THE FOUNDATION OF TORTIOUS LIABILITY

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MANY of the most respected writers of the law of torts have adopted the view that this branch of the law is based upon the general principle that all harm to another person is presumptively unlawful. As Winfield puts it, "All injuries done to another person are torts, unless there is some justification recognized by law."[1]

Against this view there have always been some voices raised, for instance, the late Sir John Salmond, although it would now appear that such attitude is distinctly that of a minority, as regards the authors of text books. As one who ventures to side with the minority, I have been led to choose this subject for my valedictory address on account of the fact that Professor Winfield, in the excellent work on torts which he has recently published,[2] has reiterated his earlier expressions of opinion as to the existence of a general principle of tortious liability.

At the outset I would say that I think the view that there is a general principle of liability has received support from some, not just as a result of their research into legal doctrine, but because it seems to have a sounder social or moral basis. Now, quite apart from whether social policy is a proper consideration for the Courts to regard, rather than leaving such matters to Parliament, both Pollock and Winfield stress the fact that there is liability unless there is a head of justification *recognized by law.* Once you look to legal and moral justification it becomes very debatable whether the general principle of liability theory necessarily provides a foundation for liability one whit more moral or socially advantageous than the so-called pigeon-hole theory of its opponents.

Professor Goodhart raises what we might term a preliminary objection to the views of Winfield. The objection is perhaps more embarrassing than destructive to the protagonists of the opposite theory; but it is one we can all ponder upon. He asks, did this alleged fundamental principle of tortious liability make its appearance in the 13th or 19th centuries?[3] Pollock is prepared to give a recent date to the doctrine's birth, but it would look as if even he feels there is some need for discretion on the question of parentage.[4] For, if it is recent, how did it come to be part of the common law; and, if it is ancient, how is it that it has been so long undiscovered?

What is surely a very substantial argument against the validity of any general principle of liability, is the admission made by some of the protagonists of that theory that the general principle does

1. P. H. Winfield, *Text-Book of the Law of Tort*, p. 15.
2. *Text-Book of the Law of Tort.*
3. *Law Quarterly Review*, 1938, p. 127.
4. Sir Frederick Pollock, *Law of Torts*, 13th edition, p. 20.

not extend to what may be termed the nominate torts, for example, assault, battery, libel, slander, nuisance, negligence and false imprisonment. You will recover nothing, Winfield says, if you allege a specific tort and fail to prove each of the specific legal ingredients.[5] Does not this admission considerably weaken the whole position of those who argue in support of a general principle of liability? For the overwhelming majority of wrongs are committed within the area of the nominate torts. Further, even future developments of social structure may well have the bulk of their wants supplied, as regards tortious liability, from the present range of nominate torts—possibly by little known causes of action blossoming out into important heads of liability. By far the greater part, then, of the area of tortious liability to-day, and what possibly will remain the greater part of such area in the future, is covered by no general principle of liability. It seems difficult therefore to apply the term "general principle of liability" to that which has at the most a very limited scope. It can hardly be doubted that Winfield is right in excluding nominate torts from the theory he espouses, for otherwise we must look upon the authorities on the so-called nominate torts, except when they are demarking a head of legal justification, as merely signposts, as it were, saying "The Courts have gone thus far so you can safely follow." However, it is beyond controversy that the effect of the authorities is not as just stated, but that from them the actual rules of law are to be derived. Nor are they normally concerned with laying down the extent of any of the heads of legal justification. If we look at the authorities on specific rules of law we find that this is obviously so. For instance the person who suffers damage as the result of nuisances committed by his next-door neighbour, and fails to prove that he is the occupier of the land in question, but only that he is a licensee, will fail in an action for nuisance, not because there is any legal justification for his neighbour in causing a nuisance, but because he has failed to establish the ingredients of his cause of action. Again there are many cases in the Year Books in which it is held that a threatened battery, though not accompanied by an immediate fear of such, was actionable.[6] That is no longer so, but can it be said that the law has therefore justified such conduct? Also, the general rule that one cannot establish a cause of action on account of spoken words where no evidence is given of special damage, although the same allegation in writing would be actionable without such evidence, is not based upon the former publication coming within any head of legal justification, but simply that the legal ingredients of the two torts of slander and libel differ for historical reasons.

