1 GENERAL INTRODUCTION

I. Historical Development of Tort Law

1. Origins of Tort Law

The law of tort—the word derives from the French for 'wrong'—is the law of civil liability for wrongfully-inflicted injury, or at least a very large part of it. (Breach of contract and breach of trust are perhaps the other two most important civil wrongs.) Tort itself is a very old legal concept, older even than the concept of crime. According to Sir Henry Maine, 'the penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of torts' (*Ancient Law* (1861), p. 328). It developed in the days before states were sufficiently organised to have a centralised prosecuting authority; the only alternative was to leave the task of punishing wrongful conduct to private individuals. The existence of such remedies was necessary for the maintenance of public order, for in their absence feuds and acts of unrestrained vengeance would no doubt have been common. Tort was a form of legalised self-help. For the injured party, the incentive was often not only the award of compensation, but also the entitlement to an additional punitive element of damages. Under Roman law's action for theft (*actio furti*), for instance, the plaintiff was entitled to recover at least 'double damages', i.e. twice the worth of the thing stolen. Indeed, where the defendant was caught red-handed (in a case of 'manifest theft') fourfold damages would be awarded. As the temptation to take the law into one's own hands would be at its strongest in such a case, a greater than usual incentive was required to ensure that the matter was resolved by lawful means.

Although the Roman law of tort—or 'delict', as it is more usually called—developed in piecemeal fashion, the civilian jurisdictions which took it as their model sought to systematise the principles of tortious liability, eliminating its anomalies and diminishing its complexity (following the analysis of the great natural lawyers such as Grotius). Their Codes—which mainly date from the Napoleonic era and thereafter—reduce the law of tort to its bare essentials. 'Almost the whole of the French law of delict rests on a mere five articles in the *Code Civile* which have remained in force virtually unchanged for 195 years' (P. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn., trans. T. Weir (Oxford: OUP, 1998), p. 615). Unlike the French code, the German *Bürgerliches Gesetzbuch* (BGB) resists the temptation of a general clause imposing liability for all the consequences of one's fault, and deals with tort liability under three 'more limited but still broad' principles. The other civilian jurisdictions in Europe (not including Scotland whose law of delict is almost identical with the English law of tort) take varying positions, some more closely aligned with the French approach, some with the German.

The English law of tort stands in stark contrast. 'The Common Law of Torts started out by having specific types of liability just like Roman law, but, whereas on the Continent legal

scholars ironed out the old distinctions between the several delicts to the point where a general principle of delictual liability became not only a possibility but an actuality in most legal systems, Anglo-American lawyers have largely adhered to the separate types of case and separate torts which developed under the writ system' (Zweigert and Kötz, *op. cit.*, p. 605). It is perhaps this lack of principle which led the great American judge and jurist, Oliver Wendell Holmes, to pronounce: 'Torts is not a proper subject for a law book' ((1871) 5 Am L Rev 340). Holmes nevertheless overcame his early prejudice, and wrote—in his masterly analysis *The Common Law* (originally published in 1881)—an account of the law of torts which remains a rewarding and insightful read today.

Holmes set himself the task of discovering 'whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is' (*The Common Law*, p. 77). He considered that this was not an easy task: 'The law did not begin with a theory. It has never worked one out' (*ibid.*). He found that discussions of general principle had been 'darkened' by historical controversies that had no contemporary relevance (*ibid.*, p. 78). Nevertheless, he felt that a full account of the law required a knowledge of its history, asserting at the beginning of his great work that '[i]n order to know what it is, we must know what it has been' (*ibid.*, p. 1). Accordingly it is with the historical development of the English law of torts through the forms of action that we begin.

2. The Forms of Action

For most of its history, English common law developed through the procedural mechanisms used to bring an action before the courts. These were known as the forms of action, the writs that it was necessary to purchase from the Chancery so that an action could be commenced in the royal courts. At the very beginnings of the common law these writs were drawn up on an ad-hoc basis, but this soon became impractical and standard-form writs began to develop. Writs set out in a formulaic style the gist of the plaintiff's complaint and instructed the local sheriff to summon the defendant to answer the allegation. There were different writs for different actions within what later became known as the law of tort. It was during this period that the foundations of modern tort law were set down. Although the forms of action were abolished by the Judicature Acts of 1873 and 1875, an understanding of modern tort law is impossible without an appreciation of the writ system and of the most important forms of action that developed under it. Amongst these, undisputed pride of place goes to the writ of trespass—'that fertile mother of actions', to use Maitland's phrase—from which developed the more flexible writ of trespass on the plaintiff's special case (the action on the case or—more simply—'case').

(a) The Writ of Trespass

The writ of trespass was one of the original royal writs (issued in the Crown's name) and it became relatively common after 1250. Trespass was a writ of wrong rather than a writ of right; it complained of a wrong rather than demanded the reinstatement of a right. The mode of trial was by jury and the remedy was damages. A number of different forms of trespass were recognised. The writ of trespass *quare clausum fregit* corresponds to the modern tort of trespass to land; that of trespass *de bonis asportatis* to the modern trespass to goods. The writs dealing with trespass to the person took various forms, corresponding to the modern

torts of assault, battery and false imprisonment. What all of them had in common was a requirement that the defendant had acted *vi et armis* ('with force and arms') and *contra pacem* ('in breach of the [king's] peace'). The writ of trespass *vi et armis* for battery, for example, required the defendant 'to show why with force and arms he made assault on the [plaintiff] at [a particular place] and beat, wounded and ill-treated him so that his life was despaired of, and offered other outrages against him, to the grave damage of the self-same [plaintiff] and against our peace' (see *Baker*, p. 545). These requirements were imposed in order to prevent the King's Courts being overwhelmed with business; cases not involving violence and a threat to public safety were left to be dealt with in the local courts.

F. Maitland, *The Forms of Action at Common Law*
(Cambridge: CUP, 1909)

What was a form of action? Already owing to modern reforms [the Judicature Acts of 1873 and 1875] it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question, but it is still one which must be answered if he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of action we have buried, but they still rule us from their graves. Let us then for a while place ourselves in Blackstone's day, or, for this matters not, some seventy years later in 1830, and let us look for a moment at English civil procedure.

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a writ of right, an assize of novel disseisin or of mort d'ancestor, a writ of entry *sur disseisin* in the *per* and *cui*, a writ of *besaiel*, of *quare impedit*, an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, case. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds.

[Maitland then discusses a number of procedural differences between the different actions.]

These remarks may be enough to show that the differences between the several forms of action have been of very great practical importance—'a form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.

[Maitland then proceeds to a chronological survey of the major developments in the history of the forms of action.]

1189–1272

The most important phenomenon is the appearance of Trespass—that fertile mother of actions. Instances of what we can not but call actions of trespass are found even in John's reign, but I think it clear that the writ of trespass did not become a writ of course until very late in Henry III's reign. Now trespass is to start with a semi-criminal action. It has its roots in criminal law, and criminal procedure. The historical importance of trespass is so great that we may step aside to look at the criminal procedure out of which it grew. The old criminal action (yes, action) was the Appeal of Felony (*appellum de felonia*). It was but slowly supplanted by indictment—the procedure of the common accuser set going by Henry II, the appeal on the other hand being an action brought by a person aggrieved by the crime. The appellant had to pronounce certain accusing words. In each case he must say of the appellee '*fecit hoc* (the murder, rape, robbery or mayhem) *nequitur et in felonia, vi et armis et contra pacem Domini Regis*' [he did this—the murder, etc—wickedly and feloniously, with force and arms and contrary to the King's Peace].

He charges him with a wicked deed of violence to be punished by death, or in the twelfth century by mutilation. The procedure is stringent with outlawry in default of appearance. The new phenomenon appears about the year 1250, it is an action which might be called an attenuated appeal based on an act of violence. The defendant is charged with a breach of the king's peace, though with one that does not amount to felony. Remember that throughout the Middle Ages there is no such word as misdemeanour—the crimes that do not amount to felony are trespasses (Latin *transgressiones*). The action of trespass is founded on a breach of the king's peace:—with force and arms the defendant has assaulted and beaten the plaintiff, broken the plaintiff's close, or carried off the plaintiff's goods; he is sued for damages. The plaintiff does not seek violence but compensation, but the unsuccessful plaintiff will also be punished and pretty severely. In other actions the unsuccessful party has to pay an amercement for making an unjust, or resisting a just claim; the defendant found guilty of trespass is fined and imprisoned. What is more, the action for trespass shows its semi-criminal nature in the process that can be used against a defendant who will not appear—if he will not appear, his body can be seized and imprisoned; if he can not be found, he may be outlawed. We thus can see that the action of trespass is one that will become very popular with plaintiffs because of the stringent process against defendants. I very much doubt whether in Henry III's day the action could as yet be used save where there really had been what we might fairly call violence and breach of the peace; but gradually the convenience of this new action showed itself. In order to constitute a case for '*Trespass vi et armis*', it was to the last necessary that there should be some wrongful application of physical force to the [plaintiff's] lands or goods or person—but a wrongful step on his land, a wrongful touch to his person or chattels was held to be force enough and an adequate breach of the king's peace. This action then has the future before it.

COMMENTARY

Each form of action had its own procedure. The dominant role played by the action of trespass depended greatly upon the convenience of its procedure. A defendant who did not appear could be fined or outlawed (an aspect of 'mesne' or middle process—the procedure for bringing a defendant to justice—whereby the defendant forfeited his chattels and was

subject to other civil disabilities). The mode of adjudication was trial by jury. This was much preferable to the older modes of trial, such as trial by ordeal (in which the plaintiff was subjected to a physical test, e.g. ducking in water to see if he or she would sink) or trial by battle (in which the parties might have to—literally—'fight it out'). No wonder trespass rapidly proved very popular!

(b) Trespass on the Case

The unsatisfactory nature of the requirement that the defendant should have acted 'with force and arms' (*vi et armis*) soon became apparent. Local courts were generally forbidden to entertain suits for more than 40 shillings without royal sanction, and there would have been a failure of justice if non-violent trespasses involving larger sums were excluded from the King's Courts as well. *Baker* writes (p. 61): 'The pressure for change is first seen in attempts to use *vi et armis* writs fictitiously, smuggling in actions under the pretence of force in the hope that no exception would be taken.' Throughout the first part of the fourteenth century there are examples of actions against blacksmiths for killing horses *vi et armis* and *contra pacem* but it seems more likely these are actions for carelessness in shoeing the horse rather than that they indicate a group of equicidal tradesmen. By the middle of the fourteenth century the Chancery clerks had begun drawing up a new writ of trespass. This writ required the plaintiff to plead his special case'. If the defendant's act had not been *vi et armis*, the plaintiff had to explain why it was nonetheless wrongful. The earliest forms of this writ involved situations where the parties were in a pre-existing relationship in the course of which the defendant had 'assumed responsibility' to the plaintiff. If the plaintiff had asked the defendant to shoe his horse or to hold a chattel on the plaintiff's behalf, any contact with the animal or chattel could not be *vi et armis*, but it could be wrongful if the shoeing was done carelessly or the chattel lost. The modern law of contract derives from the action on the case for *assumpsit* ('undertaking' or 'assumption of responsibility'), and today a party who has undertaken to do something under a contract and has done it carelessly may be liable in both contract and tort. Examples of the courts' willingness to stretch the writ of trespass *vi et armis* and then to sanction the later action on the case are extracted below.

Rattlesdene v Grunestone (1317)

J. Baker and S. Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986), p. 300

Suffolk. Richard de Grunestone and his wife Mary were attached to answer Simon de Rattlesdene on a plea why, whereas the same Simon had lately bought from the aforesaid Richard at Orford a certain tun of wine for 6 marks 6s 8d and had left that tun in the same place until he should require delivery, the aforesaid Richard and Mary with force and arms drew off a great part of the wine from the aforesaid tun, and instead of the wine so drawn off they filled the tun up with salt water so that all the wine became rotten and was altogether destroyed to the grave damage of this Simon and against the [king's] peace.

And as to this the same Simon by his attorney complains that whereas the same Simon had bought from the aforesaid Richard at Orford the aforesaid tun, and had left it in the same place until etc, the aforesaid Richard and Mary on the Thursday in the octave of St John the

Baptist in the ninth year of the present king's reign [1 July 1316] with force and arms, namely with swords and bows and arrows, drew off a great part of the wine from the aforesaid tun and instead of the wine so drawn off they filled the tun with salt water so that all the aforesaid wine was destroyed etc, to the grave damage etc, and against [the king's] peace etc whereby he says that he is the worse off and has suffered damage to the value of £10; and therefore he produces suit etc.

And Richard and Mary come by . . . their attorney and they deny force and wrong [and will deny it] when [and where they should] etc. And well do they deny that on the day and in the year aforesaid they ever drew off the aforesaid wine with force and arms or instead of the wine put in salt water or did him any other wrong as the aforesaid Simon complains. And of this [they] put themselves upon the countryside, and so does Simon. And so the sheriff is told to cause to come [a jury on such a day].

COMMENTARY

So vital was the allegation of *vi et armis* that claims that injury was inflicted 'with force and arms'—and often, for good measure, 'with swords, bows, arrows and clubs' (see Milsom (1958) 74 LQR 195)—were made in the most unlikely circumstances. Can it really have been the case in the above action that the defendants drew off a quantity of wine 'with force and arms, namely with swords and bows and arrows'? More likely, this was an action by a disgruntled purchaser of the wine for loss caused by a shipping accident.

The Farrier's Case (1372)

J. H. Baker & S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986) p. 341

Trespass was brought against a farrier for injuring a horse with a nail; and the writ said to show why, at a certain place, he drove a nail into the quick of the horse's hoof, whereby the plaintiff lost the profit from his horse for a long time.

Percy [for the defendant]. He has brought a writ of trespass against us, and does not say 'with force and arms'. We pray judgment of the writ.

Fyncheden CJ. He has brought his writ according to his case. (So he thought the writ good.)

