 3 All E.R. 201: on which see Holyoak *Tort and Contract after Junior Books* (1983) 99 L.Q.R. 591.

[12] [1982] 2 All E.R. 298: on which see Teff, *Liability for Negligently Inflicted Nervous Shock* (1983) 99 L.Q.R. 100.

Thus, at one time it was thought that, although solicitors could be liable to their clients for damage or loss flowing from a solicitor's negligence, such liability probably being founded upon breach of contract[13] (although tort liability was not necessarily excluded),[14] a barrister could not be so liable. This was the English view, founded upon the professional and technical distinction between barristers and solicitors.[15] This was not the view that obtained in jurisdictions where the profession was not divided, such as the provinces of Canada.[16] The decision of the House of Lords in *Rondel* v. *Worsley*[17] may have confirmed certain aspects of the English approach: but it also opened the way to the possibility that barristers might be amenable to the law of negligence in certain circumstances, i.e., where the negligence was concerned not with a barrister's performance as an advocate but in the area of non-litigious matters. That opening provided the House of Lords with the opportunity to extend and clarify the law in *Saif Ali* v. *Sidney Mitchell Co.*,[18] wherein the potential liability of an English barrister in negligence was described and approved. However, the peculiarities of the English situation did not permit the extension of liability to a barrister's actions as an advocate, in respect of his duties as counsel in the actual conduct of litigation. In England, the relationship between barrister and lay client may still preclude the possibility of the former's liability in negligence for the careless performance of his professional duties in court, quite apart from any reasons pertaining to the barrister's public duties that may have the same effect. However, in Canada, the relationship between a barrister (who is also a solicitor) and his client may result in the possibility that the former could be liable for neglect relating to the conduct of proceedings in court. This is contrasted with the preliminary, non-litigious aspects of a barrister's duties where potential liability is unquestionable. Such is the consequence of *Demarco* v. *Ungaro*[19] a decision of Krever J. of the High Court of Ontario, at first instance, which was decided on a preliminary point of pleading. There the learned judge held that a barrister/solicitor could be liable in negligence to his client where the barrister failed to appear on the client's behalf at a trial and sent as a substitute an unprepared colleague, with the possible result that the client's case was not adequately put before the court. The arguments that the public interest should not permit such liability, and that the duty owed by a barrister to the court should supercede and rank above the duty owed to the client, replacing potential liability to the client by a more general liability to society enforceable by appropriate disciplinary action, in place of a civil action for damages, were re-

---

[13] *Groom* v. *Crocker* [1939] 1 K.B. 194; *Clark* v. *Kirkby-Smith* [1964] Ch. 506.

[14] *Midland Bank Trust Co.* v. *Hett, Stubbs, & Kemp* [1979] Ch. 384. See, generally, Dwyer, *Solicitor's Negligence—Tort or Contract?* (1982) 56 A.L.J. 524.

[15] See *Kennedy* v. *Brown* (1863) 13 C.B.N.S. 677.

[16] *R.* v. *Doutre* (1884) 9 App. Cas. 745; cp. *Leslie* v. *Ball* (1863) 22 U.C.Q.B. 512, *Wade* v. *Ball* (1870) 20 U.C.C.P. 302.

[17] [1969] A.C. 191.

[18] [1980] A.C. 198.

[19] (1979) 95 D.L.R. (3d) 385 (Ont. H.C.).

jected by the judge.[20] Thus English courts have been prepared to whittle down the so-called immunity of a barrister from civil liability for misconduct which causes damage to his client, at least one Commonwealth court has been willing to go further and enlarge the scope of such liability in appropriate circumstances.

Much the same has occurred with respect to other professionals, who once were considered to occupy a position somewhat akin to that of a lawyer or a judge. Their function was neither to give advice, which if negligently given might form the basis of an action, nor to exercise an independent judgment, for which they could not be liable unless they were deliberately fraudulent. Among such professionals may be listed valuers[21] and arbitrators.[22] It is now clear that earlier exclusion of such persons from the obligation to act with reasonable care, and their immunity from suits for negligence, no longer necessarily obtains. In a sense, therefore, the law of torts has not only begun to reach out to encompass a broader spectrum of professionals; it has become more egalitarian in that it seeks to expose all professionals to the same obligations, making them all equally subject to the same standards of performance, and consequently subject to the same potential liability for the results of their failure to observe those standards. There are no distinctions based upon a difference in function, any more than there are distinctions founded upon some archaic notions of "privilege" stemming from the exercise of public or semi-public duties.[23] Since the law is willing to hold governmental officials bound to maintain certain standards of behaviour, and make them liable for any misperformance of their duties, it is reasonable and consistent to make private individuals similarly bound and liable, even though such individuals may be under duties to society at large with respect to their activities, not merely under more personal, contractual duties to one or more individual members of society.

Granted that such professionals as lawyers may now be under duties of care to their clients, and that such duties embrace all (or almost all) their professional conduct, the question arises whether such duties of care may extend to other persons as well as to their clients. At first, one might answer that they should not. The professional's obligation is to the party who hires him, the one who seeks to make use of his services. This is especially true of the lawyer, the scope of whose obligations should be limited so as not to interfere too much with the concept of the lawyer as an officer of the court owing responsibilities to the public at large. Other professionals or individuals exercising a special expertise have been made liable to persons beyond the scope of a contractual relationship between the professional, etc., and the client, in consequence of

---

[20] *Ibid.*, at 404-408.

[21] *Arenson* v. *Casson, Beckman, Rutley & Co.* [1977] A.C. 405; *Yianni* v. *Edwin Evans & Sons* [1981] 3 All E.R. 592.

[22] *Sutcliffe* v. *Thackrah* [1974] A.C. 727.

[23] Cp. such cases as *Dorset Yacht Co.* v. *Home Office* [1979] A.C. 1004; *Anns* v. *London Merton Borough Council* [1978] A.C. 728; *Wellbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg* (1970) 22 D.L.R. (3d) 470 (S.C.C.).

the development of the decision in *Hedley Byrne* v. *Heller Partners.*[24] Recent decisions in England and Canada have now shown that the same extension has been made with respect to lawyers, at least as far as acts not connected with the preparation and conduct of litigation are concerned. Such cases have held that when a lawyer makes a will for a client, he may also owe a duty of care to actual or potential beneficiaries under such a will, at least where the lawyer is aware of the existence of such beneficiary which fails to succeed thereunder, the lawyer may be liable in tort (for negligence) to the beneficiary.[25] No question of contract arises. It is a matter of tort. The older view that the lawyer's responsibility was only to his client has now been shown to be incorrect. In appropriate circumstances a lawyer may owe a duty of care to third parties, just as may an estate agent, a banker, a valuer, a party bound under contract to perform work for the other contracting party.

In such fashion, therefore, the tort of negligence is becoming more and more capable of providing a remedy by way of compensation where one person's neglect or carelessness has resulted in damage to another. Whether the damage be in the form of physical injury or economic loss; whether there be a "special" relationship, "equivalent to contract",[26] or not; whether the negligent party owes duties to others under contract, the law of tort, public law generally, or in some other way; there is the possibility that he or she may be liable to a plaintiff who is in no relationship with him or her, and is not owed any duty under contract or otherwise. The law of negligence can create its own duties. These may arise from considerations that have nothing in common with those that underlie the creation or existence of duties in other instances. Such considerations, as we now know, may stem from ideas of "policy" (both positive and negative) that can shape the scope and content of the law.