Of course, it may possibly be argued that the correct way in which to view all torts is to consider them as being founded upon damage caused without legal justification, rather than as being founded on wrongful acts. But, as regards nominate torts, if it is necessary to

5. Winfield, *Text-Book of the Law of Tort*, p. 19.
6. Holdsworth, Vol. VIII, p. 421.

establish a recognized cause of action and base one's case upon it, the adoption of this view would shed no light upon whether there is a cause of action or not in any given set of circumstances, and we may therefore disregard this aspect of the matter as being of no practical worth, and confine ourselves to questions that may have some bearing on the substance of the legal system. (Compare *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor.*[7])

In our enquiry as to the existence of a general principle of liability, we are confined therefore to what we may term the unoccupied area of tort, to use the topographical terminology which by general consent has been utilized in discussing this matter. As regards this unoccupied area of tortious liability, by which we mean the area outside the field of the nominate torts, the foundation principle of liability whatever it may be, must be discovered if we can determine how so-called new torts come into existence.

To begin with we cannot simply adopt the attitude that we have so many heads of justification or no-liability areas, and where damage is sustained in circumstances which do not come within the ambit of any such no-liability area, although the facts do not constitute the ingredients of any recognized tort, we nevertheless have a perfectly valid cause of action. For just in the same way as new heads of tort are said to arise, we may also have new heads of justification (*cf. The Salt Union Ltd. v. Brunner Mond & Co.*[8]), which rather suggests that in any given case it would be a matter of competing analogies to determine if a cause of action exists—the question being is the case nearer to a recognized head of liability or a head of justification.

Further we must remember that there are no-liability areas which exist, not because there is a positive right to act in a certain way, but because the law recognizes a liberty merely to act in that manner. Perhaps the most recent decision on this type of legal relationship is *Hollywood Silver Fox Farm v. Emmott,*[9] where it was held that an interference with the enjoyment of property caused by shooting a gun, an interference which in the circumstances would not ordinarily give rise to a cause of action, became actionable when the interference was malicious. In such cases it would seem that the real problem is not so much concerned with any head of justification, but as to whether in fact wrong has been committed.

Again having regard to the fact that we cannot apply the theory that there is a general principle of tortious liability to the major part of the area covered by the law of torts, i.e., the nominate torts, how are we to know when the facts before us amount to a failure to prove the ingredients of a known tort, and when they are at large in the unoccupied area of tort? I would venture to suggest that the only distinction between those two categories is a distinction in one's own mind, based on a mental picture created by the use of topographical terms in discussing the question. If no logical dis-

7. 58 C.L.R. at 505-6, *per* Dixon J.
8. [1906] 2 K.B. 822.
9. [1936] 2 K.B. 462.

tinction can be drawn, then we are brought back to our starting point as regards nominate torts—do the facts under consideration come within any known head of tortious liability? Of course, we must recognize that there is a certain power of expansion in the law of torts, and if our theory provides no place for this, it must be *prima facie* erroneous. But this difficulty is surely overcome if we say that to give rise to a cause of action in tort any given facts must come within the *principle* of a known head of tortious liability. While, in determining if any such principle applies, one would necessarily have regard to competing analogies between heads of justification and heads of liability, it would appear from the foregoing that in a case of doubt the attitude should not be, as immunity is not established there must be liability, but rather, as liability is not established, there must be immunity.