Percy. The writ should be 'with force and arms', or should say that he drove the nail maliciously; and since there is neither the one nor the other, we pray judgment . . .

Then the writ was held good. And the defendant took issue that he shod the horse, without this that he injured it with a nail . . . etc.

COMMENTARY

This is an early example of an action on the case. The court holds that it is not necessary to include the allegation, necessary in trespass, that the defendant acted *vi et armis*. Rather than relying upon evasory fiction, the court openly accepts that the action in trespass has been stretched beyond its earlier limits.

3. The Development of Fault-Based Liability

(a) Writs of Trespass and Fault

To a contemporary observer it is inconceivable that the law of tort could exist without the fault-based law of negligence. In historical terms, however, the development of negligence as a separate tort is a relatively recent event. To have talked to a medieval or early modern lawyer about the law of 'negligence' would have resulted in a short and puzzled conversation. This is not because notions of fault were unimportant, but rather that its role was obscured by the writ system that dominated the early common law. The formulaic language used on the writs meant that it was not necessary to plead the state of mind or culpability of the defendant. No doubt, if the allegation was that the defendant 'assaulted the plaintiff with force and arms and beat, wounded and ill-treated him so that his life was despaired of', it could safely be assumed that the harm was inflicted intentionally and that the defendant was culpable. But as the writ of trespass was stretched to include cases of accidental injury—a trend that, as was noted above, led to the development of trespass on the case—the defendant's fault could not be taken for granted. It is difficult today to ascertain precisely what role was played in such cases by the concept of fault, but it seems likely that the taking of all reasonable care to avoid the injury of which the plaintiff complained was regarded as a defence. This does not necessarily appear from the language of the early law reports (called 'Year Books'), however, as the reporters were primarily interested in the form of the writ (and legal challenges to its form) and the pleadings. Even later law reporters, who might note the jury's verdict on the facts, frequently said nothing about the likely reason for the verdict. There was thus no record of the evidence put to the jury by defendants 'pleading the general issue', i.e. entering a plea of Not Guilty, but respected authorities conjecture that the issue of fault was often raised at this stage (*Baker*, p. 405; S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd edn. (London: Butterworths, 1981), pp. 296–300; cf. *Ibbetson*, p. 59, who argues that questions of fault might be reflected in the jury's deliberation as to whether the defendant *caused* the plaintiff's injury).

(b) Negligence and the Action on the Case

Liability for negligently inflicted injuries was first recognised by stretching the scope of trespass, but it found a more natural home in the action on the case. As noted above, the earliest examples of actions on the case involved parties in a pre-existing relationship with each other, e.g. the relationship between vendor and seller. Most of these cases would today be regarded as falling under the law of contract, not tort. Tort concerns itself primarily with parties who are strangers to one another. Liability here was slower to develop than in the case of pre-existing relationships.

Two of the earliest examples of liability imposed in the absence of a pre-existing relationship were for harm caused by the escape of fire and by dangerous animals (the *scienter* action). The liability was premised on the allegation that it was a custom of the realm that a particular activity should be pursued so as not to cause harm. Customs of this nature were also held to apply to innkeepers and common carriers but never developed much further as 'the common custom of this realm is common law and need not be pleaded' (*Beaulieu v Fingham* (1401), in Baker & Milsom, *op. cit.*, p. 557). Liability under these customs was probably stricter than under the modern conception of negligence, although, as noted above, it is difficult to ascertain whether it was wholly independent of fault.

Actions for pure negligence were rare, but, as *Baker* points out (p. 409), this was probably because the existing law covered most situations. Forcible wrongs could be remedied in trespass, but if the wrong was non-forcible it was probably because there had been careless performance of an undertaking, remediable by *assumpsit* (which laid the foundations for the modern law of contract) or because the harm had been caused indirectly. Indirect harm normally involved the escape of something dangerous, like fire or an animal, which was covered by existing actions in case. There was no perceived need to develop a distinct general liability for negligence and the satisfactory nature of the existing remedies made any such development unlikely.

4. Eighteenth-Century Developments

(a) The Beginnings of Negligence

As with much of the development of the common law, the impetus for change came with the attempt of lawyers to modify legal rules for the benefit of their own clients. From the latter half of the seventeenth century, writs began to appear from which the development of a tort of negligence can be traced. However, a general liability for negligence did not sit easily with the forms of action in which it would need to be pleaded. The beginning of the problem can probably be traced to *Mitchil v Alestree* (1676) 1 Vent 295. The plaintiff had been injured in Little Lincoln's Inn Fields when one of the horses the defendants were trying to break in escaped and kicked her. Prima facie this was a forcible wrong, remediable in trespass *vi et armis*. However, it was a defence to trespass to show that the contact had been against the defendant's will, so that in *Mitchil*, if the jury could be convinced that the contact was the result of the independent action of the horse, it might find for the defendant. This encouraged the plaintiff to plead the action in case, by alleging that the defendant's wrong was to break in the horses 'improvidently, rashly and without due consideration of the unsuitability of the place for the purpose'. She was successful. Another reason why the plaintiff might want to choose case instead of trespass *vi et armis* was the development of vicarious liability. It was during the course of the eighteenth century that case became the appropriate form of action in which to sue an employer 'vicariously', i.e. for a tort committed by his employee. Again, case was the correct action even where the employee's act had been forcible *vis-à-vis* the plaintiff.

(b) The Direct/Indirect Distinction

If the forms of action were to mean anything at all, there needed to be some guidance on the circumstances in which trespass *vi et armis* or case was the appropriate form. It was this need that led to the introduction of the infamous direct/indirect distinction between actions of trespass and case. In *Reynolds v Clarke* (1724) 1 Str 634 at 636, Fortescue J ruled:

> [I]f a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all.

This distinction proved difficult to operate in practice. In the famous case of *Scott v Shepherd* (1773) 2 W Bl 892 the defendant threw a lighted squib (firework) into a crowded market,

where it was twice thrown on before striking the plaintiff in the face and exploding. The plaintiff pleaded in trespass *vi et armis* and this was ultimately held to be the correct form.

Although the distinction was problematic throughout the history of the two actions of trespass and case, the increase in the number of running-down cases towards the end of the eighteenth century caused particular difficulties. If the plaintiff was hit by a horse-drawn stagecoach, this was a forcible act and hence trespass was the appropriate form of action. However, if the horses had bolted contrary to the intention of the driver this might be a defence to trespass. But, in case, liability might well be imposed if the allegation was that the defendant had carelessly attempted to control the horses. Further, if the coach had been driven by an employee rather than its owner, case had to be brought as this was the proper form for vicarious liability. None of this mattered much if courts were prepared to turn a blind eye to whether or not an action was in the correct form, but in *Day v Edwards* (1794) 5 TR 648, Lord Kenyon CJ held that, in a running-down case, the plaintiff complained of an immediate act and hence trespass was the required form of action. This was reaffirmed by his successor, Lord Ellenborough CJ (see *Leame v Bray* (1803) 3 East 593), but the practical difficulties with a rigid distinction between trespass and case proved insurmountable.

The solution lay in allowing the plaintiff to 'waive' the trespass and sue instead in case. In *Williams v Holland* (1833) 2 LJCP (NS) 190, the Court of Common Pleas decided that this would be allowed where the plaintiff's injury was occasioned by the 'carelessness and negligence' of the defendant, notwithstanding the act was immediate, so long as it was not a wilful act. It thus became the norm to bring case whether the negligence of the defendant produced immediate or consequential damage. The independent action in negligence was thus well and truly established by the time the last vestiges of the forms of action were abolished by the Judicature Acts 1873–5, and the direct/indirect distinction was effectively jettisoned in favour of a new classification: intention and negligence.

For more detailed discussion on the historical development of the tort of negligence see: Kiralfy, *The Action on the Case* (London: Sweet & Maxwell, 1951); Milsom, 'Not Doing is No Trespass: A View of the Boundaries of Case' [1954] CLJ 105; 'Trespass from Henry III to Edward III' (1958) 74 LQR 195–224, 407–36, 561–90; Baker, 'Introduction' (1977) 94 Selden Society 23 (Spelman's Reports, vol. II), ch. VIII; Prichard, 'Trespass, Case and the Rule in *Williams v Holland*' [1964] CLJ 234 and '*Scott v Shepherd* and the Emergence of the Tort of Negligence', Selden Society Lecture (1976); *Ibbetson*, chs 8 and 9.

5. The Classification of Obligations

The task of classifying the various forms of action under the headings we recognise in the modern law—the law of tort, the law of contract, the law of property, etc.—began in England in the early seventeenth century. In the category of those actions imposing personal obligations, as opposed to recognising rights over property, contract (*assumpsit*) came to be regarded as distinct. (Equity, which imposed obligations on trustees and fiduciaries, was always a separate entity.) This left behind a miscellaneous collection of actions in trespass and case which resisted easy classification. These actions were lumped together in books as 'torts', but little thought was given to how they should be rationalised, or whether the law could be simplified, or whether obligations recognised in the courts of equity should be introduced to the classification. The development of general principles of liability had to wait until the period after the abolition of the forms of action in 1875, and many would

argue that the task is yet to be completed. The most important advance was the recognition of a generalised liability for negligently-inflicted injuries; liability for intentional acts has still to be so thoroughly rationalised, largely because of a historical attachment to the old writs of trespass.

J. H. Baker, *Introduction to English Legal History* 4th edn. (London: Butterworths, 2002)

The Concept of Tort

The law of torts, or civil wrongs, is extensive and its boundaries are indistinct. An understanding of the process by which a number of miscellaneous causes of action came to be classified as 'torts' must depend partly on semantics. The nearest medieval equivalent of the modern lawyer's 'tort' was 'trespass', because the old French word *tort* (*injuria in Latin*) had a wider meaning; tort denoted any kind of legal injury. In the preceding chapters we traced the development of trespass in the areas of contract and property law, and noticed that in the early sixteenth century there was nothing incongruous about describing a breach of contract as a tort or trespass. But when the action of *assumpsit* became a truly contractual remedy, based on a promise in return for consideration, breaches of contract came to be seen as legally different in a number of ways from other kinds of trespass . . . By the middle of the seventeenth century contract and tort were seen as being so different that claims in tort and contract could not be joined in the same action. Thus, when an action was brought in 1665 against the hirer of a horse for misusing the animal and not paying the hire, counsel argued that the joinder of the two causes of action was erroneous because one action sounded in tort and the other in 'breach of promise only'. In another case the same year, counsel treated contract and tort as mutually exclusive: 'tort can never be done where there is a special agreement, unless there be duty by statute or common law incumbent'. This is near the modern understanding of the word . . . Already by 1663 legal indexes were classifying 'tort' in the modern sense, as a subheading under 'actions on the case'.

As different kinds of trespass action acquired separate characteristics in the sixteenth and seventeenth centuries, further subdivisions of the law of torts were made, subdivisions which survived the abolition of the writ system itself. During the last century or so, however, the law of torts has been undergoing a gradual reclassification as a result of the rapid expansion of the tort of negligence. Liability for negligence alone—that is, without reference to other factors—was rarely imposed before 1700, and even at the beginning of the twentieth century Sir John Salmond was denying the existence of a separate tort of negligence. In the practitioners' book, *Clerk and Lindsell on Torts*, negligence did not reach the status of a separate chapter until 1947. It would be easy to conclude that negligence has a short history; but this would be misleading. The negligence approach of the modern law determines liability by focusing on the quality of the defendant's act rather than on the kind of harm done to the plaintiff. The rearrangement of so much of the modern law of tort around the concept of negligence is partly a result of that shift of focus. But there is nothing modern about the concept of negligence in itself; what has changed is its primacy. Negligence and fault have always been familiar ideas, and for at least four centuries before 1700 they played a role in law and legal terminology; but their role was ancillary rather than primary. Negligence was something which a plaintiff might mention together with other factors in his writ, or which a defendant might raise by way of showing that he was not at fault. It was not even confined to actions in tort, in the modern sense of the term . . .

G. Williams and B. Hepple, *Foundations of the Law of Tort* 2nd edn. (London: Butterworths, 1984)

Since the Judicature Act [1873] judges have been slowly emancipating themselves from the forms of action; they have begun to think in terms of broad rules of law which are not related to the old categories. An outstanding example is the case of *Wilkinson v Downton* [1897] 2 QB 57, decided by an eminent judge of the Victorian era, Wright J:

> Mr Downton, in jest, told Mrs Wilkinson that her husband had been 'smashed up' in an accident and had both his legs broken. The lady suffered a serious shock entailing weeks of suffering and incapacity. At the risk of seeming to have no sense of humour she sued Downton for damages. Wright J held that the action well lay.

There was no precedent for this decision before the Judicature Act. The plaintiff could not have brought an action for trespass, which lay only for the direct physical infliction of harm (or the threat of it). Here the plaintiff had been physically injured, but only as a result of her mental shock following upon the words spoken. She could not have sued for this mental suffering in deceit, because an action for deceit could be brought only where the defendant had made a fraudulent statement on which the plaintiff was intended to rely, and did rely to his detriment; here the plaintiff was not claiming in respect of damage resulting from any conduct on her part in reliance upon the truth of the statement. The damage resulted merely from her belief in its truth, and from the effect that that belief had upon her mind. Notwithstanding these difficulties, the judge felt able to assert the existence of a principle of law without the attempt to relate his decision to any of the ancient writs, as by saying that the concept of trespass to the person could be extended to a 'psychological assault'. Instead, he assumed the existence of a general principle of law according to which a person who intends without justification to cause fear or anxiety to another, in circumstances where grave effects are likely to follow, is responsible if such effects do follow. The judge's attitude can perhaps be expressed in Horatio's words: 'There needs be no ghost, my lord, come from the grave to tell us this.' The decision is an outstanding example of the greater readiness of the courts at the present day to lay down general principles of liability instead of indulging in mere historical research.