The broadening of the scope of negligence has been paralleled by developments in respect of "intentional" torts which involve the infliction of economic loss on the plaintiff as a consequence of some deliberate act by the defendant.[27] In particular, this is true of the tort of procuring a breach of contract. Until recently, it was thought that to impose such liability it had to be shown that the defendant had procured, induced, or caused the breach of an existing contract between the plaintiff and a third party, either by some direct act of persuasion or inducement,[28] or by some indirect act, such as the theft of goods which the defendant was obliged to show in public under a contract between himself and the plaintiff.[29] A relaxation of this requirement appears to have been introduced for the first time by the English Court of Appeal, in *Tor-*

---

[24][1964] A.C. 465.

[25]*Whittingham* v. *Crease & Co.* (1978) 88 D.L.R. (3d) 353 (B.G.S.C.); *Ross* v. *Caunters* [1980] Ch. 297; *Sutherland* v. *Public Trustee* [1980] 2 N.Z.L.R. 536; *Watts* v. *Public Trustee for Western Australia* [1980] W.A.R. 97; *Seale* v. *Perry* [1982] V.R. 193.

[26]*Hedley Byrne & Co. Ltd.* v. *Heller & Partners* [1964] A.C. 465 at 529 *per* Lord Devlin, quoting Lord Shaw in *Nocton* v. *Lord Ashburton* [1914] A.C. 932 at 972.

[27]Some writers include trespass and other torts of interference with a person, land, or goods as torts of intention: see, e.g., Cane, *Justice and Justifications for Tort Liability* (1982) 2 Oxford J. of Leg. Studies 30 at pp. 35-39.

[28]*D.C. Thomson and Co. Ltd.* v. *Deakin* [1952] Ch. 646; *Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269.

[29]*G.W.K. Ltd.* v. *Dunlop Rubber Co. Ltd.* (1926) 42 T.L.R. 376 (K.B.), 593 (C.A.).

quay Hotel v. *Cousins*.[30] There it was held that there need be no actual breach of contract, entitling the third party to sue the plaintiff (or vice versa) for the tort of interference with contract to have occurred. It was sufficient if the result of the defendant's acts was that the contract was breached. Hence, even though the plaintiff (or the third party) could have pleaded frustration or impossibility as a defence to an action for breach of contract brought by the other contracting party in consequence of the conduct of the defendant, the defendant might still be liable for the tort. Still more recently, the House of Lords has held, in *Merkur Island Shipping Corp.* v. *Laughton*,[31] that a defendant can be liable for the tort of inducing a breach of contract where what happened as a result of the defendant's behaviour was that the third party was prevented from performing the contract in question according to the terms of the contract. In that case the defendants declared a certain ship "black" because of the low wages paid by the shipowners to the crew. In consequence, tugmen employed by a tug company refused to operate tugs assigned to move the ship that had been blacked. Under the contract between the shipowners and charterers (who had sub-chartered the ship) the captain was bound to "prosecute his voyages with the utmost despatch"; and the charterers and sub-charterers were obliged to provide and pay for towage of the ship in and out of berths when the ship docked. Because of the tugmen's refusal to work, which was a breach of their contracts of employment with the tug company, the swift departure of the chartered ship in and out of the berth was impeded. Although the terms of the charter and sub-charter were not broken, the conduct of the tugmen hampered the proper and complete performance of the contract. The House of Lords held that this of itself did not preclude the possibility of liability for the tort.[32]

The English cases still stress the need for some interference with a contract. There must be conduct which amounts to a disruption of contractual rights[33] which have been conferred upon the plaintiff in consequence of a valid, lawful, enforceable agreement[34] between himself and a third party. There must also be knowledge of the existence of such contract (or the material term), or such recklessness with respect to the existence of the contract that it may be inferred that there was an intention on the part of the defendant to bring about the kind of interference or disruption that occurred.[35] Thus far, it would appear, that there is no clear, decisive English authority in favour of a more general proposition that any wrongful, i.e. unauthorised or unjustified, interference with rights other than contractual rights, even though no independently tortious misconduct has taken place, may itself be actionable as a tort. There are dicta to the effect that the unlawful interference with the right

[30] [1969] 2 Ch. 106.

[31] [1983] 2 All E.R. 189.

[32] Nor was liability affected by the *Trade Union and Labour Relations Act*, 1974, s. 13(1).

[33] Or a future breach: *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106; *Midland Cold Storage Ltd.* v. *Steer* [1972] Ch. 630.

[34] Not one which is a wagering contract (*Joe Lee Ltd.* v. *Dalmeny* [1927] 12 Ch. 300) or in restraint of trade (*Greig* v. *Insole* [1978] 1 W.L.R. 302).

[35] *Emerald Construction Co. Ltd.* v. *Lowthian* [1966] w W.L.R. 691; *Daily Mirror Newspapers Ltd.* v. *Gardner* [1968] 2 Q.B. 762.

of a man who is carrying on a lawful trade or calling, or his right to continue carrying on such trade or calling, is tortious in itself.[36] Such dicta are based on the ground that this is an interference with a right which is in the nature of a right of property.[37] In other words, wrongful conduct of this kind is akin to trespass, or nuisance, even though it does not partake of the nature of a trespass or a nuisance, and is therefore actionable. Such dicta have been questioned.[38] In Canada, however, there have been stronger statements, even decisions, to the effect that any unjustified interference with another person, if it is deliberate and is designed to cause him economic loss, is actionable. There may be no need to show that a particular contract has been breached, or otherwise interfered with, to support an action for the resulting loss.[39]

What has been happening, it may be suggested, is that some courts have recognized that there are possibilities for causing harm, in the form of economic loss, in other ways than by bringing about a breach of contract, or something approaching, but not quite constituting, such a breach. The originally limited nature of the tort of interference with contract has been seen to be too restricted in the face of commercial developments. The element of combination, once believed to be an essential ingredient of liability for such activity, has been declared redundant. In the courts, it has formerly been thought that a combination was necessary as a matter of law, even though, realistically, more harm might be perpetrated by one juristic person acting alone than by a combination of two or more natural persons, who might not possess much economic power between them, even when they acted in concert.[40] The opinion now seems to be held that, in some situations, it is not inappropriate for the law to give a remedy to a person who has been damnified by the acts of one party acting singly, where such acts are unjustified in law, and are performed with the intention of causing the kind of harm that has eventuated. As will be seen later, the law of conspiracy, or combinations to cause harm, has undergone some limitation, qualification or contraction in recent years. However, at the same time, it would appear that the courts are becoming more and more prepared to accept the prospect that individuals who deliberately and without lawful justification or excuse set out to cause harm to another person by interfering with that other's rights, whether contractual or something else, may be liable in tort.

One area of intentional wrongdoing that still seems to be uncertain is the tort of intimidation. Almost twenty years have passed since the House of Lords gave new life to some antique examples of this kind of liability, in *Rookes* v. *Barnard*.[41] Since then, virtually as a complement to the tort, there has emerged a wide concept of duress in relation to contract, that seems to

---

[36] *Stratfoed & Son Ltd.* v. *Lindley* [1965] A.C. 269 at pp. 325, 328-329; *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106 at 139; *Acrow (Automation) Ltd.* v. *Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676.

[37] *Ex parte Island Records Ltd.* [1978] 3 All E.R. 824 at 830 *per* Lord Denning M.R.

[38] *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* [1981] 2 All E.R. 456 at 463 *per* Lord Diplock.

[39] *Mintuck* v. *Valley River Band No. 63A* (1977) 75 D.L.R. (3d) 589; (Man. C.A.) *Gershman* v. *Manitoba Vegetable Producers* (1976) 65 D.L.R. (3d) 181 (Man. Q.B.), (1977) 69 D.L.R. (3d) 116. (Man. C.A.).

[40] Cp. Lord Diplock in *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* [1981] 2 All E.R. 456 at 464.