Generally speaking this is the attitude adopted by Dr. Jenks.[10] He says "It is impossible at present to formulate a test which will ensure the recognition by the Court of any claim in tort, unless a substantially similar claim has previously received recognition by a precedent-setting tribunal." Winfield, in his recent work,[11] devotes some space to a criticism of this viewpoint. He alleges that so-called new torts are in fact new and not substantially similar to those previously in existence. But if Jenks means by "substantially similar," "covered by the same principle," then it would appear that Winfield has really missed the point made by Jenks, for Winfield, judging by examples he gives, is considering rather outward similarity of fact.

Let us consider the cases Winfield cites in support of his thesis and see if they bear out his contention that new torts have been deliberately created—the justification for such creation being that all damage is *prima facie* wrongful. That would be *why* the new torts were created, while Jenks only shows us *how* it was done. One case he principally relies on is *Pasley v. Freeman.*[12] Now in that case Ashurst J. makes it clear that the decision is arrived at because the Court felt the facts were covered by a known principle of law. Go outside that principle and there is no cause of action. Winfield says we should look to what the Court did. Well in fact what it did was to recognize a cause of action, with the proviso that any other facts not coming within the principle would not sustain a cause of action. As to both this case as well as *Rylands v. Fletcher*[13] and *Brooke v. Bool*[14] which Winfield also cites, it may perhaps be that the actual decisions were too wide, though of course good law now. But for a Court to give decisions which are too wide after construing earlier decided cases, does not establish that the decision is made on the basis that here was unjustifiable harm and therefore it would give redress, however much that may have subconsciously caused the

10. *Journal of Comparative Legislation*, Vol. 14, p. 207.
11. *Text-Book of the Law of Tort*, p. 20.
12. 3 T.R. 51.
13. L.R. 3 H.L. 330.
14. 3 De G. & J. 33.

judges to go wrong. So long as the Court's attitude is that it can go so far and no further in conformity with some principle of law, the theory at the back of that branch of legal liability is surely not affected if a wrong decision succeeds in extending the area of liability. Nor can it be said that the basis of liability is affected because in the constant working out of some rule of law with too scant regard for the principle from which it is sprung the rule becomes inconsistent with the principle.

Winfield makes another admission which is I think dangerous to his general principle. He says that not in every case where damage is done which otherwise will be considered unjustifiable will Courts give redress. One reason being that they may think the remedy a proper one for Parliament. But that is no head of legal justification. Might one not more correctly state in such a case that the rule creating liability did not extend to such facts?

Negligence is another tort which is often relied upon by those who argue in support of a general principle of liability. Now negligence arises historically from the action on the case in which damage was the chief consideration. To prove the damage to be actionable the Courts came to consider the question from this angle —should a man exercising reasonable care have foreseen the consequences. Thus the objective standard of negligence arose. Further the enquiry whether the action of the defendant was thus a proximate cause of the damage was unnecessary unless there was a definite duty of care. Historically therefore the action rests not on damage caused without legal justification, but on breach of a specific duty.

The recent decision of the High Court in *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor*[15] is definitely in conflict with the existence of a general principle of liability. For example Dixon says[16] with regard to actionable conduct, ". . . . it remains true it must answer a known description; or in other words respond to the tests or criteria laid down by established principle."

More recently the same question came before the High Court in connection with two unreported demurrers in *James v. The Commonwealth*. Mr. Ward (of the South Australian bar) for the plaintiff sought to rely on a general principle of tortious liability. He logically started on the basis that there being no obvious head of justification as regards the damage his client had suffered he would leave it to Counsel for the Commonwealth to produce any heads of justification that applied. He would content himself by showing that his client had suffered harm. He could not in any way connect it with any known head of liability, but the chain of causation was complete, the damage was there, and therefore he had made out a *prima facie* case. The matter never reached judgment, but it was obvious that the High Court was unsympathetic to the suggestion that harm to another was *prima facie* unlawful.

15. 58 C.L.R. 479.
16. 58 C.L.R. at 506.

I shall therefore conclude that whether we view tortious liability from the aspect of unjustifiable damage or actionable conduct, a cause of action in tort can only exist if the facts relied upon conform to the tests laid down by the established principles of the law of torts.