COMMENTARY

As we shall see in Chapter 2, the imposition of liability for an intentional act causing indirect harm was not unknown under the forms of action (see *Bird v Holbrook* (1828) 4 Bing 628) but the rationalisation of the result by way of a wide general principle was predominantly a nineteenth-century development. Even then, the courts stopped short of integrating the old writs of trespass to the person—assault, battery and false imprisonment—within the new scheme, and these remained the primary remedy for injuries resulting directly from an intentional act. Wright J's general principle was effectively side-lined: in the next 100 years, it was applied on only a handful of occasions (see Ch. 2.V, below). Perhaps this was just as well, for there now appears to be considerable doubt whether Wright J ever intended his judgment to form the basis for a broad principle of liability (see Lunney, 'Practical Joking and Its Penalty: *Wilkinson v Downton* in Context' (2002) 10 Tort L Rev 168).

A later and more influential example of the introduction of a broad principle of liability was the opinion of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, in which his Lordship identified a single principle—the 'neighbour principle'—running through all the instances of liability for negligently inflicted harm. If *Wilkinson v Downton* provides a rule for

intentionally inflicted harm, and *Donoghue v Stevenson* a rule for negligently inflicted harm, is the rest of the law of tort necessary at all?

6. The Modern Pre-Eminence of Negligence

Without doubt, the tort that has dominated all others since the early twentieth century is negligence; according to one writer it has attained a 'majestic pre-eminence' (M. Millner, *Negligence in Modern Law* (London: Butterworths, 1967), p. 227). However, as we have seen, negligence as an independent action is a relatively modern phenomenon, and the main period of its growth has been in the last 75 years. Why should negligence, as opposed to other torts, have achieved this position? The extract below suggests some possible reasons.

D. Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' in E. Schrage (ed.), *Negligence: The Comparative Legal History of the Law of Torts* (Berlin: Duncker & Humblot, 2001)

Transformative Factors in the Twentieth-Century Tort of Negligence

From around the beginning of the twentieth century a number of factors combined to alter the nature and structure of negligence liability.

First of all, there were a number of economic changes which altered the basis on which negligence liability operated. Most obvious of these was the increasing preponderance of corporate defendants. This was, of course, not a new phenomenon, as the frequency of actions against railway companies in the nineteenth century amply demonstrates; but the increasingly corporate nature of industrial enterprise by the early twentieth century meant that actions were ever more commonly brought against companies rather than individuals. This undoubtedly brought about a more plaintiff-centred approach to liability, equivalent to that found in actions by railway passengers after the 1850s. As well as the prejudice against wealthy defendants—the maxim of natural jurisprudence, 'It is no sin to rob an apparently rich man'—large corporate defendants were undoubtedly better able to spread losses across their business and so pass them on to customers or shareholders than were individual capitalists or small partnerships. Moreover, in so far as the nineteenth-century legal thinking was built on a moral principle that individuals should only be liable for their own shortcomings, the justification for this in a world of corporate defendants was rather more difficult to see. Added to this there was the increasing availability of liability insurance. Whereas in the nineteenth century individuals might only insure against their losses, from the late nineteenth century it became possible to insure against legal liability; and well into the twentieth century there were doubts about the legality of insuring against the consequence of one's own wrongdoing. Moreover, as the century progressed it became compulsory to take out such liability insurance in respect of certain activities, such as driving a motor vehicle. The same arguments came into play here as in the case of corporate defendants: as between an injured plaintiff and an anonymous (and wealthy) insurance company it was easy to have sympathy with the plaintiff; and losses could be spread widely and relatively painlessly rather than borne by the individual plaintiff or defendant.

Secondly, there was an intellectual shift. The acute individualism which had characterised Victorian England began to give way to a more communitarian approach: no longer

was it obvious that an individual who caused harm to another while pursuing his own economic self-interest should be liable only if it could be shown that he had not taken reasonable care. Alongside this, legal commentators began to stress that negligence liability did not depend on a moral principle but on a social one; it was not based on something internal to the defendant but on a failure to live up to an external standard, and that external standard was something which could be determined by public policy. The American jurist Oliver Wendell Holmes was the principal proponent of this view, and even before 1900 it had become so much part of common learning that it was being misunderstood by examination candidates. As corporate and insured defendants became the norm judges and scholars, especially in America, came to formulate the principles of liability in wholly economic, non-moral terms.

Thirdly, this time affecting more the structure of liability than its incidence, the jury disappeared from the trial of negligence actions. This occurred in three stages. First of all, the County Courts Acts [dating from 1846] provided that trial would be without jury in small cases, and might be without jury in other cases within the jurisdiction of the court (though either party had a right to demand a jury). In practice, jury trials in County Courts were very uncommon in any form of action, including negligence actions; they were abolished in 1934. Secondly, after the Judicature Acts 1873–1875 it was possible for some negligence cases to be assigned to the Chancery Division of the High Court; such cases would be heard without a jury. Thirdly, and most significantly, after a prolonged stutter, the jury was to all intents and purposes made optional after the Judicature Acts of 1873–1875, though in actions sounding in tort the option generally appears to have been exercised; temporary provisions restricting the right to trial by jury to a small number of situations (not including negligence) were in force from 1918 to 1925; new rules of procedure were introduced in 1932; and in 1933 the right to trial by jury in negligence actions was effectively abolished. After this practically all cases were tried by judge alone. In so far as the classic structure of the tort of negligence had been largely generated by the separation between judge and jury, the reintegration of the trial process brought about a reintegration of the elements of the tort of negligence.

COMMENTARY

Ibbetson provides a useful corrective to those tempted to view tort law's development in purely doctrinal terms, as the progressive rationalisation of disparate pockets of liability driven only by legal logic. While tort law's 'intellectual history' should not be disregarded altogether (see especially G. White, *Tort Law in America: An Intellectual History* (expanded edn., New York: OUP, 2003)), it is important to explicate the link between tort law and the social, economic and political environment in which it operates, and to consider how, over the passage of time, tort has responded to changes in that environment. In fact, the influence of external, societal factors upon the law of tort can be traced back a very long way. The writ of trespass *vi et armis*, it may plausibly be argued, was introduced as a means of maintaining the authority of the sovereign and the security of the realm: the writ enabled the King's courts to deal with outbreaks of violent behaviour which would previously have ended up only in the local courts. But it is with the Industrial Revolution that the influence of extra-legal factors becomes most interesting, above all in the development of a generalised liability for negligence.

Tort Law and the Industrial Revolution

According to the very influential but highly controversial thesis of Morton J. Horwitz (*The Transformation of American Law 1780–1860* (New York: OUP, 1977)), tort law was

transformed in the nineteenth century in order to provide a subsidy to the industrial concerns that had sprung up in the aftermath of the Industrial Revolution. (Horwitz concentrated on America, but believed his thesis equally applicable to England.) Horwitz claimed that the courts of the time abandoned the erstwhile general principle of strict liability (i.e. liability without fault), as expressed by the Latin maxim *sic utere tuo ut alienum non laedas* (use your own only in such a way that you do not harm anyone else's), and adopted instead the fault-based standard of negligence (p. 99):

> At the beginning of the nineteenth century there was a general private law presumption in favour of compensation, expressed by the oft-cited common law maxim *sic utere*. For Blackstone, it was clear that even an otherwise lawful use of one's property that caused injury to the land of another would establish liability in nuisance, 'for it is incumbent on him to find some other place to do that act, where it will be less offensive.' In 1800, therefore, virtually all injuries were still conceived of as nuisances, thereby invoking a standard of strict liability which tended to ignore the specific character of the defendant's acts. By the time of the [American] Civil War [1861–65], however, many types of injuries had been reclassified under a 'negligence' heading, which had the effect of substantially reducing entrepreneurial liability . . . [T]he law of negligence became a leading means by which the dynamic and growing forces in American society were able to challenge and eventually overwhelm the weak and relatively powerless segments of the American economy. After 1840 the principle that one could not be held liable for socially useful activity exercised with due care became a commonplace of American law.

The thesis is not without its difficulties. Horwitz's apparent ascription of conscious agency to the judiciary fails to deal with the very wide range of different attitudes evident in the decisions of different judges. It ignores the likely hostility to industrial expansion of those many judges who were members of the landed gentry. And its depiction of a straightforward change from strict liability to negligence liability fails to fit the facts. As Rabin, 'The Historical Development of the Fault Principle: A Reinterpretation' (1981) 15 Ga L Rev 925 points out, we should regard the view that the industrial era was dominated by a comprehensive theory of fault liability for unintended harm as largely a myth . . . Along similar lines . . . [it is] a serious mistake to characterize the pre-industrial era as one of strict liability' (p. 927). Far from replacing strict liability, 'fault liability emerged out of a world-view dominated largely by no-liability thinking' (p. 928), as was evident in the continuing denial—until well into the twentieth century—of any general duty to consumers of products and trespassers, and the limitations upon employers' liability to their employees (see further Ch. 11). For further criticism of the Horwitz thesis in its application to tort law, see Schwarz, 'Tort Law and Economy in Nineteenth Century America' (1981) 90 Yale LJ 1717.

Yet there is no denying that industrialisation had a significant influence on tort law, both as a catalyst for expansion and as a cause for circumspection. As regards the former, it seems clear that '[a]dvances in transportation and industry—mills, dams, carriages, ships—made injuries involving strangers more common', and as a result forced the courts to move beyond a conception of negligence liability as peculiar to certain pre-existing relationships and to adopt a generalised theory of liability: 'the modern negligence principle in tort law seems to have been an intellectual response to the increased number of accidents involving persons who had no pre-existing relationship with one another' (White, *op. cit.*, p. 16). However, the seemingly unstoppable development of negligence into a generalised liability was a cause of alarm to at least some members of the judiciary, who urged caution and sought ways to limit the new liabilities to which entrepreneurs were exposed. This 'backlash' was most apparent in relation to accidents in the workplace, in which context a

number of very effective defences were developed by the courts so as to safeguard the interests of employers (see further Chs 6 and 11.I). However, industrial concerns were never granted an immunity from suit in negligence, and in some areas negligence liability flourished. Consider especially the large number of actions by passengers against railway companies from the mid-nineteenth century on: 'Mass transportation … [gave] rise to mass litigation' (R. Kostal, *Law and English Railway Capitalism 1825–1875* (Oxford: OUP, 1994) p. 255). This was, says Kostal (p. 290), 'the first wave of personal injury litigation in English legal history'.

From Laissez-Faire Individualism to the Welfare State

By the end of the nineteenth century, the prevailing political mood was beginning to change. There was a recognition both that the courts had too jealously protected employers from negligence actions brought by injured employees and that the tort system as a whole was inadequate to the task of providing compensation for the victims of industrial (and other) accidents. In 1897, a no-fault Workmen's Compensation Scheme was introduced by legislation. It was not just a response to the inadequacies of the law of employer's liability; more significantly, it was the first step on the road towards the welfare state. In the twentieth century, the principal burden of providing compensation for the victims of accident, illness or other misfortune was to fall upon taxpayers, not tortfeasors. And it became trite to observe a shift from the laissez-faire individualism of the nineteenth century to the more community-spirited outlook of the twentieth.

Tort law could not remain immune to the changing mood of the times, and the courts sought to adapt its principles in an effort to broaden the scope of tort compensation. Duties of care were recognised in many new types of case, expanding still further the scope of liability in negligence, a development which culminated in Lord Atkin's enunciation of his 'neighbour principle' in *Donoghue v Stevenson* [1932] AC 562 (see Ch. 3.I.2 below). New limits were placed on the defences available to employers in actions brought against them by their injured employees (see Ch. 11.I.1(b) below). And fault came to be determined by reference to an external or objective standard, the standard of the reasonable person (see Ch. 4.IV, below), thereby divorcing legal notions of fault from the moral notions of the ordinary person. As W. Cornish and G. Clarke, *Law and Society in England 1750–1950* (London: Sweet & Maxwell, 1989), p. 538 point out: 'Liability for personal fault had undoubtedly appealed to the strongly individualistic strain in Victorian moralising; but as a basis for a workable system of accident compensation it had required significant compromise.' Its moral trappings stripped away, tort law came to be seen as no more than a component part of the compensation system: it was 'simply a complex of legal rules, largely devoid of moral content and of penal or deterrent effect, the function of which is to mark off the field of recoverable damage' (M. Millner (*op. cit.*), p. 4). Whether tort law could ever be a satisfactory system of accident compensation remained to be seen.

Tort Law and Insurance

It was only with the underpinning of the insurance system that tort law could even aspire to act as a major source of compensation to the victims of accidents. The development of liability insurance in the late nineteenth century, initially as a mechanism for protecting employers against the risk of lawsuits from employees, came to be seen as a justification for tapping the compensation potential of tort law still further (see White, *op. cit.*, pp. 147–50). By the middle of the twentieth century, tort law's function was identified as the transfer of losses away from the victims of accidents and the distribution or spreading of

those losses throughout society by means (especially) of the liability insurance system (see James, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57 Yale LJ 549). The buck no longer stopped with the negligent actor, but was passed on to his or her insurer and thereafter spread amongst the class of premium-payers as a whole. So vital was insurance thought to be to the effectiveness of the tort compensation system that legislation was introduced to require the commonest targets of negligence litigation car owners and employers—to take out compulsory insurance against their potential liabilities (see, respectively, the Road Traffic Act 1930 (now Road Traffic Act 1988, s. 143ff) and the Employers' Liability (Compulsory Insurance) Act 1969).

Insurers no doubt play a major role in the operation of tort law; whether insurance considerations have brought about change in the substantive doctrines of tort law is another, more disputed matter. Certainly, the predominant judicial attitude is that the insurance position of the parties should have no influence on the adjudication of individual cases. The issue is considered in more detail below (Ch. 1.III.1).