[41] [1964] A.C. 1129.

bear a close resemblance to the idea of intimidation shaped by the House of Lords in the *Rookes* case. That decision made it clear that a threat to break one's contract could amount to the kind of misconduct that would support an action for intimidation on the part of someone damnified in consequence of the other contracting party's reaction to the threat in question; and that economic duress was equivalent to duress in the form of physical violence, or the threat of such violence, which produced harmful consequences to the plaintiff. Subsequent contract cases dealt with the problem of the validity of promises made in consequence of a threat to break a contract.[42] The situation in these cases involved an existing contract, under which one party was obliged to do something, and a statement by the obligee that he would not perform his contractual duty unless the other party, the obligor, was willing to pay an increased price for the performance of the obligation already arising under the contract. What was suggested in these cases, although for a variety of reasons the victim of the threat was unable to take advantage of the notion of economic duress to invalidate the later exacted promise, was that such conduct could amount to duress, such that the voluntary nature of the resulting promise could be negated, thereby rendering the promise voidable at the suit of the victim.[43] The original physical nature of duress was thus extended to cover acts which could not be considered to involve threats to the physical well-being of the victim, but did give rise to a serious interference with his economic situation. From what was ultimately said by the Privy Council in *Pao On* v. *Lau Yiu*[44] it follows that, in appropriate circumstances, such threats could permit the invalidation of an agreement made as a consequence (and might also allow a restitutionary, or quasi-contractual, recovery of money which might have been paid in consequence of such threat).[45] What had to be established was that the will of the victim was overborne by the threat in question,[46] so that it could then be said that he did not freely enter into the contract that was the outcome (or make the payment). These two developments have occurred side by side, independently of each other. The question which now arises, but remains to be resolved authoritatively, is whether the same act, *viz*, a threat to break one's contract, or some similar kind of action which does not involve physical harm to the plaintiff or to his property, but does carry with it the possibility of some economic loss if the demands of the party making the threat are not carried out, can not only amount to conduct which might invalidate a contract made in consequence of the threat and support an action for the recovery of money paid over in consequence of the threat, but can also provide the basis for a successul tort action for intimidation.

In this respect, dicta of two members of the House of Lords in the recent case of *Universe Tankship Inc. of Monrovia* v. *International Transport*

---

[42] *The Siboen* [1976] 1 Lloyds Rep. 293; *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.* [1978] 3 All E.R. 1170; *Pao On* v. *Lau Yiu* Long [1980] A.C. 614. Contrast the facts and the decision in *Gilbert Steel Ltd.* v. *University Construction Ltd.* (1976) 67 D.L.R. (3d) 606. (Ont. C.A.).

[43] See Tiplady, David (1983) 99 L.Q.R. 1988.

[44] [1979] 3 All E.R. 65.

[45] Cp. Fridman & McLeod, *Restitution* 213-218; Goff & Jones, *Law of Restitution*, 2d ed. 1978, at 176-186.

[46] Professor Atiyah questions this formulation, (1983) 99 L.Q.R. 353.

Workers' Federation[47] are interesting, if inconclusive. What was said in these speeches appears to be contradictory, leaving the present state of the law in some doubt. Lord Diplock said:

> The use of economic duress to induce another person to part with property or money is not a tort per se; the form that the duress takes may, or may not, be tortious. The remedy to which economic duress gives rise is not an action for damages but an action for restitution of property or money exacted under such duress and the avoidance of any contract that had been induced by it;....[48]

He went on to speak of the possibility of a restitutional remedy for money had and received (by "waiving the tort") where the form of economic duress is itself a tort. Lord Scarman had this to say on the question:

> It is...already established law that economic pressure can in law amount to duress; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss: see *Barton* v. *Armstrong*[50] and *Pao On* v. *Lau Yiu*.[51] The authorities on which these two cases were based reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted.[49]

He then continued by discussing the notion of "compulsion", making it plain that the essence of the wrong he was considering was the victim's intentional submission arising from the realization that there was no other practical choice open to him. It was this which linked classical cases of duress (threat to life or limb) with later developments which the law came to recognize as duress, first the threat to property and now the threat to a man's business or trade.

The language of Lord Diplock suggests that the tort of intimidation (or duress, as it may be called) is not necessarily coterminous with the defence of plea of duress in a contract or restitution case. The language of Lord Scarman, on the other hand, hints at the equation of the two ideas. In the case in question, no issue of tort appears to have arisen. The claim was for the return of money paid by the plaintiffs to a welfare fund estabished under the auspices of the defendants. This payment had been made after the "blacking" of a ship by the defendants in accordance with its policies on rates of pay and other terms of employment of the crews of ships flying "flags of convenience". Hence, what was said about tortious liability was by way of *obiter dicta*, leaving in the air the present state of the law in this respect.

It may be suggested that it would be consistent with other developments in the law of torts were the courts to accept that the sort of economic pressure, or duress, that can operate to invalidate contracts and justify the recovery of money should also support an action in tort. This follows regardless of whether such pressure or duress is accompanied by, or takes the form of, conduct that is tortious in itself, such as physical assaults or threats of such assaults. The law now appears to take seriously the possibility that harm is

[47] [1982] 2 All E.R. 67.

[48] *Ibid.*, at 76.

[49] *Ibid.*, at 88.

[50] [1976] A.C. 104.

[51] [1980] A.C. 614.

likely to occur from threats of economic action as well as from threats of physical injury. It would not be out of step with developments in relation to causing economic harm or loss by, for example, negligent misrepresentation, for the law to regard economic duress as tortious *per se*, at least where actual harm or loss has been suffered by the victim of such duress.[52] If this were to be the ultimate resolution of the law by the courts, it would mean that there could be far-reaching liability for conduct that once would have been treated or regarded as simple business behaviour, perhaps undesirable to encourage or promote, but not otherwise, conduct of which the law would take cognizance. As Lord Scarman pointed out in the *Universe Tankships* case,[53] relying on the language of Lords Wilberforce and Simon in *Barton* v. *Armstrong*, the pressure that would amount to such wrongdoing must be one of a kind which the law does not regard as legitimate. Not all pressure in life, including life in commerce and finance, even overwhelming pressure, is necessarily duress for legal purposes. Whether acts done in consequence of such pressure are acts done under duress depends upon whether the pressure is regarded by the law as legitimate. As Lord Scarman said

> In determining what is legitimate, two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.[54]

Thus, while every facet of such tortious liability has not yet been clarified, the remarks of Lord Scarman could be taken as indicating the direction in which the law should move. If it were to do so, there would undoubtedly be an expansion of the area of liability for intentional wrongdoing.

Contradicting the impression of gradual expansion of the law that may be conveyed by the previous discussion, there are some parts of the law of torts where recent decisions indicate a narrowing of the role to be played by the law, and a contraction of the scope of liability for causing damage or loss. Consideration of these reveals that there may be a significant distinction between liability founded upon negligence and liability that stems from the intentional infliction of harm.

English courts appear to have accepted the view that the breach of a statutory duty can amount to negligence *per se*, where the statute can be construed as creating not merely a criminal offence, but also potential tort liability to a party injured individually by its breach.[55] Breach of statutory duty, while sometimes assimilated to negligence, in England has been turned into a variation of strict liability. Admittedly, the courts have insisted upon the satisfaction of a number of essentials before such liability can be established: viz., that the harm suffered came within the scope of the statutory provision; that there

[52]The situation might be different where no such harm has occurred even though harm might result if the threat were acted upon or the victim of the threat does, or refrains from doing, what the party threatening has demanded.

[53]*Supra.*, footnote 47, at 89.

[54]*Ibid.*, at 89.