The Modern Tort Crisis

As the twentieth century progressed, tort law in general—and negligence liability in particular—were stretched further and further (see P. Atiyah, *The Damages Lottery* (Oxford: Hart, 1997), chs 2 and 3). It increasingly came to be seen as falling between two stools. On the one hand, it sought to fulfil compensation objectives for which it was fundamentally ill-suited. Compared with social security, tort law was a very expensive method of providing compensation, and, notwithstanding the breadth of the negligence principle, it compensated a very small proportion of all accident victims, namely those injured by another's fault. At the same time, tort law offended against principles of equality as successful claimants received disproportionately high awards compared with those left to rely upon the social security system. By the 1960s and 70s, the notion that tort law could be justified in terms of accident compensation was thoroughly discredited (see especially the first edition of Patrick Atiyah's *Accidents, Compensation and the Law*, published in 1970). The greater the success of the negligence principle in expanding the reach of tort law, the more its inadequacies were exposed: 'in the very moment of its triumph, the shadow of its decline' was falling upon the tort of negligence (Millner, *op. cit.*, p. 234). Reformers, including Atiyah, sought to pursue compensation objectives by other means, for example by the introduction of universal no-fault compensation paid by the state. The high-water mark of such efforts came in 1974, on the other side of the world, when New Zealand abolished its system of tort compensation for personal injuries and replaced it with a no-fault Accident Compensation Scheme (see Ch. 18.II.2(b) below). However, similar reform proposals in Australia were never implemented, while in the United Kingdom the idea never really got off the ground at all: a Royal Commission on *Civil Liability and Compensation for Personal Injury*, chaired by Lord Pearson, confounded the hopes and expectations of advocates of the no-fault endeavour by refusing even to contemplate universal no-fault compensation (Cmnd 7054, 1978). Such is the rhetorical appeal of the notion of fault-based liability that it now seems highly unlikely that it will be abolished in order to make way for any alternative compensation mechanism (see further Ch. 18.II).

At the same time, tort law came under attack from those who believed it had betrayed its moral purpose of promoting justice between individuals. In their eyes, tort law could only be seen as a part of private law, and it risked incoherence if it sought to pursue 'public' goals, for example, the provision of accident compensation, which were inconsistent with the bipartite nature of legal proceedings (see, e.g., E. Weinrib, *The Idea of Private Law*

(Cambridge, Mass: Harvard University Press, 1995)). In short, tort law was about individual, not social, responsibility. Subscribers to this position believed that tort law had overstretched itself in an effort to be something it could not, and should not, become. In particular, it had extended liability to losses that were better left to lie where they fell (e.g. because they were entrepreneurial risks: see the discussion of pure economic loss in Ch. 8); it had encouraged a 'pass the buck' mentality whereby individuals sought someone else to blame for every misfortune that befell them (often on the basis that someone else, often the state, had a duty to take positive steps for their benefit: see Chs 9 and 10); and it had overburdened business and the insurance industry by 'opening the floodgates' of liability. This last concern was particularly highlighted by various 'crises' afflicting the insurance industry in the late 1980s/early 1990s, exemplified by the near collapse of the Lloyds of London insurance market in 1990. Although it was conceded that a number of other factors played a role in these crises (e.g. general economic conditions and a succession of natural disasters), it was also alleged that tort law had played a contributory role by encouraging the spread of (risky) third-party or liability insurance at the expense of (comparatively safe) first-party or loss insurance: it is much easier to predict the potential losses of a single insured person than it is to predict the potential losses of all those other people—who knows how many there could be?—to whom the insured might be held liable (see generally Priest, 'The Current Insurance Crisis and Modern Tort Law' (1987) 96 Yale LJ 1521). To this day the problem of the increasing cost, and sometimes unavailability, of liability insurance has been a common cry of those who bemoan the 'compensation culture' (see further Ch. 1.III.3 below).

At the time of writing these tensions show no signs of resolution. The past 30 years or so have seen, in society as a whole, a return to nineteenth-century values of individual responsibility and self-reliance, and fears that tort law might undermine these by 'going too far' have caused the courts to cut back the scope of liability in negligence in certain notable respects (see Chs 3 and 7–10). But tort law has not shed all traces of the loss-distribution ideology which prompted its spectacular growth throughout the greater part of the twentieth century. (Consider, in particular, the doctrine of an employer's vicarious liability for torts committed by his or her employees: Ch. 15.) Undoubtedly, the attempt to reconcile the nineteenth-century requirement of individual fault with the idea of a wider social responsibility for accident victims has led to a lack of coherence in the law of tort in general and negligence in particular (see Hepple, 'Negligence: The Search for Coherence' (1997) CLP 69). Yet tort law continues to muddle on, seeking what can only be an uneasy compromise between notions of loss-distribution on the one hand and individualised justice on the other.

II. Theories of Tort

Having looked at this history, let us now consider current views as to the nature and functions of tortious liability. We shall consider two issues. First, what are the aims of tort law—what purposes might it pursue, how effectively does it pursue them? Secondly, how do the aims of tort law differ from those of other branches of the law, and how in doctrinal terms are torts to be distinguished from, say, crimes, contracts and trusts?

1. The Aims of the Law of Tort

Glanville Williams, 'The Aims of the Law of Tort' [1951] CLP 137

An intelligent approach to the study of law must take account of its purpose, and must be prepared to test the law critically in the light of its purpose. The question that I shall propound is the end or social function or raison d'etre of the law of tort, and particularly of the action in tort for damages.

It is commonly said that the civil action for damages aims at compensation, as opposed to the criminal prosecution which aims at punishment. This, however, does not look below the surface of things. Granted that the immediate object of the tort action is to compensate the plaintiff at the expense of the tortfeasor, why do we wish to do this? Is it to restore the *status quo ante*?—but if so, why do we want to restore the *status quo ante*? And could we not restore this status in some other and better way, for instance by a system of national insurance? Or is it really that we want to deter people from committing torts? Or, again, is it that the payment of compensation is regarded as educational, or as a kind of expiation for a wrong?

...There are four possible bases of the action for damages in tort: appeasement, justice, deterrence and compensation.

Appeasement.—Crime and tort have common historical roots. The object of early law is to prevent the disruption of society by disputes arising from the infliction of injury. Primitive law looks not so much to preventing crime in general as to preventing the continuance of this squabble in particular. The victim's vengeance is bought off by compensation, which gives him satisfaction in two ways: he is comforted to receive the money himself, and he is pleased that the aggressor is discomfited by being made to pay. By this means the victim is induced to 'let off steam' within the law rather than outside it.

In modern times the safety-valve function of the law of tort probably takes a subordinate place. We do not reckon on the recrudescence of family feuds as a serious possibility, or even that of duelling. However, it may be thought that unredressed torts would be regarded as a canker in society, and to that extent the law can still be regarded as having a pacificatory aim...

Justice.—With the growth of moral ideas it came to be thought that the law of tort was the expression of a moral principle. One who by his fault has caused damage to another ought as a matter of justice to make compensation. Two variants of this theory may be perceived: (1) The first places emphasis upon the fact that the payment of compensation is an evil for the offender, and declares that justice requires that he should suffer this evil. This is the principal of ethical retribution, exemplified (in criminal law) by Kant's dictum about the moral necessity of executing even the last murderer. (2) The second variant looks at the same situation from the point of view of the victim; it emphasises the fact that the payment of compensation is a benefit to the victim of the wrong, and declares that justice requires that he should receive this compensation.

It may be thought that these two variants are simply two different ways of stating the same thing, but that is not entirely true. (1) Many people who would not subscribe generally to the principle of ethical retribution would nevertheless assert the principle of ethical compensation. Again, (2) one who asserts the principle of ethical compensation does not necessarily say that the wrongdoer must himself be afflicted. If no one else will pay the compensation, the wrongdoer must; but if someone (such as the State or an insurance company) steps in and pays for him, the requirement of recuperation is satisfied even though there is no ethical retribution against the offender.

Those who adopt the doctrine of ethical retribution do not, and cannot, refer it to any other principle. It is a postulate—an ultimate value-judgment which can only be accepted or rejected...

The case is far different with ethical compensation. This does serve a social purpose, independently of any doctrine of punishment or (for that matter) of deterrence. Imagine a small community of comparatively moral people who hardly need a deterrent legal system but who do occasionally commit acts of negligence or even of unruly temper. Even such a community would find educational value in a rule requiring the making of reparation for harm caused by fault. Whereas people do not voluntarily accept punishment for themselves (except for religious reasons by way of penance), good people do accept for themselves the necessity of paying compensation for harm that they have caused. It is not a question of punishment, but of showing in a practical way one's solicitude and contrition, and of obeying the golden rule that we should do as we would be done by . . .

Deterrence.—Ranged against the theory of tort as part of the moral order are those who believe that it is merely a regime of prevention. The action in tort is a 'judicial parable', designed to control the future conduct of the community in general. In England this view seems to have been first expounded by Bentham. Blackstone had expressed the opinion that civil injuries are 'immaterial to the public', but Bentham thought that such a contrast with criminal law could not be maintained, and that the underlying object of civil and criminal law was the same. Both criminal punishment and tort damages were sanctions and therefore evils: the only difference was in the degree of evil. The purpose of threatening them was to secure obedience to rules . . .

Whatever the imperfections of the moral interpretation of tort, the deterrent theory itself fails to provide a perfect rationale. For one thing, it offends against the principle that deterrent punishment must be kept to the effective minimum. According to utilitarian philosophy, of which the deterrent theory is an application, a punishment must not be greater than is necessary to repress the mischief in question. Damages in tort, however, may be far greater than are needful as a warning . . .

Compensation.—Finally there is the compensatory or reparative theory, according to which one who has caused injury to another must make good the damage whether he was at fault or not. This is the same as the theory of ethical compensation except that it does not require culpability on the part of the defendant. If valid, it justifies strict liability [i.e. liability independent of fault], which the theory of ethical compensation does not. The difficulty is, however, to state it in such a form as to make it acceptable. If it is said that a person who has been damaged by another ought to be compensated, we readily assent, moved as we are by sympathy for the victim's loss. But what has to be shown is not merely that the sufferer ought to be compensated, but that he ought to be compensated by the defendant. In the absence of any moral blame of the defendant, how is this demonstration possible?

It is fashionable to say that the question is simply one of who ought to bear the risk. This, however, is a restatement of the problem rather than a solution to it. A more satisfactory version is that known as the entrepreneur theory or, to speak English, the enterprise theory. This regards liability for torts connected with an enterprise as a normal business expense. Nothing can be undertaken without some risk of damage to others, and if the risk eventuates it must be shouldered by the undertaker in the same way as the cost of his raw materials. That this attitude has come into prominence in the present century, though not unknown in the last, is symptomatic of the general search for security at the cost, if need be, of freedom of enterprise . . .

[Williams proceeds to consider whether the rules of the law of tort are consistent or inconsistent with the principal theories of liability. He concludes:]

Our attempt to find a coherent purpose in the present law of tort cannot be said to have met with striking success . . . Where possible the law seems to like to ride two or three horses at once; but occasionally a situation occurs where one must be selected. The tendency then is to choose the deterrent purpose for the torts of intention, and the compensatory purpose for other torts.

COMMENTARY

Of the four possible functions of tort law canvassed by Williams, we can place on one side appeasement (which 'takes a subordinate place' in the modern law) and compensation (which we have already considered in some detail, and will consider further in Ch. 18). It is necessary, however, to say something more on the topics of deterrence and justice.

Deterrence

Notwithstanding Williams's scepticism as to whether deterrence can be seen as one of the functions of tort law, some very sophisticated attempts have been made, especially by members of the law and economics movement in the United States, to demonstrate just that. It is a basic tenet of the economic analysis of law that the incentive provided by the threat of tort liability by and large promotes economic efficiency, and that it is its function to do so. Economic efficiency entails not as great a reduction in the accident rate as is possible, but only such a reduction as is efficient. In the language of Guido Calabresi, one of the founding fathers of the law and economics movement, the aim is to reduce not the number of accidents, but the costs of accidents, taking into account also the cost of safety measures (see *The Cost of Accidents* (New Haven, Conn.: Yale University Press, 1970)). Perhaps the most influential figure in the movement currently is Judge Richard Posner, who argues that tort law's general reliance upon principles of fault-based liability makes it the best mechanism available for ensuring that all efficient precautions are taken in order to reduce the risk of accidental injury (see especially 'A Theory of Negligence' (1972) 1 J Leg St 29). Posner summarises his approach as follows (p. 33):

> [T]he dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—cost-justified—level of accidents and safety. Under this view, damages are assessed against the defendant as a way of measuring the costs of accidents, and the damages so assessed are paid over to the plaintiff (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system. Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident.

In other published writing, Posner has gone beyond the claim made in the extract above, viz. that economic inefficiency attracts moral disapproval, to argue that economic efficiency is the foundation of all moral imperatives and hence the main meaning of 'justice' itself (see *The Economics of Justice* (1981)). This somewhat implausible claim is subjected to convincing criticism by Ronald Dworkin in 'Is Wealth A Value?', ch. 12 of *A Matter of Principle* (London: Duckworth, 1985) and in ch. 8 of *Law's Empire* (London: Fontana, 1986). Dworkin accuses Posner of 'moral monstrousness' in suggesting that wealth is a value of intrinsic, or even instrumental, worth.

Even ignoring such extravagant claims about its normative foundations, the descriptive elements of the economic analysis of tort law have attracted a sceptical response from several quarters. S. Sugarman, *Doing Away with Personal Injury Law* (New York: Quorum, 1989), for instance, argues that tort law's role in reducing levels of excessively dangerous activity has been exaggerated. He points to a number of other behavioural controls apart from the law of tort that might exercise such a deterrent effect '[s]elf-preservation instincts, market forces, personal morality, and governmental regulation (criminal and administrative) combine to control unreasonably dangerous actions independently of tort law' (p. 128). And he claims that, seen in terms of deterrence, tort's record has largely been one of a conspicuous lack of success: 'successful lawsuits represent a catalog of tort failures;

people behaved in unacceptable ways notwithstanding the threat of liability' (p. 130). For further criticism, see Abel, 'Torts' in D. Kairys (ed.), *The Politics of Law*, 3rd edn. (New York: Basic Books, 1998).

Justice

The depiction of tort law as designed to serve instrumental goals, for example the compensation of accident victims or the deterrence of accidents, has been disputed by a number of recent commentators. Their view is that tort law does not look forward to the achievement of instrumental goals of this nature, but backwards to a wrong that needs to be redressed. The central idea in tort law, then, is corrective justice. In Aristotle's classic account, corrective justice is contrasted with distributive justice: the former makes good a wrong without any regard to the needs, character, or worth of the individuals concerned; the latter is concerned only with the distribution of goods throughout society as a whole, having regard to every person's needs and desert (*Nichomachaean Ethics, revised edn.* (London: Penguin Classics, 1976), pp. 176–7, 180). In terms of this scheme, tort law would be a system of corrective justice, social security a system of distributive justice. The idea that the function of tort law is to achieve (corrective) justice is perhaps the longest-standing of all theories of tort—it is considered by Williams, above, under the name of 'ethical compensation'—but it has received a particular stimulus over the past 20 or 30 years, largely by way of a backlash to the vogue enjoyed by the instrumentalist accounts of tort law considered above. In particular, it has gained ground as a result of the increasing perception that tort law is ill-suited as a mechanism for achieving a rational system of compensation for incapacity.

One of the leading modern-day proponents of the corrective justice theory is Ernest J. Weinrib, who, in the following passage, describes the elements of tort law and procedure (and of the doctrine and procedure of private law more generally) that support his analysis (*The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995), p. 1):

> The most striking feature about private law is that it directly connects two particular parties through the phenomenon of liability. Both procedure and doctrine express this connection. Procedurally, litigation in private law takes the form of a claim that a particular plaintiff presses against a particular defendant. Doctrinally, requirements such as the causation of harm attest to the dependence of the plaintiff's claim on a wrong suffered at the defendant's hands. In singling out the two parties and bringing them together in this way, private law looks neither to the litigants individually nor to the interests of the community as a whole, but to a bipolar relationship of liability.

Weinrib argues that instrumental accounts of tort law cannot make sense of these features because they look only to a desired outcome across society as a whole. 'Only if the plaintiff and defendant are linked in a single and coherent justificatory structure can one make sense of the practice of transferring resources directly from the defeated defendant to the victorious plaintiff' (p. 2). In his view, tort law can perform a rational function only if it abstains from all attempts to achieve instrumental goals, and tort lawyers should give up evaluating tort law in terms of such external (social rather than legal) goals and seek an 'internal' understanding of the law in the notion of corrective justice.

Weinrib's point about the unsuitability of tort law for the pursuit of instrumental goals is well taken (as least in relation to compensation for incapacity). However, as a blueprint for action his account is flawed. Over time, the tort system has come to play a role in our overall system of compensation for incapacity—largely through the 'stretching' of certain of its key doctrines (notably, the concept of fault). This role may be, by and large, only

limited, but in some areas it is very significant, for example, in respect of accidents at work and on the roads. If, as Weinrib suggests, the courts should abandon those doctrines which were the product of the stretching of tort law to make it fulfil compensation goals, and should ignore such instrumental concerns in applying the law, then surely this cannot be done without putting in tort law's place some mechanism for ensuring adequate compensation for those who are to lose out. Weinrib is right to consider tort law from an internal perspective, but wrong to look at it in a vacuum, i.e. in isolation from its social context.

Even if it is conceded that tort law's only concern is corrective justice, the question arises of what sort of wrongs it should attempt to redress, and how it should redress them. Aristotle's account of corrective justice was purely formal. It entailed neither a particular conception of 'wrongful conduct' sufficient to give rise to injustice, nor a particular response by way of remedying that injustice. It may thus be regarded as an empty receptacle into which different conceptions of 'wrong' and 'remedy' can be placed. As Posner has pointed out, the concept of corrective justice is compatible with a number of different conceptions of the wrongful conduct whose outcome is to be corrected (see 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 J Leg St 187). Similarly, there is a wide range of different remedies that might appropriately be employed to redress a wrong. Admittedly, it is tempting to think that redress must entail the payment of compensation to restore the victim as nearly as possible to the position he would have been in if the injustice had not occurred; this indeed is the principle of the modern law of tort. But there is no reason for thinking that this is necessarily the just outcome. If a very poor person were to cause some small financial injury to a millionaire, would it really be just to demand that he pay compensation in respect of the full extent of that loss, at the cost of personal financial ruin, or would we think that justice had been secured by a sincere apology? It is no doubt true (as Aristotle held) that the wealth, character and desert of an individual are irrelevant in considering whether an injury inflicted or sustained is wrongful, but it is submitted that these factors may be very pertinent to the question of how in justice the wrong should be put right.

There is nothing then in the notion of corrective justice that requires the remedying of wrongful conduct through the law of tort. Nevertheless, the idea that tort law ought to perform such a function has strong intuitive appeal. Those interested in reading further should consult Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harv L Rev 537, Epstein, 'A Theory of Strict Liability' (1973) 2 J Leg St 151 and D. Owens (ed.), *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), *passim*. A recent attempt to analyse the English law of negligence in corrective justice terms may be found in A. Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007).

Can the existence of compulsory liability insurance regimes in respect of road accidents and accidents at work be reconciled with a corrective justice theory of tort law?

2. Doctrinal Classifications: Tort Law and other Legal Categories

J. Fleming, *The Law of Torts* 9th edn.
(North Ryde, NSW: Law Book Co, 1998), pp. 3–5

Perhaps the most profitable method of delimiting the field of tort liability is to describe it in terms of the policies which have brought it into existence and contrast these with the policies

underlying other forms of liability. Broadly speaking, the entire field of liability may be divided according to its purposes into criminal, tortious, contractual and restitutionary. Each of these is distinguishable by the nature of the conduct or its consequences and the purpose for which legal remedies are given.

The law of tort and crime, despite their common origin in revenge and deterrence, long ago parted company and assumed distinctly separate functions. A crime is an offence against the State, as representative of the public, which will vindicate its interests by punishing the offender. A criminal prosecution is not concerned with repairing an injury that may have been done to an individual, but with exacting a penalty in order to protect society as a whole. Tort liability, on the other hand, exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage done. True, some traces of its older link with punishment and crime have survived to the present day, most prominently exemplary damages to punish and deter contumelious and outrageous wrongdoing. Yet the principal concern of the law of torts nowadays is with casualties of accidents, that is, of unintended harm. In this wider field, the law is concerned chiefly with distributing losses which are an inevitable by-product of modern living, and, in allocating the risk, makes less and less allowance to ideas of punishment, admonition and deterrence.

The law of contract exists, at least in its most immediate reach, for the purpose of vindicating a single interest, that of having promises of others performed. This it does either by specifically compelling the promisor to perform or by awarding the promisee damages to put him in as good a position as if the promise had been kept. Thus while contract law as a rule assures the promisee the benefit of the bargain, tort law has the different function of primarily compensating injuries or losses. Moreover, by comparison the interests vindicated by the law of torts are much more numerous. They may be interests in personal security, reputation or dignity, as in actions for assault, personal injuries and defamation. They may be interests in property, as in actions for trespass and conversion; or interests in unimpaired relations with others, as in causing injury or death to relatives. Hence the field covered by the law of torts is much broader, and certainly more diverse, than that of contract.

According to another distinction, tort duties are said to be 'primarily fixed by law', in contrast to contractual obligations which can arise only from voluntary agreement. Certainly, in classical theory, the function of contract is to promote voluntary allocation of risks (typically, but not exclusively, commercial risks) in a self-regulating society, while tort law allocates risks collectively in accordance with community values by the fiat of court or legislature. But this distinction, though still fundamentally sound, has become somewhat blurred as the area of self-regulation by contract is being progressively narrowed by regulatory legislation and judicial policing for fairness inspired by collectivist and egalitarian ideals. Besides, contractual terms (where not expressly spelled out) are 'implied' (imposed) by law and [are] usually identical with tort duties arising from one party's 'undertaking' to act for another, as in the case of professional and other services.

The third field of legal liability calling for demarcation from tort, restitution, serves the idea that justice requires the restitution of unintended benefits so as to prevent unjustified enrichment. Common illustrations are the return of money paid under mistake or the recovery of a bribe or profit (rather than loss) from misappropriation. Unlike the law of contract, it has nothing to do with promises and, unlike tort, with losses.

To summarise, criminal liability is distinguished from tort by the fact its object is to punish, not to compensate; contractual liability by reason of the different interests protected and the fact that risks are allocated primarily voluntarily rather than collectively; and restitution because it is concerned with the restitution of benefits, not compensation for losses.

COMMENTARY

The analysis of tort liability put forward by Fleming is similar to that found in other leading tort text books (*Winfield & Jolowicz*, ch. 1; *Salmond & Heuston*, ch. 2). However, it should be noted that the distinction between tort, on the one hand, and other forms of civil liability, on the other, has been challenged. Attempts have been made to find general principles of liability for the law of obligations, of which the current law of tort, contract, and restitution form part (see, e.g., Patrick Atiyah's attempts to find a common foundation for all types of civil liability in the notion of reliance: P. S. Atiyah, *Promises, Morals, and Law* (Oxford: Clarendon Press, 1981), cf. Hedley (1988) 8 LS 137; McBride (1994) 14 LS 35). This may be going too far, but it is certainly true that recent developments have blurred the distinction between tort and other forms of liability. Damages for loss of an expectation of gain under a contract have been awarded in tort (*White v Jones* [1995] 2 AC 207); it has been affirmed that a defendant may be concurrently liable in contract and tort (*Henderson v Merrett Syndicates* [1995] 2 AC 145; see Stapleton (1997) 113 LQR 257); common law causation concepts associated with the law of tort have been imported into the law of trusts (*Target Holdings v Redferns (a firm)* [1996] AC 421); and causes of action like breach of confidence, historically recognised as equitable, are now re-classified as torts. To some observers, such developments can only be regarded as steps towards a common law of obligations (see further J. Cooke and D. Oughton, *The Common Law of Obligations*, 3rd edn. (London: Butterworths, 2000); A. Tettenborn, *Introduction to the Law of Obligations* (London: Butterworths, 1984)). In so far as the result is the abandonment of old distinctions between different heads of liability based only on historical chance (e.g. the historical distinction between common law and equitable wrongs), then they can only be applauded. But it may confidently be asserted that there will always be a need for the separate exposition of the principles of tortious liability (perhaps including, in time, wrongs whose origins are in equity), if for no other reason than that tort is the general law, while contracts and trusts (for example) are institutional arrangements entered into by consent and the conditions for their formation, dissolution, etc. themselves merit independent analysis (see also *Winfield & Jolowicz*, para. 1–14; *Stanton*, p. 10).

III. Modern Influences on Tort Law

In this final section of our general introduction, we highlight a number of external factors that have had a particular influence on the development of tort law in recent years, and can be expected to shape its future.

1. The Influence of Insurance

R. Lewis, 'Insurance and the Tort System' (2005) 25 LS 85

There is no doubt that insurance profoundly influences the practical operation of the law of tort. Liability is not merely an ancillary device to protect the insured, but is the 'primary medium for the payment of compensation, and tort law [is] a subsidiary part of the process'

(P. Cane, *Atiyah's Accidents, Compensation and the Law*). Although the majority of defendants in tort are individual people, they are almost all insured. In nine out of ten cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies. Only rarely are individuals the real defendants. Instead, policyholders cede control over their case to their insurer and thereafter usually play little or no part in the litigation process. Insurers determine how the defence is to be conducted and, for example, commonly make admissions without the consent of the insured, and settle cases in spite of the policyholder's objection.

Insurers pay out 94% of tort compensation. Classic studies reveal that it is their bureaucracy that dictates much litigation procedure, and determines when, and for how much, claims are settled. It is their buildings, rather than courts of law, or even solicitors' offices, that are the important centres of tort practice . . . Because insurers dominate the system, it is very difficult to view any tort case in isolation: each and every case is affected, no matter whether determined in court or out of it . . . Insurers are the paymasters of the tort system: they process the routine payments and they decide which elements of damage they will accept or contest . . . Insurers determine the extent that lawyers become involved in disputes, and the tactics that are used in the proceedings. Increasingly cases are being settled at an early stage, and without resort to the issue of court documents. Insurers decide, in particular, whether a case merits the very exceptional treatment of being taken to a court hearing. In effect, they allow trial judges to determine only 1% of all the claims made. Only a few of these are appealed with the result that the senior judiciary are left to adjudicate upon a small fraction of what are, by then, very untypical cases. Whether an appeal court is to be given an opportunity to examine a point of tort law may depend upon the insurer for, if it serves the insurer's purpose for doubt to remain, the claimant can be paid in full and threatened with a costs award if the action is continued. In this sense tort principles themselves have been shaped by and for insurers . . .

The importance of insurers to the tort system is reflected in the fact that the claims which are brought closely match the areas where liability insurance is to be found. Thus road and work accidents predominate partly because these are the two major areas where tort insurance is compulsory. They constitute 86% of all the claims brought for personal injury. They dominate the practice of tort even though they are relatively minor causes of disability and incapacity for work. Those suffering injury in areas not covered by insurance are extremely unlikely to obtain compensation. According to one study [for the *Pearson Commission*, 1978], whereas 1 in 4 road accident victims and 1 in 10 work accident victims gain compensation from tort, only 1 in 67 injured elsewhere do so . . .

This influence of insurance upon the general pattern of tort liability is matched by its effect upon the level of compensation awarded. The principles upon which damages are assessed implicitly recognise that it is a company with a deep pocket that will pay and not an individual. Although most awards in tort are for very limited sums—little more than £2,500—there are very few individuals who could afford to pay the amounts required in serious injury cases . . . If it were not for insurance there would be little hope of restoring the claimant to the pre-accident position in a serious injury case. It is doubtful whether we would even wish to attempt to place full responsibility for the damage on most defendants. The very nature of the tort system would have to change. Without insurance, it is probable that tort liability itself could not survive . . .