[55]*Lochgelly Iron & Coal Co.* v. *McMullan* (1934) A.C. 1; but see *London Passenger Transport Board* v. *Upson* [1949] A.C. 155; cp. *Murfin* v. *United Steel Companies Ltd.* [1957] 1 W.L.R. 104. See Fleming, *Law of Torts*, 6th ed. 1983, at 117-127.

was a casual connection between the breach and the harm; that the damage was not too remote a consequence of the breach.[56] They have also permitted, by way of defence, various pleas that are usually associated with negligence: viz., contributory negligence, *volenti non fit injuria*; the participation of the plaintiff in the breach of statute, thereby making the plaintiff *particeps criminis*[57]. This does not deny the strictness of the liability for breach of statutory duty. The important feature of this kind of liability is that proof of breach of the statute suffices to make the defendant, who is under the duty imposed by the statute, *prima facie* at fault. It may be questionable to describe the wrong that is thereby committed as negligence. Such description, however, is by now traditional.

By the evolution of this form of liability the English courts in effect expanded the scope of the law of torts, and in particular the law of negligence. The history of civil liability for breach of statute that imposes duties, the non-observance of which involves criminal responsibility, testifies to the willingness of the English courts to enlarge upon existing forms of liability, by using statutes as the source not only of obligations but also of rights. Infringement of such rights could then lead to the sanction of an action for damages.[58] The most important and widely accepted instance of this was in relation to statutes that provided for the safety of certain classes of employees. From time to time, however, other statutes have been interpreted as giving rise to the same kind of liability, although such extensions have been few and far between.

The validity of this enterprise may be called into question. The way in which it has been carried out is also dubious. Indeed, Lord Denning referred to the way in which statutes have been construed so as to justify civil liability for a breach as involving a kind of "guesswork puzzle", which he, for one, was reluctant to undertake.[59] Attempts to set out the legal framework, within which this use of statutes could be made, may be said to involve juridical contortions of the strangest sort. More than one judge has declared that there is no rational basis for differentiating statutes which attract the operation of such liability from those which do not.[60] The idea that there may be civil liability for breach of a statutory duty can be attacked, therefore, on two major grounds. First of all, insofar as such liability is conceived of as the equivalent of negligence, or as an alternative to liability for negligence, it may be argued that it is both technically and pragmatically incorrect to consider the breach of the relevant statute as constituting sufficient negligent misconduct to substantiate an action for what is in effect the tort of negligence. Secondly, the sometimes haphazard way in which statutes have been construed, albeit that courts purport to justify what they are doing on grounds of principle, rather than policy (i.e., on the footing of pragmatism), brings the entire process under suspicion from the point of view of its juridical validity. It may even be that the first

[56] *Winfield & Jolowicz on Torts*, 11th ed. 199, at pp. 160-163.

[57] *Ibid.*, 163-165; *Salmond & Heuston on the Law of Torts*, 18th ed. 1981 at 237-239.

[58] *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* [1981] 2 All E.R. 456 at 461-462.

[59] *Ex parte Island Records Ltd.* [1978] 3 All E.R. 824 at 829.

[60] See e.g. *Solomon* v. *R. Gertzenstein Ltd.* 2 [1954] Q.B. 243 at 253 *per* Somervell L.J., 264 *per* Romer L.J.

ground set out above has influenced judges to take a somewhat firmer stand in regard to the second ground. Lord Diplock, in *Lonrho Ltd.* v. *Shell Petroleum Ltd.*[61], recently set out some ground-rules governing the extent to which, and circumstances in which, a court could legitimately decide that a particular statute could give rise to a civil action for its breach, even though the statute was primarily concerned with criminal sanctions. Reading his language, it is hard not to conclude that his lordship was heavily influenced by the notion that, to find that a statute permitted civil liability was tantamount to creating a form of strict liability — not dependent upon proof of negligence or deliberate, intentional wrongdoing. Hence the need to restrict the number of occasions when such a finding could be made.

The move to contract the scope of liability for breach of a statutory duty has taken two major directions. One, which is amply illustrated by English, as well as Canadian, decisions, seems to be concerned with the possibility that courts may find a defendant liable in tort for breach of a statute on the basis that the illegality concerned was undertaken with the intention of inflicting harm. The other, which has manifested itself in an important recent Canadian decision, seems to be concerned with limiting the effect of breach of statutory duty in relation to negligence. Instead of using such a breach to take the place of evidence of negligent conduct, so as to support an action by a person damnified by the breach, over and above whatever criminal penalties might be imposed for such breach, the Canadian court has adopted the view that this English approach is inconsistent with the general law of negligence. This approach is also inconsistent with modern trends in the law which are against forms of strict liability and in favour of making more and more liability in tort depend upon proof of actual negligence (where there is no evidence of a deliberate intention to harm the plaintiff). The net effect of such developments, it is suggested, is to limit the field of operation of the action for breach of statutory duty.

The possibility that an action in tort might lie for the deliberate, intentional and positive breach of a statute (the inevitable, if not intended or foreseeable consequence of which would be harm to another person) was first seriously mooted by the High Court of Australia in ***Beaudesert Shire Council*** v. *Smith.*[62] Attractive though such a principle might appear at first sight, it has not been accepted and adopted. In Australia and England, in subsequent decisions, courts of authority, namely the High Court of Australia,[63] the Privy Council[64] and the House of Lords,[65] rejected the suggestion in the ***Beaudesert*** case that tort liability can be based upon the breach of a criminal statute when the ultimate consequence was harm to another, even where the breach was deliberately and the harm was inevitable or foreseeable. In *Kittano* v. *The com-*

---

[61] [1981] 2 All E.R. 456 at 461-462.

[62] (1969-70) 120 C.L.R. 145.

[63] *Kittano* v. *The Commonwealth* (1973) 129 C.L.R. 151.

[64] *Dunlop* v. *Woolhara Municipal Council* [1981] 1 All E.R. 1202.

[65] *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* [1981] 2 All E.R. 456.

monwealth,[66] it was said that the plaintiff would still have to establish that the act complained of, the "unlawful" act contemplated in *Beaudesert*, was tortious in itself, as well as being a contravention of a statute. In *Dunlop* v. *Woollhara Municipal Council,*[67] a Privy Council appeal from Australia, Lord Diplock rejected the *Beaudesert* idea on the ground that what was meant by an "unlawful" act was uncertain. More recently, in *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.,*[68] Lord Diplock again referred to the *Beaudesert* principle or idea and said that English law did not admit of any extension of the principle, even on the assumption that the principle itself was part of English law — which he does not seem to have been prepared to accept. That case was concerned with the question of whether a breach of statute that resulted in harm to the plaintiff could be the basis for a civil action against the statute-breaker. Lord Diplock, speaking for the House of Lords, would not accept the prospect of any such civil liability for breach of a criminal statute outside the narrow scope of the exceptions permitted by the present law, namely, where the statute could be construed as permitting such liability. In a subsequent decision, *Canada Cement LeFarge Ltd.* v. *British Columbia Lightweight Aggregates,*[69] the Supreme Court of Court appear to have approved both language and decision in the *Lonrho* case. Although this approval is expressed to be in respect of the decision in the *Lonrho* case only as regards the tort of conspiracy, it would seem reasonable to infer that the approval of the Supreme Court of Canada also extended as far as the comments by the House of Lords in relation to actions for the intentional breach of a criminal statute that resulted in specific harm to an individual. The fact-situations in the *Lonrho* and *Canada Cement* cases were sufficiently similar, and the issues as regards both conspiracy and breach of statute were so alike, as to justify the conclusion that the approach of Lord Diplock in the English case is part of the law in Canada. It may be suggested, therefore, that the door has been closed authoritatively against the possibility of admitting the idea that a deliberate breach of a criminal statute, so as to inflict injury upon a specific individual or specific individuals, may allow such injured parties to sue civilly, without the need to prove that the acts in question were also torts *per se*, such as trespass, nuisance, or defamation. Indeed, in the *Lonrho* case, Lord Diplock also rejected the notion, propounded by Lord Denning in *Ex parte Island Records,*[70] that interference with a private right by a criminal act (which would presumably include the breach of a statute that imposed criminal liability for its breach) may give an individual, who has been caused, or who has been threatened with the prospect of sustaining, special damage over and above the generality of the public, a right of action against the statute-breaker. Thus, even the narrower formulation of the *Beaudesert* principle that is contained in Lord Denning's judgment cannot be said to be accepted by English law, and would seemingly also be rejected as part of the law in Australia and Canada. A potential extension of the scope of tort liability has therefore been denied or

[66] *Supra*, footnote 63.