Whether the rules of tort themselves have been changed to reflect insurance is more difficult to establish. On the one hand, it is certainly true that the foundations of tort remain largely unchanged. Formally, liability still depends upon proof of fault and, even where rules have been revised more in favour of claimants, it is too easy to suggest that insurance is the cause. On the other hand, some judges have acknowledged that they have concerned themselves with who has the deeper pocket, or who was in the better position to distribute, or absorb, a loss.

It is difficult to conclude that loss distribution arguments have influenced only the facts found and not, to some degree, the rules applied. However, substantial change in tort rules has not occurred. Instead it is the overall involvement of insurers with the system which leads us to conclude that insurance has had a major effect.

COMMENTARY

The type of insurance we are concerned with here is liability (or third-party) insurance, which is to be contrasted with loss (first-party) insurance in which the insured pays to be indemnified in the event of some adverse event (e.g. illness or injury), or for someone else to be indemnified (e.g. on his death), usually whether or not another person is liable for the adversity. Liability insurance is essentially parasitic on the tort system as it is triggered only where there is a liability to pay damages to someone else. Loss insurance is largely independent of the tort system—it is concerned simply with loss, not liability—but a loss insurer may get involved in tort litigation where it has a right ('the right of subrogation') to bring a claim in the insured's name, after paying him under the policy, for an injury for which another person is liable. In fact, a tort claim—recorded under the names of two private individuals—could well be, in reality, between two insurers, the claimant's loss insurer and the defendant's liability insurer. The latter usually has full control over the defence by virtue of an express term of the contract of insurance, and need not seek approval from or even consult the defendant about either litigation strategy or settlement. A telling anecdote is recounted by the late Professor Harry Street, author of a well-regarded text on tort law and (with D. W. Elliott) a pioneering socio-legal study on *Road Accidents* (Penguin Books, 1968). In the latter (pp. 209–10), he tells how he was involved in a road accident for which he was sued. His insurer undertook the defence and the claim failed in the county court. He assumed that was that—until to his total surprise he picked up the newspaper one day and read that the Court of Appeal had just heard the claimant's appeal. He had been entirely unaware that any appeal was in prospect.

The courts too are usually unaware whether either or both the parties before them were insured at the relevant time, so they do not know who is in reality going to pay the damages, or who will actually benefit from them. (In road traffic accident cases, however, it is now possible for the claimant to proceed directly, and by name, against the defendant's liability insurer: European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061.) The traditional judicial view is that the insurance position of the parties should not be disclosed in case it influences the court in deciding questions of liability or damages (see, e.g., *Davie v New Merton Board Mills Ltd* [1959] AC 604 at 626–7, per Viscount Simonds, *Morgans v Launchbury* [1973] AC 127 at 136–7, per Lord Wilberforce, and *Hunt v Severs* [1994] 2 AC 350 at 363, per Lord Bridge). However, in a small but not insignificant set of cases, there has been express discussion of the insurance position. A notable example is provided by Lord Denning who—in a typically candid moment—openly approved of judges demanding a higher standard of care from parties (specifically, drivers of motor vehicles) known to be insured in order to secure compensation for the injured person (*Nettleship v Weston* [1971] 2 QB 691 at 699):

[A] person injured by a motor-car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured

person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard.

It must be admitted that such expressions of opinion are very rare, and that many judges would doubtless disapprove of Lord Denning's sentiments, especially as they entail a move away from the purported basis of liability for tortious negligence—i.e. fault—in favour of considerations of loss distribution. There is perhaps greater judicial willingness to admit to the influence of insurance considerations in contexts where 'policy' is a relevant factor, e.g. in determining whether it is fair, just and reasonable to recognise a duty of care. In *Vowles v Evans* [2003] 1 WLR 1607, a case considering the liability of a rugby referee to a player, the Court of Appeal expressly acknowledged (at 1614) that the availability of insurance—to both defendant and claimant—could bear on this crucial question of policy. (See also, in slightly difference contexts, *Smith v Eric S. Bush* [1990] 1 AC 831 at 859, per Lord Griffiths, and *Gwilliam v West Hertfordshire Hospitals NHS Trust* [2003] QB 443, considered at p. 574, below.)

A broader question is whether the development and spread of liability insurance has been instrumental in bringing about major structural changes in tort law doctrine (e.g. extensions in the application of the duty of care concept) in the interests of loss distribution. In a subsequent section of the above article, Lewis identifies two diametrically opposed points of view, both well-represented in the literature: on the one hand, that insurance has been the 'hidden hand' that has pulled legal liability rules along with it (see, in the American context, K. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, Mass: Harvard University Press, 2008); on the other, that the influence of insurance has been overstated and actually rather limited. A leading representative of the latter school of thought is Jane Stapleton, who argues that 'neither actual insurance nor insurability are or should be relevant to the reach and shape of tort liability' ('Tort, Insurance and Ideology' (1995) 58 MLR 820 at p. 820). One important point that she makes is that the courts very rarely point to the *claimant's* ability to protect himself by purchasing first-party (loss) insurance as a reason for absolving the defendant from liability. (For a much-criticised example, see *Lamb v Camden Borough Council* [1981] 1 QB 625 at 637–8, per Lord Denning MR.) And rightly so: the result would be the shifting of accident costs—mediated through the pricing of insurance premiums—from tortfeasors to victims, and the diminution of whatever deterrent effect that tort law possesses.

As Lewis argues, the main impact of insurance on the substantive rules of tort may actually have been on the law of damages—an area mostly ignored by other writers—rather than the principles of liability. In fact, a number of recent reforms relating to the assessment of damages—e.g. the new judicial power to order that damages be paid periodically rather than in the traditional lump sum—could not have been contemplated were it not possible to draw upon the insurance industry's technology and financial resources. (See further Ch. 16.) The impact of insurance on liability rules is much more difficult to establish—at least in the United Kingdom, where tort remains largely fault-based. But the influence is perhaps easier to discern in systems such as the French, which over the course of the twentieth century moved decisively in the direction of strict liability, a development which many French commentators have associated directly with the growth of liability insurance (see, e.g., G. Viney, *Introduction à la responsabilité,* 2nd edn. (Paris: LGDJ, 1995), para. 25, translated in *van Gerven*, pp. 23–4).

Insurers themselves are not always happy with reforms which purport to have an insurance rationale, as they may increase insurers' costs and falsify the assumptions grounding

their past and present premium rates. (Other things being equal, however, more liability means more business for liability insurers.) Increasingly, they have sought to influence the tort reform agenda by contributing to public debate and applying pressure in the political sphere. Their role in the current debate about 'compensation culture' is considered below.

For further analysis of tort law's insurance context, see Chapter 18, below. For additional discussion of some of the points addressed above, see Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 LS 67, and Morgan, 'Tort, Insurance and Incoherence' (2004) 67 MLR 384.

2. The Influence of Human Rights

A topic of utmost contemporary importance, and no little controversy, has been the effect upon the law of tort of the incorporation of human rights standards into English law. By the Human Rights Act 1998, the courts have an obligation to act compatibly with many of the rights recognised in the European Convention on Human Rights and Fundamental Freedoms. The question of how exactly this is going to affect principles of tortious liability has aroused very great interest and a good deal of uncertainty remains.

Human Rights Act 1998

1. THE CONVENTION RIGHTS

(1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention;
(b) Articles 1 to 3 of the First Protocol; and
(c) Articles 1 and 2 of the Sixth Protocol

as read with Articles 16 to 18 of the Convention . . .

2. INTERPRETATION OF CONVENTION RIGHTS

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights;
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention;
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention; or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen . . .

3. INTERPRETATION OF LEGISLATION

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility . . .

6. ACTS OF PUBLIC AUTHORITIES

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes—
(a) a court or tribunal; and
(b) any person certain of whose functions are functions of a public nature

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) 'Parliament' does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) 'An act' includes a failure to act but does not include a failure to—
(a) introduce in, or lay before, Parliament a proposal for legislation; or
(b) make any primary legislation or remedial order.

7. PROCEEDINGS

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
(a) bring proceedings against the authority under this Act in the appropriate court or tribunal; or
(b) rely on the Convention right or rights concerned in any legal proceedings but only if he is (or would be) a victim of the unlawful act . . .

(6) In subsection (1)(b) 'legal proceedings' includes—
(a) proceedings brought by or at the instigation of a public authority; and
(b) an appeal against the decision of a court or tribunal.

8. JUDICIAL REMEDIES

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and

(b) the consequences of any decision (of that or any other court) in respect of that act the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made . . .

11. SAFEGUARD FOR EXISTING HUMAN RIGHTS

A person's reliance on a Convention right does not restrict—

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from section 7 to 9.

COMMENTARY

The Human Rights Act 1998 (hereinafter HRA) came into force in October 2000. Not all of the Convention rights are incorporated by the HRA, but some of the most important that are incorporated are Article 2 (right to life), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 10 (right to freedom of expression).

There are several ways in which the HRA may have an impact upon the law of tort. First, s. 3 of the HRA requires a court or tribunal to interpret legislation, as far as possible, in accordance with the Convention rights. Secondly, s. 6 makes it unlawful for a public authority (as defined) to act in a manner that is incompatible with the Convention rights. As courts are public authorities for the purpose of the HRA, it seems that a court must give a judgment which is compatible with the Convention rights even in an action between two private individuals (see *Douglas v Hello!* [2001] 1 FLR 982, *Venables v News Group Newspapers Ltd* [2001] Fam 430). If a public authority does breach s. 6, the 'victim' may bring proceedings under the Act (s. 7) and, if successful, may be awarded compensation or granted some other remedy at the discretion of the court (s. 8) (although note that s. 9, not extracted above, limits the remedies available where it is alleged that a judicial act is in breach of a Convention right: see further Bamforth [1999] CLJ 159). Also important is s. 2, which requires a court or tribunal, when considering any question which has arisen in connection with a Convention right, to take account of, amongst other things, decisions of the European Commission and Court of Human Rights.

The potential effects of the Act are immense, and it is difficult to predict even after some 10 years' experience of its operation what areas of tort law might be affected. One question which warrants extended consideration is how the new statutory remedy against public authorities will be developed and what effect it will have on the liabilities of public authorities at common law (see Ch. 10). How other common law liabilities will be affected by the HRA is considered at relevant points throughout the book, but some particular issues of interest are identified in outline below.

Trespass to the Person (Assault, Battery and False Imprisonment) and Articles 2 and 5

Trespass to the person protects interests in personal security and freedom: assault and battery protect against unwanted or threatened interferences with the person, whilst false imprisonment protects the liberty interest of the individual. Article 2 (right to life) and Article 5 (right to liberty and security) are concerned with similar subject matter, and the question will arise whether the remedies provided in tort are sufficient to satisfy the obligations thereby imposed upon the state. It is important to note that the obligation imposed may be one of positive action. Thus the state might be liable under the Convention not only for breaching the Convention itself but also for failing to take steps to ensure that a third party did not contravene another's Convention rights. For example, the estate of a person who was stabbed to death by another would have a civil action against the actual perpetrator in battery, but might also be able to sue the state for breach of Article 2 if it failed to take reasonable steps to safeguard the deceased's right to life (cf. *Osman v United Kingdom* [1999] 1 FLR 193, and *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225, noted at p. 533f, below). Such obligations might be imposed in respect of other Convention rights (see, e.g., *Z v United Kingdom* [2001] 2 FLR 612: Art. 3), but in the tort context are especially relevant in relation to Articles 2 and 5. It has also been argued that these Articles could be interpreted so as to give rights of actions between private individuals (for discussion, see Bamforth [1999] CLJ 159) but in *Austin v Commissioner of the Police for the Metropolis* [2005] EWHC 480 (QB) Tugendhat J saw 'some difficulty' in achieving an alignment between a tort action in false imprisonment and a claim for a violation of Article 5, and in practice the trend seems to be to plead the causes of action in false imprisonment and under the HRA as alternatives. (For later proceedings in *Austin*, see p. 96 below.)

Negligence and the Right to a Court under Article 6

At one time it seemed that the most significant impact of the Act would be through the incorporation of Article 6 of the Convention (right to a fair trial, entailing in turn the right to a court). It was once assumed that Article 6 goes beyond mere procedural safeguards and guarantees, at least to a point, a form of substantive due process. In *Osman v United Kingdom* [1999] 1 FLR 193, the European Court of Human Rights ruled that the applicants had a right under Article 6 to have their allegations of negligence against the police—whom they alleged ought to have prevented an attack by a third party—heard in a full trial; the right was violated when the English court had struck out the action at a preliminary hearing, on the grounds that public policy in any case precluded the recognition of any duty of care. Detailed consideration of this issue is reserved until later (see p. 151ff, below), but it should be noted now that the decision cast doubt over the compatibility with the Convention of English law's basic approach to the tort of negligence. However, in the subsequent case of *Z v United Kingdom* [2001] 2 FLR 612, the European Court of Human Rights appeared to resile from its earlier decision in *Osman*, though not without creating uncertainties of its own (see further p. 152ff, below).

Defamation, Privacy and Articles 8 and 10

Defamation is a tort that protects one's reputation, usually by an award of damages and, if required, an injunction. Most commonly, defendants in defamation cases are members of the media, sued for a false allegation that lowers the reputation of the claimant in the eyes of the general public. Two Convention rights are clearly relevant in this context. Article 8 guarantees a right to privacy, subject to the derogations set out in Article 8(2).