[67] *Supra*, footnote 64, at 1208.

[68] *Supra*, footnote 65, at 463.

[69] (1983) 145 D.L.R. (3d) 385 (S.C.C.).

[70] *Supra*, footnote 59, at 829.

negated. What might have proved to be a fruitful source of tort law has been cut off in the early stages of its development.

The second restriction mentioned above takes the form of limiting the scope of the so-called tort of statutory negligence. Quite apart from the problems of determining whether or not a given statute could be construed as allowing such liability, there arises the issue of the effect of a breach of such a statute, once the statute has been construed in such a manner. As far as the former question is concerned, the trend in modern decisions, in England as well as Canada, has been to take a somewhat narrow view. Statutes will not be so construed unless they clearly reveal that they were not designed: to exclude any other remedy, or to result in the imposition of criminal liability, or were passed for the benefit and protection of a specific class of persons, or created a public right; and a particular individual has suffered some special or particular damage. Such was the formulation of Lord Diplock in the *Lonrho* case.[71] As suggested earlier, his Lordship's expression of the modern law indicates a certain reluctance to enlarge upon the scope of this type of liability, perhaps especially in light of the attitude of English courts that a breach of such a statute entitles an injured party to sue without proof of anything more (given the satisfaction of other rules as to remoteness or causation). Canadian courts have now gone further, and it has been held that, even where the statute permits such civil liability for its breach; it is no longer valid, in Canada, to say that the breach of statute itself will suffice to establish the requisite degree of fault to justify the imposition of such liability. In the language of Dickson J. of the Supreme Court of Canada in *Saskatchewan Wheat Pool* v. *Government of Canada*;[72]

> "1. Civil consequences of breach of statute should be subsumed in the law of negligence.
>
> 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of a breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct".

An important reason for this approach, as stated by Dickson J.,[73] was that the English viewpoint was inconsistent with modern ideas of liability based upon fault, i.e. the gradual enlargement of the scope of negligence. It stressed absolute, or strict liability, at the expense of negligence, as a basis for legal responsibility. Hence it was not an approach that should be perpetuated and should be replaced by the doctrine that the breach of a statute might be proof that negligence had occurred, but, as happened in the *Saskatchewan Wheat* case, was not negligence in and of itself. In that case, which concerned the breach of a statute that made it illegal to deliver infested grain, the grain in question had arrived at its destination infested with rusty grain beetle larvae.

---

[71] *Supra*, footnote 65, at 461.

[72] (1983) 143 D.L.R. (3d) 0 (S.C.C.) at 25.

[73] *Ibid.*, at 21, 23.

There was no evidence to establish that the infestation had resulted from any negligence on the part of the Canadian Wheat Board. The Wheat Pool endeavoured to affix liability on the Crown (as being responsibile for the acts of the Board) on the basis of the breach of the statute. The Supreme Court of Canada held that this was not possible. Without proof of acts of negligence that produced or caused the infestation, there could be no civil liability for the damage resulting from such infestation, even though there might be criminal liability for the delivery of the affected grain. Clearly, this is a decision of the utmost importance, in Canada if not elsewhere. However, it could be influential were English courts to take a more critical look at the present state of the law in England on the subject of breach of statutory duty, or statutory negligence. Whatever may be the final result in England, it is plain that, so far as Canada is concerned, the scope of this tort has been considerably reduced, and its utility, from the point of view of plaintiffs, significantly affected.[74]

There is another aspect of the *Beaudesert* principle, distinct from and independent of the suggestion that the deliberate breach of a statute, with the inevitable consequence of causing damage to a specific individual, can support a tort action by such individual. The language employed by the High Court of Australia in that case[75] purported to say, or could be interpreted to mean, that the intentional infliction of damage or loss upon another was actionable *per se*, unless somehow justifiable in law. Were this to be the law, it might no longer be necessary for a plaintiff to establish that the defendant had committed a particular tort, involving intention to cause harm, such as intimidation, conspiracy, or inducing a breach of contract. It would suffice to prove an intention to injure and actual injury; (whether the onus of proving lack of justification or lawful excuse was on the plaintiff, or the onus of establishing such a defence on the defendant being an unresolved issue). The fate of the *Beaudesert* principle has been discussed earlier. It would seem that the underlying notions contained in that principle have not received the *imprimatur* of other courts, whether in the country in which the principle originated, or elsewhere. So far from welcoming the possibility of extending the scope of tort liability, and perhaps, of creating a tort of "intention" (along the lines of the tort of negligence that developed from the speech of Lord Atkin in *Donoghue* v. *Stevenson*, fifty years ago) the courts have expressed not only reluctance, but even distaste, for any suggestion that the existing torts of intention can be generalised in such a way. Although the scope of some of these torts may have been enlarged in recent years, no efforts have been made to go beyond the individual torts and subsume them all under some broad idea of the kind expressed in the *Beaudesert* case.

Indeed, with respect to one tort, that of conspiracy, recent decisions have revealed certain objections to what was previously thought to be the wide scope of that tort. Prior to the decision of the House of Lords in *Lonrho* v.

---

[74]But see *Re National Capital Commission and Pugliese*, (1980) 97 D.L.R. (3d) 631 (S.C.C.), which seems to conflict with the *Saskatchewan Wheat Board* case: Fridman, *Civil Liability for Criminal Conduct* (1984) 6 Ottawa. L.R. 36 Contrast, *Baird* v. *Queen in Right of Ontario* (1983) 148 D.L.R. (3d) 1, a decision of the Federal Court of Appeal.

[75]*Supra*, footnote 62, at 156.

Shell Petroleum Co. Ltd.,[76] it was thought that the tort of conspiracy could be committed in either one of two situations. The first was where two or more persons combined in order to injure another, the eventual plaintiff; whether lawful or unlawful means were used to achieve such end. Only if the end to be obtained by the conspirators could be justified on the ground of legitimate self-interest would such a combination not be actionable (where it resulted in harm to the plaintiff). The second was where, in consequence of a combination that used unlawful means, harm was suffered by the plaintiff, albeit that such harm was not intended as a consequence of what those combining had done, even if the intended object of the combiners was lawful. The House of Lords has not stated categorically that the latter situation will not give rise to liability for conspiracy. According to Lord Diplock,[77] earlier authority had left open the question whether there could be liability for conspiracy where the damage-causing acts, although neither done for the purpose of injuring the plaintiff alone nor actionable at his suit if they had been done by one person alone, were nevertheless a contravention of some penal law. The House elected to limit the civil action for conspiracy to acts done in combination for the predominant purpose of injuring the interests of the plaintiff. The result of this judgment, it is suggested, is that the English law of conspiracy has not stressed the importance of the element of intention. It is the intent to injure (coupled naturally with actual injury) which is the foundation of an action for conspiracy. Even the deliberate flouting of some law, i.e. some penal law, will not suffice for such liability, without the ingredient of intention, in the sense of an intention to cause injury (presumably of the kind that actually occurred--since it is not clear whether the House of Lords would have accepted for the purposes of liability an intent to injure in a certain way (A) when the conspiracy caused a different injury (B)). Conspiracy in England, therefore, was narrowed in scope by this decision; in much the same way as the *Beaudesert* principle, which does not seem to have depended upon any intent to injure for its operation, was rejected.

By a strange coincidence, the problem of defining the tort of conspiracy came before the Supreme Court of Canada very soon after the decision of the House of Lords in the *Lonrho* case. The opportunity was taken by that court, speaking through Estey J., to adopt the same approach as had been used by the House of Lords. In *Canada Cement LaFarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*,[78] it was held that plaintiffs could not sue for the tort of conspiracy where there was no evidence of any specific intent on the part of the defendants to cause injury to the plaintiffs. The evidence revealed that the intent of the defendants was against the public at large. Moreover there was evidence that the plaintiffs had engaged voluntarily in the combination, with a view to participating in its benefits. This had another effect in that it allowed the invocation of the maxim *ex turpi causa non oritur actio* to defeat any possible claims by the plaintiffs.[79] The combination was unlawful in that it

---

[76] *Supra*, footnote 65.

[77] *Ibid.*, at 464.

[78] *Supra*, footnote 69.

[79] *Ibid.*, at 402-404.

contravened the *Combines Investigation Act*.[80] That, however, did not suffice to create liability. There had to be the intent to cause injury to the plaintiff — or conduct directed towards the plaintiff (along or together with others) in circumstances in which the defendants should know that injury to the plaintiff was likely to result (and did result). This latter form of *constructive intent* would be enough to bring into play the law of conspiracy, as now defined by the House of Lords in the *Lonrho* case, to which favourable reference was made by the Supreme Court of Canada.

The Canadian court appears to have formulated the idea of conspiracy slightly differently from the way it has been put in England. In the Canadian case[81] there is reference to the idea of "constructive intent". No mention of such intent is made in the *Lonrho* case. Whether this signifies a difference between the Canadian and English positions, it is hard to say. If the language of Lord Diplock is interpreted or understood restrictively, then it would follow that, in England, the requisite intent must be actual, not constructive. Indeed, having regard to Lord Diplock's comments on the *Beaudesert* principle in the *Lonrho* case (and the earlier *Woollhara* case), it might well be thought that his Lordship was excluding any possibility of a constructive intent, based upon the inevitability or great likelihood of injury to the plaintiff following upon the deliberate, and unlawful, act of the defendants. However, it might be said that when the House of Lords spoke of an intent to injure, in the *Lonrho* case, it was implicit in the language of the House that such intent should include within its ambit the implication of the necessary intent that could be made where the kind of damage that occurred to the plaintiff was an inevitable or highly likely consequence of the unlawful acts employed by the conspirators to achieve their ends. On that basis, while the wording of the elements of the tort of conspiracy may differ as between the English and Canadian courts, the fundamental policy and rationale of the law in this regard are the same. If that is accepted, then both in England and Canada, intention is the key to liability. For example, the intention to cause injury, derived from positive evidence of intention or evidence of knowledge of the consequences and disregard for what would ultimately happen vis-a-vis the plaintiff as a result of adherence to the aims and purposes of the conspiracy and perpetration of the acts agreed upon by the conspirators.

Thus, whether the defendant acted alone or in combination with others, the intention to commit an unlawful act will not suffice to result in civil liability for harmful consequences flowing from such act, unless (a) the act is tortious and actionable in itself, e.g. where it involves assault, battery, nuisance or, (b) there was also an intent to injure the plaintiff. Even in the latter situation it may well be that without the element of combination no civil action will lie in favour of the injured plaintiff in the absence of some otherwise tortious behaviour; or where the unlawful act is a breach of a penal statute which has been, or can be, construed as permitting a civil action for its breach. Not only has the potentially viable tort of intention been stifled at birth; the already mature tort of conspiracy has had its further growth stunted by judicial action.

---

[80] R.S.C. 1970 c. C-23, ss. 31.1, 32 (enacted by St. Can. 1974-75, c. 76, s. 12).

[81] *Supra*, footnote 69, at 399.

The foregoing discussion may seem in many respects to be inconclusive. If so, then it reflects the current state of the law of torts. Throughout its history, tort law has undergone change, sometimes by way of development of the areas and scope of liability, at other times by way of qualification of developments that might have gone too far and produced undesirable consequences had they been permitted to proceed unchecked. Using the terminology of Holmes J.[82], the law of torts has evolved by a shrewd and subtle combination of logic and experience. However, although pragmatism may have played an important role in this history, the influence and effect of logic must never be forgotten. Even when courts have been anxious to shape the future scope and content of the law so as to take into account the evidence of experience and the necessities of what is practical and desirable, they have expressed what they were doing, so far as possible, in terms of the logic of the law. The deliberate negation of previous law, on the ground that it has outlived its previous utility and purpose, is rarely seen. In recent times, perhaps the only true illustration of this is the decision of the House of Lords in *Herrington* v. *British Railways Board*,[83] where the older rule relating to an occupier's liability to trespassers was purposely and purposively overthrown by explicit reference to the changes in the social and economic life of the country. Whether or not such considerations underlie the final outcome of, and the reasons given by, a court for some decisions, it is unusual to find any explicit statement to such effect justifying a change in the doctrines espoused and expressed by the court, or the policy which is the foundation of such a change. By and large, courts have been content to reveal the incorrectness of the original rule, or the basis for its expansion or contraction, in terms of the invalidity of the reasoning of the original case-law, when reviewed in the light of subsequent legal developments.

This has produced a collection of precedents which are sometimes awkward to reconcile, or are indicative of trends in the law, without necessarily being decisive as to the ultimate rule, doctrine or policy that will eventually be adopted as the governing one. Hence, it is only possible to discuss what has been happening in recent years in very general, broad terms, in an endeavour to state how the observer of such developments sees and understands the evolution and possible outcome of the cases.

With respect to the subject-matter of this essay, some hesitant suggestions can be offered, by way of a subjective assessment of the present situation in the light of the cases that have been examined. First of all it may be said that, with one major exception,[84] the law of torts has not yet equated situations where physical injury results from a defendant's conduct with those where only economic loss has emerged. There remains in the law some hidden reluctance to treat the latter form of damage with the former. This may be the consequence of the historic distinction between tort and contract, which some have suggested is archaic, outmoded, irrelevant, and a hindrance to the proper

---

[82] *The Common Law*, at 1.

[83] [1972] A.C. 877.

[84] The law of negligent misrepresentation.

evolution of the law.[85] The former was more appropriate to cases of physical injury: the latter more appropriate to economic loss, since it depended upon the agreement by one party to bear possible risks from a certain course of conduct, whereas the former was dependent upon the willingness of the law to create and impose duties from breach of which liability could flow. Save for some situations involving interference with property (or the possession of goods or land), the law of torts was largely unconcerned with economic loss unless it was the outcome of some physical injury to the person (or his reputation, where the gravamen of the liability was the insult rather than the injury). Protection against economic loss was usually conceived of as a matter of agreement, i.e. contract. In modern times, however, the development of the law of negligent misrepresentation, and other outgrowths from that development, may have made inroads into such reluctance on the part of the law of torts, and may have narrowed or blurred the line between contract and tort. While the law of negligence may have changed in this respect, a similar change may not have occured in respect of other torts. It is still too early to speak in terms of the abolition of the distinction between tort and contract, at least as far as economic loss is concerned. Efforts were made by Lord Denning to achieve something like this in the narrow context of sale of goods, by making distinctions between remoteness or measurement of damages dependent upon the difference between physical and economic injury, rather than tort and contract. This met with no support from the other members of the Court of Appeal, in *Parsons* v. *Uttley Ingham & Co. Ltd.*[86] On the whole, therefore, the courts have not been prepared to abandon classical notions of tort and contract, for any reason or for any purpose

However, some more positive developments can be put forward as being evidenced by modern case-law. Put together they summarize the extent to which, and ways in which, the law of torts is both expanding and contracting, in a manner which appears to be consistent with some overall growth or evolution of the law. At the present time, the law of torts seems to be placing much more emphasis upon the intent to injure, or upon negligence, as bases of liability. Simultaneously, as a complement so to speak, it is de-emphasising the idea of strict liability as a source of responsibility for injuries or loss occasioned by or through the acts of the defendant. What this amounts to is the bringing into prominence of the notion of "fault" as the fundamental source or foundation of tort liability.