Such a right is wider than the tort of defamation, which protects only reputation. Traditionally, English law does not recognise a liability for invasion of privacy as such, and that approach has been affirmed by the House of Lords even post-HRA (*Wainwright v Home Office* [2004] 2 AC 406). Nevertheless, under the influence of the Convention right, the courts have manipulated established principles of the equitable law of confidence to a very considerable extent, creating what is effectively a tort applying to the wrongful disclosure of private information (*Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457).

The right to privacy has to be balanced against the competing right to freedom of expression in Article 10 of the Convention, which HRA, s. 12 explicitly directs the courts to heed when considering the grant of any relief that might affect its exercise. In other common law jurisdictions, the highest courts have balanced these competing concerns in ways that contrast with the traditional approach of the English law of defamation (see *New York Times v Sullivan* 376 US 254 (1964), *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520) but there are signs that the English courts may be prepared to modify existing rules to ensure that the principles of defamation law are compatible with the Convention (see especially *Reynolds v Times Newspapers* [2001] 2 AC 127 and *O'Shea v MGN Ltd* [2001] EMLR 40; cf. *Loutchansky v Times Newspapers* [2002] QB 783 and *Jameel v Wall Street Journal (Europe) Sprl* [2006] UKHL 44). See further Chapter 13.

Conclusion

The above is merely a sample of the effects the HRA has had—and may have in future—on the law of tort. Only with the further passage of time will the true significance on the Act become clear. Though it is already clear that the European Convention on Human Rights has played a more significant role in the English law of tort than was the case before the HRA, whether the Act will bring about really substantial changes to fundamental tort law principles remains to be seen.

For further discussion and analysis, see J. Wright, *Tort Law and Human Rights* (Oxford: Hart Publishing, 2001).

3. Concerns about 'Compensation Culture'

Tomlinson v Congleton Borough Council [2004] 1 AC 46

The claimant waded into the defendant council's lake, threw himself forward into a dive, and hit his head on the sandy bottom, suffering serious injuries. The lake was on the site of an old quarry, which the council had transformed into a beauty spot. Various water sports were pursued on the lake, and sand had been deposited around it to create a beach, which was a popular place to picnic and sunbathe. As the result of a risk assessment, the council decided to prohibit swimming as unduly dangerous, for example, because a swimmer might be injured by windsurfers. Because warning signs proved ineffective, the council concluded that the only way of dealing with the problem was to make the water less accessible and less inviting. Shortly before the claimant's accident, it allocated a sum in its budget to a scheme to remove or cover over the beaches and replace them by muddy reed beds. The beach off which the claimant was injured was destroyed a few months after the accident. The claimant sued the council under the law of occupiers' liability (see Ch. 11.II), and the case eventually came before the House of Lords.

Lord Hobhouse

[81]…[I]t is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. But this is the road down which your Lordships, like other courts before, have been invited to travel and which the councils in the present case found so inviting. In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.

Lord Scott

[94]…[The claimant] was simply sporting about in the water with his friends, giving free rein to his exuberance. And why not? And why should the council be discouraged by the law of tort from providing facilities for young men and young women to enjoy themselves in this way? Of course there is some risk of accidents arising out of the joie de vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone.

COMMENTARY

This is one of the emblematic decisions of the modern law of tort, and we shall encounter it again (see further extracts at pp. 573 and 579). In the passages extracted, Lord Hobhouse and Lord Scott explicitly addressed concerns that the deterrent effect of potential tort liability might lead to the undesirable withdrawal of services and amenities of value to the community at large, and the imposition of (in Lord Scott's words) 'a grey and dull safety regime on everyone'. No doubt the decision will reduce the anxiety previously experienced by councils and other landowners—indeed potential defendants in general—about their potential liabilities, and make it less likely that they will go to such extreme lengths in the interests of risk reduction. The Law Lords also struck out against the dilution of individual responsibility that can result if tort law is too ready to accord the injury victim a remedy. In an official report shortly afterwards (*Better Routes to Redress*, extracted below), the Better Regulation Task Force stated that the decision was 'an important legal precedent…which should make people understand that they need to be responsible for their own actions and should anticipate risk'.

Though *Tomlinson* addressed concerns of compensation in a particularly direct and explicit fashion, it was far from being the first case to contain expressions of judicial concern about the supposed excesses of the tort system. Lord Templeman anticipated the modern 'compensation culture' debate as early as 1986, deriding the assumption 'that for every mischance in an accident-prone world someone solvent must be liable in damages' (*CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1059). His words were echoed almost 20 years later by Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [2]: 'the courts must not contribute to the creation of a society bent

on litigation, which is premised on the illusion that for every misfortune there is a remedy'. In *Corr v IBC Vehicles Ltd* [2007] QB 46 at [63], Ward LJ said that he would 'prefer to forget' Lord Hobhouse's observation relating to the 'evil consequences' of compensation culture, but could not ignore Lord Steyn's more measured expression of concern. What do you think is the difference, if any, between the remarks of the two Law Lords? Can you explain why Ward LJ objected to one and yet was able to assent to the other?

In *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [69], Baroness Hale attempted to explain why the increased scope for claiming compensation in the modern law had raised concern: 'The fear is that, instead of learning to cope with the inevitable irritations and misfortunes of life, people will look to others to compensate them for all their woes, and those others will then become unduly defensive or protective.' Do you think that such fears *ought* to influence how the courts develop and apply the law? In particular, do they have sufficient evidence on which to determine whether or not the fears have any foundation in fact?

The factual evidence for the existence of a 'compensation culture' is considered in the extracts below.

Better Regulation Task Force, *Better Routes to Redress* (2004)

Almost every day there is a report in the media—newspaper, radio or television, suggesting that the United Kingdom is in the grip of a compensation culture. Headlines shout about people trying to claim what appear to be large sums of money for what are portrayed as dubious reasons. But what is not always reported is the outcome. The reality is often very different. Litigating is not easy. Many claims never reach court. Some will, of course, be settled out-of-court; others disappear because the claim had little chance of succeeding in the first place. For a claimant to succeed they have to be able to prove that first someone else owed them a duty of care and then that the same person was negligent.

The term 'compensation culture' is not used to describe a society where people are able to seek compensation. Rather a 'compensation culture' implies that a decision to seek compensation is wrong. 'Compensation culture' is a pejorative term and suggests that those that seek to 'blame and claim' should be criticised. It suggests greed; rather than people legitimately enforcing their rights. Few would oppose the principle that if people's rights are infringed, appropriate action should be available to the injured party to gain compensation from the guilty party. So why the double standards? . . .

Developments in recent years, principally the introduction of 'no win no fee' arrangements—where the claimant only pays their lawyer's fees in the event of success—and the emergence of claims management companies have increased access to justice. But they have also meant that more people have been encouraged to 'have a go' at claiming redress for a wrong they feel they have suffered.

We live in a much richer, but more risk averse, society than ever before. We are also much better informed about our rights, which means we are more aware when there is a case to answer. However some people may be persuaded, by what they have read in the papers or through the contact they have had with claims management companies, to look for compensation where none is available and therefore decide to 'have a go'. This has had both positive and negative impacts. On the positive side the public sector, such as schools, rather than cancelling trips and activities as the media would have us believe, have become much better at assessing and managing risks. Local authorities have put sophisticated systems in place to manage, for example, repairs to their pathways and highways.

However, on the negative side, the 'have a go' culture that encourages people to pursue misconceived or trivial claims:

- has put a drain on public sector resources;
- may make businesses and other organisations more cautious for fear of litigation;
- contributes to higher insurance premiums; and
- clogs up the system for those with indisputable claims . . .

However the so-called 'compensation culture' cannot be blamed for all these problems. Some have arisen from poor operational practices by companies . . .

The compensation culture: it's all in the mind . . .

Almost everyone we spoke to in the course of this study told us that they did not believe that there is a compensation culture in the UK. They argued that the reality is somewhat different, because the number of accident claims, including personal injury claims, is going down . . . , and that this proves the absence of a compensation culture in the UK. However, it ignores the fact that . . . people believe that there is a 'compensation culture' in the UK.

It is this perception, and the impact it is having on the UK as a whole, which needs to be tackled. Quoting statistics will not win the argument whilst the papers run 'compensation culture' stories. There is undoubtedly a perception that the public have a greater tendency now than ever before to seek redress if they suffer an injustice or injury, which they believe was someone else's fault. People look for someone else to blame for their misfortune. Advances in science and technology also mean that links between cause and effect are better understood. In the health arena, for example in areas such as passive smoking or occupational exposure to asbestos, this has led to a large increase in claims . . .

Don't believe everything you read

Regardless of perception, the truth behind the 'compensation culture' is somewhat different to how it is portrayed by the media and commentators. Many of the stories we read and hear either are simply not true or only have a grain of truth about them. The truth behind the famous, or rather infamous, McDonald's coffee case, which is often held up as a shining example of the 'compensation culture', is different to how it is reported or quoted. Newspapers readily use the incident to highlight the 'compensation culture'.

Litigating is not easy

Litigating, or pursuing a case to court, is only one form of redress. The majority of claims never make it to court. In order to litigate successfully the party who accuses (the claimant) another of acting in a negligent manner has to be able to prove that the other party (the defendant) owed them a duty of care and was negligent. This is the tort of negligence . . . The shift in recent years has been over what kinds of experiences are now appropriate to try to litigate against. Whole new types of claims that were simply not considered by lawyers 20 or 30 years ago are now being pursued. However, despite what the media would lead us to believe such claims do not always succeed . . .

Keeping the perception alive: the media

The perception of the 'compensation culture' is largely, though not entirely, perpetuated by the media. Whilst appearing to despise the phenomenon, it fills many column inches in newspapers. The media regularly report claims for apparently exorbitant sums, without later reporting the final outcome, which may have been very different. They also report stories from other parts of the world without pointing out that such cases would be unlikely to succeed here . . .

Impact of the 'compensation culture' perception

The threat of litigation, or just a complaint or claim, can have some positive effects. We have already mentioned improved risk assessments in the case of schools and maintenance work by local authorities. It can also help to improve the provision of goods and services without the need for Government intervention. Those who complain loudest about the current system need to think about the alternatives. However, there are also negative aspects of the 'have a go' culture. Dealing with complaints and claims costs a great deal of money . . . Of course, some of the claims each local authority handles will be genuine but a large number will be vexatious or frivolous. Dealing with these puts an enormous drain on local authority resources; resources which come from local residents and businesses and which could be better spent for the benefit of the same residents and businesses. Fear of litigation does change behaviour. Reporting incidents that appear trivial, and may be urban myths, will encourage others to change their behaviour. There are more serious examples of an overly cautious approach being taken. Pharmaceutical companies are more wary about developing new drugs for fear of litigation, and some doctors prefer to carry out a caesarean section to a natural birth because it is perceived as less risky (despite caesarean section not being risk free). Excessive risk aversion is not helpful to the UK's prosperity nor well-being.

K. Williams, 'State of Fear: Britain's "compensation culture" reviewed' (2005) 25 LS 499

Claims that Britain is in the grip of a 'compensation culture' and, consequently, a 'litigation crisis' are asserted with increased frequency. Concerns of this kind can be found in the columns of newspapers, in official reports, political discourse, legislative debate, and judicial decisions . . .

Is there a problem?

The answer to this question is hotly disputed, depending as it does on what exactly is thought to constitute the 'problem', as well as on who is asked. The growth of a 'compensation culture' implies an increased and unreasonable willingness to seek legal redress when things go wrong, whilst 'litigation crisis' implies that this shift in social attitudes has been translated into undesirable (perhaps unbearable) levels of formal disputing . . .

It seems there may be a number of different problems. Frequently it appears that there are too many (successful) claims; at other times that compensation payouts are too costly, quite commonly that lawyers' fees are excessive; sometimes a mixture of all of these . . . [But] the statistical evidence is both incomplete and somewhat equivocal . . . And, of course, even if we could establish with certainty how many claims there are, that would not tell us how many claims is *too* many. It often seems to be assumed, implicitly at least, that any increase is a cause for concern whilst a fall is to be applauded . . .

There are two other considerations connected with the numbers issue. First, claimant lawyers often point out with considerable (if self-interested) justification that the great majority of injured persons never resort to the law; that it is precisely the *absence* of a compensation culture that characterises our liability system . . . A second point is whether legitimate, well-founded claims should be counted as part of the 'problem'. After all, one reason why 'compensation crisis' stories find such ready audiences seems to be related to the ways in which they reflect public anxieties about the decline of social and moral values, such as self-reliance and personal responsibility; anxieties that are represented here by tales of greedy lawyers egging on grasping claimants chasing compensation for trivial harms which in an earlier era would have been stoically shouldered without public complaint. Accordingly, any attempt to

test for the existence of a 'crisis' should, arguably, look beyond the absolute numbers of injury claims to whether there has been an increase in those that are substantially without merit or are bought off simply for their nuisance value. Unfortunately, there is no direct or reliable evidence to answer this crucial question either . . .

The 'real' problem and some of its causes

The idea that defendants are beset by ever-increasing numbers of doubtful claims is not proven. Indeed, the 'problem' we started with seems to have come down to this: that whatever may be the *actual* likelihood of irresponsible litigation, many *believe* themselves to be at heightened risk of being unfairly sued. According to the Task Force, this critical misperception or 'urban myth' induces socially and economically damaging risk-averse behaviour. Reputedly, organisations become less innovative, scarce resources that would be better applied elsewhere are unproductively diverted, unnecessarily costly safety precautions are taken, sometimes beneficial activities are fearfully abandoned altogether . . .

[T]he Task force . . . make anxious reference to an expanding liability regime . . . [They] say that new types of claims 'that were simply not considered by lawyers twenty or thirty years ago are now being pursued'—the implication being that the judiciary must take the blame to the extent that novel claims are admitted. Of course, quite how expansions of tort liability affect (insured) defendants or society more broadly is uncertain and disputed . . . No doubt the great bulk of claims will continue to be based on conventional legal principles applied to perfectly ordinary road traffic and workplace injury cases. On the other hand, the psychological impact of new, especially uncertain liabilities on defendants (and on their insurers' underwriting and pricing policies) may be marked, even where the development in question initially appears to advantage relatively few claimants. In fact, some recent judicial decisions have the potential to affect large numbers (albeit we can only guess how many) and destabilise some (particularly public sector) budgets.

COMMENTARY

A man driving his new Winnebago motor home set it on cruise control, then went into the back to make himself a cup of coffee; the vehicle left the highway, crashed and overturned—and the man successfully sued the manufacturers for failing to advise him not to leave the driving seat! More evidence of the excesses of our compensation culture? Well, no: just one of the myths, often perpetuated by an uncritical news media, that have grown up about the tort system, and are exposed in the Better Regulation Task Force (BRTF) report. In fact, there is no truth in the story at all: 'Winnebago man' did not exist. But this has not prevented his story being reported as fact in numerous national newspapers (including *The Express*, the *Daily Star*, the *Daily Record*, *The People* and *The Mirror*, plus the London *Evening Standard*).

Not quite belonging in the category of pure myth are 'myth-representations'—stories that have some basis in truth but are told in such a way as to present a wholly misleading picture. The famous 'McDonald's coffee case' is the pre-eminent example. Eighty-one-year-old Stella Liebeck got a cup of coffee from a McDonald's drive-through restaurant and suffered third-degree burns after spilling it on her lap in the front seat of her car. She was awarded $2.9 million in damages by a New Mexico jury. Her case has become perhaps *the* emblem of the excesses of the US tort system, and by implication *our* tort system too, and of modern tort law's alleged subversion of traditional values of individual responsibility. But how accurate has been the case's representation in the media and in public debate?

The truth is that the reporting of the case has been sensationalised, partial, misleading and sometimes inaccurate (see W. Haltom and M. McCann, *Distorting the Law* (Chicago: University of Chicago Press, 2004), ch. 6). The plaintiff has been castigated for trying to profit from a trivial accident that was really her own fault; the tort process has been called into question for ignoring her own responsibility for the accident, and for awarding compensation going far beyond her losses. In fact, the truth is much more complex than such media portrayals, and rather different in key respects. Mrs Liebeck was not driving the car, merely a passenger, and the car was not in fact being driven at all at the material time, but parked up. Her injuries were far from trivial: she sustained third-degree burns, was in hospital for more than a week, suffered partial disability for two years after the accident, and was left with permanent scarring on 16 per cent of her body. The jury found McDonald's at fault because the coffee was not just hot—as, of course, it had to be—but excessively hot (considerably hotter than that produced by (e.g.) a domestic coffee machine). The jury did not ignore Mrs Liebeck's share of responsibility for the accident, but found her guilty of contributory negligence and reduced her damages by 20 per cent. After the reduction, the compensatory component of her award was only $160,000, a significant part of this attributable to her medical fees. The rest was punitive damages, the (very large) figure said to represent two days' profits for McDonald's from sales of coffee. In fact, Mrs Liebeck never received anything like the $2.9 million still quoted in news reports. As very commonly occurs in the United States, the award for punitive damages was subsequently reduced very considerably by the judge—to $480,000. Even the combined sum of $640,000 is unlikely to have been what Mrs Liebeck actually received, because—to forestall an appeal—she then accepted an undisclosed sum in final settlement of her claim.

Mrs Liebeck has been commemorated—fairly or not—by the institution of an annual Stella Award for America's most frivolous or outrageous lawsuits of the year: see www.stellaawards.com. While this may seem just a bit of fun, Haltom and McCann, *op. cit.*, argue that a more serious intent lies behind such interventions: the production of, and saturation of the media with, popular narratives ('pop torts') that advance the cause of tort reform. (See also Lunney, 'Letter from America: Tort Reform Illinois Style' (1998) 8 KCLJ 43.)

However the McDonald's coffee case is interpreted, its lessons are not easily applied to England and Wales. Our tort law is very different from that in the United States: no jury determination of liability or assessment of damages for personal injury; no punitive damages for negligence and no contingency fees to feed the lawyers who drive the process. (Our conditional fees are not the same: the successful lawyer gets an uplift on his usual fee, but not—as in the United States—a percentage of the damages.) In fact, when similar coffee cases were brought against McDonald's on this side of the Atlantic, they failed (see *Bogle v McDonald's Restaurants Ltd* [2002] EWHC 490). Why do you think the media has not given the same prominence to the claims that failed as to Mrs Liebeck's claim in the United States?

For further discussion of the tort system in the United States, highlighting differences with England and Wales, see J. Fleming, *The American Tort Process* (Oxford: OUP, 1988).

The Statistical Evidence

The statistical evidence about claims numbers and compensation costs is considered in Chapter 18. Suffice it for now to note that the period which has seen the greatest concern about compensation culture—since broadly speaking the late 1990s, with the rise of the claims management companies (CMCs) and 'no win no fee' litigation—has in fact coincided with relative stability in the annual number of claims for personal injury (see Morris, 'Spiralling or

Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 MLR 349 at 357–8). Cost is a more complex issue, but it may be noted that the BRTF itself (p. 15) endorsed an estimate of tort costs in the United Kingdom which represents a surprisingly low percentage of gross domestic product (0.6%), and is significantly lower than the comparable figure for most other developed countries, including France (0.8%), Germany (1.3%), Italy (1.7%) and the United States (1.9%).

Translating Rhetoric into Action

The official response to concerns about compensation culture may be traced back to December 2002, when the Department of Work and Pensions established an official review of employers' liability compulsory insurance after significant rises in premiums had raised concerns that the costs of the system were too high and that employers were finding it difficult to secure affordable cover. The review's recommendations (*Review of Employers' Liability Compulsory Insurance: Second Stage Report*, 2003) included the promotion of 'vocational rehabilitation'—helping those who are ill, injured or have a disability to access, maintain or return to employment or some other useful occupation—but were conspicuously lacking in substance. The review did little to settle public fears and a 'media and political frenzy' developed (Morris (2007) 70 MLR 349 at 350), with contributions from across the political spectrum. The insurance industry itself engaged in substantial lobbying and made frequent interventions in the public debate, seeking (according to Morris, p. 365):

> to create a sense of moral and political panic . . . [and] to undermine the legitimacy of those using the tort system and even the tort system itself . . . Insurers have also used the compensation culture as a smokescreen to hide their own role in the sudden and significant increases in liability insurance premiums.

The latter proposition finds some support in an analysis by the Office of Fair Trading (OFT), which noted 'a tendency (perhaps understandable) on the part of the insurance industry, to exaggerate the effect of some drivers of liability insurance premiums, such as changes in tort law' (*An analysis of current problems in the UK liability insurance market* (2003), para. 10.4). In fact, said the OFT, there was 'a consistent pattern of substantial losses and under-pricing of liability risks over many years' in which a significant explanatory factor was '[t]he failure of the market as a whole to anticipate and accurately quantify the effect of a number of emergent risks, including a variety of gradually developing diseases' (paras 10.11–10.12).

Other groups also sought to influence the political process because of concerns about their potential liabilities and the rising costs of liability insurance, amongst them teachers responsible for the organisation of school trips, and companies and volunteer groups engaged in outdoor pursuits. (On the latter, see in particular J. Fulbrook, *Outdoor Activities, Negligence and the Law* (Aldershot: Ashgate Publishing, 2005).) In September 2004, shortly after the publication of the BRTF's report, a private member's bill sought to address concerns that potential volunteers were being deterred from participating in outdoor activities by the fear of liability (Promotion of Volunteering Bill, House of Commons Bill 18, Session 2003–04) but failed to progress to a vote in the House of Commons.

In May 2005, then Prime Minister Tony Blair announced the Government's intention to legislate to address concerns about compensation culture (www.number10.gov.uk/Page7562). The result, a year later, was the Compensation Act 2006. It is the Act's first two sections that are of most interest to us here. Section 1, extracted at p. 175, below, is evidently an attempt to change public perceptions and reassure volunteer groups by restating the well-established

common law rule that the deterrent effect of potential liability should be considered in assessing the level of care that would have been exercised by the reasonable person on the facts. Section 2 also restates existing principle: 'An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.' The Government hopes that the provision will reduce the number of cases in which adversarial disputes prevent the early rehabilitation of the accident victim (Hansard, HC vol. 447 col. 422, 8 June 2006). Part II of the Act establishes a regime for the regulation of claims management companies, who were the subject of considerable criticism in the BRTF report: see further p. 948, below.

The Act has itself been the subject of considerable criticism, with questioning of the necessity to devote valuable legislative time to a simple restatement of existing law, and concern that s. 1 will promote new litigation about the meaning of its constituent terms (see further p. 176, below).

Compensation Culture and Tort Reform in Other Countries

The issue of compensation culture is certainly not unique to the United Kingdom, and several other countries have embarked upon legislative reform with a view to constraining the costs of the tort system.

It is in the United States that tort law has been the focus of the most intent political scrutiny and the subject of the most divisive debate. The titles of two recent books give a strong flavour of the positions taken on either side: C. Bogus, *Why Lawsuits are Good for America* (New York: New York University Press, 2001), and P. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines our Freedom* (Ballantyne Books, 2002). One of the strongest and most consistent proponents of tort reform was former President George W. Bush, though the majority of specific reforms are constitutionally a matter for the state legislatures, and there is therefore only limited scope for federal intervention. Amongst the reforms that have been adopted in different states are caps on the level of damages for non-pecuniary loss, caps on punitive damages, the introduction of proportionate liability for secondary defendants (in place of joint and several liability in full), restrictions on the scope for class actions, and adoption of the (English) 'loser pays' costs rule. As already noted, it must always be remembered, when considering tort law in the United States, that many of the most problematic and controversial matters—e.g. jury assessment of damages, the availability of punitive damages, class actions—are either not to be found at all in England and Wales or only present in a very watered-down form. For further analysis, see Rabin, 'Some Reflections on the Process of Tort Reform' (1988) 25 San Diego L Rev 13; Galanter, 'Real World Torts: An Antidote to Anecdote' (1996) 55 Md L Rev 1093).

Another country to have embarked upon extensive tort reform is Australia. In 2002, the Federal Government convened an expert panel to review the law of negligence in response to the collapse of a leading liability insurer and general concerns about the cost and availability of public liability insurance (*Review of the Law of Negligence: Final Report*, 2002, www.revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf ('the Ipp report')). The major part of the review's recommendations related to the restatement of existing principles in statutory form, with a view to correcting alleged misunderstandings of the law, promoting greater clarity and certainty, and giving the courts more guidance as to the application of rules and principles that are open to various interpretations (paras 1.12–1.13). As in the United States, tort reform falls constitutionally within the competence of the states, some of whom considered that the Ipp review had not gone far enough and went considerably further in their own legislation (e.g. by introducing greater protection for certain sorts of

defendants including public authorities and providers of recreational services: see Civil Liability Act 2002 (NSW), ss. 5M, 5L, 42, 45). However, the extent to which these reforms were needed, or have themselves been responsible for any reduction in insurance costs, has been questioned (Wright, 'National trends in personal injury litigation: Before and after "Ipp"' (2006) 14 TLJ 233). Indeed, Ipp JA—the Chair of the expert panel mentioned above—has himself questioned the breadth of the reforms and commented: 'It is difficult to accept that public sentiment will allow all these changes to remain long-term features of the law' ('Themes in the Law of Tort' (2007) 81 ALJ 609) For discussion of the reforms, see Keeler, 'Personal responsibility and the reforms recommended by the Ipp Report: "Time future contained in time past"' (2006) 14 TLJ 48, and McDonald, 'The impact of the civil liability legislation on fundamental policies and principles on the common law of negligence' (2006) 14 TLJ 268.

More recently, and closer to home, Ireland presents us with another model for possible reform. Since 2004, a new statutory body, the Personal Injuries Assessment Board (PIAB), has had the task of assessing compensation in most cases of personal injury where liability is not contested. Claimants must submit to the procedure and cannot initiate a claim in court without the PIAB's authorisation. Proceedings are conducted entirely on paper, with no oral hearing. Claimants can get assistance from the PIAB's own telephone advice line, but if they want to be represented by a solicitor they must make arrangements at their own expense; they usually also have to bear a significant part of the cost of any medical report. The PIAB assesses the level of damages for non-pecuniary loss ('pain and suffering') by reference to the World Health Organization's International Classification of Diseases, with guideline figures for particular injuries set out in a Book of Quantum. Damages for loss of earnings, medical expenses, etc. are also recoverable. The parties can choose whether to accept or reject the assessment, but, if both accept, it has the same legal effect as a court judgment. If either party rejects the assessment, the case has to be pursued through the courts. The reform aims to allow the resolution of personal injury claims quickly (an average of nine months, as opposed to three years for personal injury claims in the courts) and without the legal expenses and experts fees associated with traditional tort litigation. Some observers in the United Kingdom, especially in the insurance sector, are beginning to advocate a similar reform on this side of the Irish Sea. But the Irish reforms have been criticised for making claimants bear their own legal and expert witness costs, for allowing defendants to put liability in issue *after* the PIAB's assessment of damages, and so pressure claimants into acceptance, and for failing to meet its own objectives because only about a quarter of personal injury claims result in a PIAB assessment (Flynn, *April PI Focus*, 2006, vol. 16 issue 3(33) and 2007, vol. 17 issue 2(10)). See generally Gilhoody, 'PI Changes in Ireland—Implications for England and Wales' [2006] JPIL 104; Quill, in *European Tort Law 2004*, pp. 363–6.

It can be seen that, in the United States, Australia and Ireland, 'tort reform' inevitably refers to *restrictions* on the scope of liability in tort. That is not (yet) true in the United Kingdom. In fact, many of the most recent tort reforms here have *increased* the cost of compensation, or at least effected a significant transfer of the cost from the public to the private sector (see Lewis, 'The Politics of Tort Reform' (2006) 69 MLR 418). These issues are considered in more detail in Chapters 16 and 18.