The value and relevance of "fault" are being emphasized and clarified in several ways. There is the extension of the number of situations in which negligent conduct can result in liability. Where once the fact that a defendant had been negligent, in the abstract, would not have led to his liability to anyone, or to a particular plaintiff, there is now the possibility of such liability. This may be illustrated by decisions dealing with the liability of lawyers and

---

[85] E.g., Atiyah, *The Rise and Fall of Freedom of Contract*, 4, 768, 778-779; Atiyah, (1978) 94 L.Q.R. 193 at 220-223. See also Gilmore, *The Death of Contract*, 1974 at 87-94; Reiter, *Contracts, Torts Relations and Reliance*, in Reiter and Swan, *Studies in Contract Law*, 1980, Chap. 8. But see Burrows, *Contract, Tort and Restitution----A Satisfactory Division or Not?* (1983) 99 L.Q.R. 217. See also, Bishop, *The Contract-Tort Boundary and the Economics of Insurance* (1983) 12 J. Leg. Studies 241.

[86] [1978] Q.B. 791.

by cases on nervous shock and economic loss to a plaintiff stemming from a contract between the defendant and a third party. In Canada, the expansion of the relevance of fault is evident in the way in which the law relating to breach of statutory duty has been stated by the Supreme Court.[87] Mention might also be made of the development with regard to causation that may be seen in *McGhee* v. *National Coal Board*.[88] That decision, and the cases in which it has been adopted and followed (especially in Canada)[89] suggest that once a defendant has created a situation out of which harm of the kind resulting to the plantiff might have been caused, the plaintiff no longer has to establish the necessary element of causation: the requisite causal connection can be deduced in the absence of some contradictory evidence. Although this is not the same as the doctrine of *res ipsa loquitur*, it may have achieved much the same effect. In any event, what has occured in this regard is that the courts seem prepared to accept that fault of some kind, in the particular instance the breach of a statutory duty, may produce liability by a very broad interpretation of both the notions of fault and of causation. Furthermore, in cases in which liability rests upon the intention to cause harm, the importance of "fault" is obvious. An examination of recent cases exposes the way in which the courts are becoming insistent upon proof of an unqualified intent to injure, as contrasted with the fact the injury results from the commission of some (unlawful) act, even where the resulting injury is a foreseeable, but not necessarily likely, consequence of the conduct in question. While the motive of the party acting may be irrelevant, his intent is not. In defining or discovering his intent it is material to investigate what were the likely, even inevitable, consequences of his acts, so as to show that the intent to injure was present despite protestations to the contrary or arguments that what occurred was not what was intended.

The corollary of this, it is suggested, is that the mere causation of harm will not suffice to involve the party whose acts caused the harm in liability. Even the intent to commit an unlawful act will not give rise to liability in tort, whatever effect it may have under the criminal law. The must be some negligence vis-a-vis the plaintiff, where there was no intent to cause the plaintiff harm. The classical cases or instances of strict liability may be beyond alteration (except by statute); but there will be no extension or broadening of their scope or application. The chief emphasis of the law is upon "fault" in the senses of negligence or an intent to cause injury. Such was the attitute of the Supreme Court of Canada in the *Saskatchewan Wheat* case.[90] The same attitude can be seen in operation in the conspiracy cases in England and Canada,

---

[87]Cf. Canadian developments in relation to privacy: *Poole* v. *Ragan* [1958] O.W.N. 77; *Robbins* v. *C.B.C.* (1958) 12 D.L.R. (2d) 35 (Que. S.C.), *Motherwell* v. *Motherwell* (1977) 73 D.L.R. (3d) 62 (Alta. S.C.): especially in respect of appropriation (or misappropriation) of another's personality: see *Krouse* v. *Chrysler Canada Ltd.* (1970) 12 D.L.R. (3d) 463 (Ont. H.C.), (1972) 25 D.L.R. (3d) 49 (Ont. H.C.); *Athans* v. *Canadian Adventue Camps* (1978) 80 D.L.R. (3d) 583 (Ont. H.C.); *Racine* v. *C.J.R.C.* (1978) 17 O.R. (2d) 370 (Ct. Ct.). See also Frazier, *Appropriation of Personality----A New Tort?* (1983) 99 L.Q.R. 281.

[88][1972] 3 All E.R. 1008.

[89]*W.C.B.* v. *Schmidt* (1977) 80 D.L.R. (3d) 696 (Man. Q.B.); *Powell* v. *Guttman* (1978) 89 D.L.R. (3d) 180 (Man. C.A.); *Nowsco Well Services Ltd.* v. *Canadian Propane Gas & Oil Ltd.* (1981) 122 D.L.R. (3d) 228 (Sask. C.A.). See also Weinrib, *A Step Forward in Factual Causation* (1975) 38 M.L.R. 518.

[90](1983) 143 D.L.R. (3d) 9.

the *Lonrho* case[91] and the *Canada Cement* case.[92] At a time when some commentators on the law applaud and promote the argument that the law of torts should be getting away from the concept of negligence, and should be approaching its problems more from the point of view of loss distribution, which may have nothing to do with, or be independent of, the concept of "fault", ther are judicial decisions and statements that appear to stress the ever increasing importance of fault as an underlying basis of tort liability.

This observable fact raises the issue of the true basis of liability in the modern law of tort. On this there has been much debate in recent years. Several different theories have been propounded. One commentator has distinguished three approaches. The first comprises those

> which seek to transcend the accepted categorisation of the law into various different torts and to find general principles on the basis of which the law could be reorganized in a more satisfactory way. Second, there are those approaches which accept the current categories of the law but search for principles common to all those categories. A third approach sees the law of torts as based on a number of different theories: some torts protect interests, some torts compensate for harms, and so on.[93]

The writer in question adopts the latter approach, which he says is common among English writers. The first, illustrated by Calabresi's functional approach to accident law,[94] Epstein's theory of liability based on causation,[95] and Fletcher's theory of reciprocity of risk,[96] and the second, which includes Holmes' general theory of tort liability[97] and Posner's economic theory,[98] the writer in question does not positively reject, but does seem to treat critically. He is not alone in such criticism. Theorists such as Calabresi, Posner, Epstein, Fletcher, and others have all been subjected to critical appraisal.[99] The effect of this is not only to leave the inquirer into truth bewildered, confused, and bereft of all assistance, but also in a state of complete uncertainty as to what, if anything, can be said to be the proper way to interpret how the courts have responded to the challenges presented by the need to provide remedies for the infliction of harm by wrongful acts.[100] An alternative way of grouping these

---

[91] [1981] 2 All E.R. 456.

[92] (1983) 145 D.L.R. (3d) 385. See also Lord Wilberforce in *Kooragang Investments Pty Ltd.* v. *Richardson & Wrench Ltd.* (1981) 3 All E.R. 65 at 71.

[93] Cane, *Justice and Justifications for Tort Liability* (1982) 2 Oxford J. of Legal Studies 30.

[94] *The Cost of Accidents*, 1970; see also the articles cited in Englard, *loc. cite infra* note 170, at 33 note 22.

[95] *A Theory of Strict Liability (1973) 2 J. Leg. Studies 151; Defences and Subsequent Pleas in a System of Strict Liability* (1978) 3 J. Legal Studies 165; *Nuisance Law: Corrective Justice and Its Utilitarian Constraints* (1979) 8 J. Legal Studies 49. See also Harari, *The Place of Negligence in the Law of Torts*, 1962, criticised by the present writer in (1963) 26 M.L.R. 722.

[96] *Fairness and Utility in Tort Theory* (1972) 85 H.L.R. 537: on which see Coleman, *Justice and Reciprocity in Tort Theory* (1975) 14 U.W.O.L.R. 105.

[97] *The Common Law*, 1881, Lectures III, IV: on which see Atiyah, *The Legacy of Holmes Through English Eyes* (1983) 63 Boston U.L.R. 341 at 350-365.

[98] *Economic Analysis of Law*, 1977, Chaps. 1, 2, 6; *A Theory of Negligence* (1972) 1 J. Legal Studies 29.

[99] Englard, *The Systems Builders: A Critical Appraisal of Modern American Tort Theory* (1980) 9 J. Legal Studies 27.

[100] Cp. the similar comments in relation to theories of contract made by Warren, *Formal and Operative Rules Under Common Law and Code* (1983) 30 U.C.L.A. Law Review 898.

various theories, it is suggested, is by labelling them as follows: (1) the economic view of torts, as contained in the writings of Posner or Calabresi, although it would be improper to lump them together without any form of distinction; (2) the philosophic view of torts, which has been embraced and promoted by Fletcher; (3) the scientific view of torts, which may also be called the juridical or legal view, illustrated in the writings of Epstein.

All these scholars purport to find support and justification for their different theories in decided cases, both English and American. In fact what they are doing is to analyze those decisions in a way which harmonizes with their views as to the law, rather than discover in the language of the judges, with some notable exceptions,[101] the actual content of such theories. There is nothing *per se* objectionable in this. The writers in question are simply utilising the cases and their trends as commentators on the law have done for generations, in order to discover some common threads of principle or policy which can explain the decisions and provide a basis for future determinations. Their ideas and approaches are open to objection, however, in that they are only attempts to create some systematic exposition of the workings of the law in terms that will bring the law into line with what the individual concerned believes is an appropriate attitude for the law to adopt. They are idealistic and to some extent *a priori*, rather than expository and empirical. Indeed, the criticism has been made that the theories do not fit in with the cases and do not accommodate the real world.[102] All these theories, interesting and imaginative though they may be, do not adequately serve the purpose of a valid theory of torts, which is to explain how and why the courts and respond as they do to the demands of litigation. Perhaps the closest approximation to such a theory is the approach contained in the essay by Cane[103] which adopts and expands upon the "English approach", as it may be called, of different theories for different torts. This is founded on what the learned author calls "four conceptions of justice"; viz., a rights-based conception of justice, a conduct-based, duty-based conception, a conception of justice as fairness, and a needs-based conception of justice.[104] Useful and enlightening though this may be, it remains unsatifactory in that, despite its apparent dependence or reliance upon historical analysis and developments, it fails to provide an unifying, ecumenical idea of what the law of torts is all about. The nearest the author in question comes to this is in his statement[105] that the conduct-based or duty-based conception has enjoyed dominance in modern law. The reason is that negligence, the most important tort in the modern law, is clearly conduct-based or duty-based, stemming as it does from the notion of corrective justice.[106] This emphasis on negligence, which is at the root of many of the

[101] E.g., the use of Judge Learned Hand's analysis of negligence in *United States* v. *Carroll Towing Co.* (1947) 159 F. 2d 169, by, for example, Posner, *A Theory of Negligence, supra*, footnote 169, at 32 and by Epstein, *A Theory of Strict Liability, supra*, footnote 95, at 154-160.

[102] See Englard, *loc. cit. supra*, footnote 99, at 46-47, 53.

[103] *Supra*, footnote 93.

[104] *Ibid.*, at 31-35.

[105] *Ibid.*, at 30-31.

[106] *Ibid.*, at 32.

other theories, in particular those of Calabresi and Posner (Epstein has at least attempted to incorporate intentional torts in his analysis and theory), may be the cause of the somewhat lopsided nature and effect of most theories of tort law. Yet negligence, for all its importance, is not the whole of the law of torts: and a valid theory of tort law should surely be able to comprehend within its scope all tort law. Hence we are thrown back to possibly simplistic ideas of fault.

That expression, by itself, is not enough. There has to be some further analysis of what it entails. Is "fault" being employed in a legal sense? If so, what does that involve? Or is "fault" being used in a moral and ethical sense? This could require some consideration of the philosophical implications of tort law. Much of the difficulty resulting from the theoretical writing referred to earlier is that the authors in question have not always made it clear whether they were discussing the legal notion of fault or some meta-legal, or metaphysical conception. It does not necessarily follow, although one would hope that in a civilised system of law, such as the common law may be considered, it would probably follow, that the legal idea of fault is connected with, even depends upon or evolves from, the philosophical. Where the definition or elucidation is to be found seems to depend upon the level of inquiry or abstraction at which the search for definition or elucidation is made. To put this another way, we are back again in the age-old conflict or confrontation between the positivist approach to law, and an approach which rests upon some version of natural law theory. The latter may be ethically based with the ethical content being drawn from religion or humanism. The latter may be sociologically based, being drawn from the realities of social intercourse, standards of actual behaviour, or expectations among reasonable men. It may even be politically based, being founded on what is necessary for a politico-legal system to adopt to accord with its philosophical bases and its effectiveness in practice. The contrast is between what is thought by the law itself, in terms of the technical reasoning of the law, as the theoretical underpinnings of the law of tort, and what is conceived of as the underlying rationale of the law. If the second approach is adopted, then there would seem to be no generally accepted, or acceptable, resolution; everything turns upon the particular biases or preferences of the individual commentator. If the first approach is taken, it ought to be possible to arrive at a conclusion that is broadly capable of acceptance. For this obvious reason, therefore, the positivist approach is the one that is to be encouraged and followed.

Thus the issue becomes, what is meant by "fault" in legal terms? The internal logic of the expression, as well as the language of the courts, dictates that the expression cannot refer to, or connote, the mere fact that harm or injury has been caused by some act or omission of the wrongdoing party. There must be some deviation from standards of conduct that have been laid down as proper by the law over the centuries. Can those standards be discovered objectively or empirically? If so, on what basis or by what means? The answer is that the standards that apply to determine whether a party is at "fault" in any legal sense, so as to give rise to liability in negligence or for intential wrongdoing, are those which the courts have worked out by and through the doctrine of precedent. The standards are there, expressed in print, for all to read and

understand. They rest upon notions of negligence and intention that have been elaborated and refined in the cases. Thus, for example, the various features that, in sum, make up the test of negligence can be culled from a variety of decisions. The content of the idea of intentional wrongdoing, likewise, is to be found in the decisions in which common law courts have said that conduct designed and perpetrated to impinge upon the personal or economic safety of another, where there is no lawful justification or excuse for such conduct, will constitute a wrongful act giving rise to liability in the event of damage. In recent years, certain aspects of both negligence and intention as the foundations of tort liability have been the subject of some further elucidation, refinement, and activity by the courts. The thrust of all this has been to make abundantly clear that, whether expansion or contraction is taking place in regard to a particular tort or a particular form of liability, the courts are not seeking to enshrine some philosophy of law, whether it be scientific, economic, ethical, or otherwise. They are simply attempting in a practical way to continue to apply the principles they have inherited from the past in a manner which will accommodate the needs of the present and the potential demands of the future. So far from being governed by, or attributable to some underlying conception of what the law of torts is, and how it should operate so as it give effect to such a view, the actions of the courts have been motivated by the fundamentally more simple and practical idea that in principle, i.e. in accordance with earlier expressions of the law, and as a matter of logic, i.e., in conformity with the internal conceptions of the law, the various expansions or contractions are both rational and justified. There is nothing mysterious about the law of torts.