Torts – Staying Alive

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I. Introduction

This essay is concerned with the current state of the law of torts. Its purpose is to show that the law of torts, which started life in the reign of William the Conqueror is still very much alive and relevant. It is neither out of date nor moribund. Its flexibility and adaptability have enabled it to survive legislative attempts to render it redundant and scholarly efforts to embalm it.

In recent decades the hydra-like tort of negligence has grown new heads of liability: for nervous shock, or rather, in accordance with modern views and terminology, psychiatric damage: for what is usually referred to as "pure economic loss": for damage resulting from the intervening act or omission of a stranger reacting with some careless act or omission of the defendant: in circumstances previously thought to entail "strict" liability: and for damage inflicted by unauthorised acts by a medical or dental practitioner, i.e. where the patient did not either actually or validly consent to the particular conduct that caused the damage.

Apart from such innovations the scope and reach of the law of torts have been expanding, enabling courts to impose liability for conduct that, in the past, escaped their jurisdiction. Much has yet to occur before, in these new instances, it will be technically correct to speak of new forms of tort liability. Nevertheless the indications and trends are there, pointing to, or working towards recognition of new torts, taking their place alongside established, classical instances of tort liability.

These various developments illustrate and confirm the remarks of Mr. Justice Holmes of more than a century ago that the law has evolved out

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of "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men".[1] He was contrasting the importance of such influences with that of the syllogism in regard to the determination of "the rules by which men should be governed". In other words, notwithstanding their constant re-iteration of the doctrine of precedent as being the backbone of the common law, courts have not been reluctant to extend the scope of existing forms of tort liability to new situations not previously considered to fall within ambit of the law, as well as invent new types of liability not previously recognised by the law, when, in accordance with the factors mentioned by Mr. Justice Holmes, to do so was thought proper and useful.

II. The Extension of Negligence

(a) Introduction

The tort of negligence, which was born in the twentieth century although its conception and growth date back to before the nineteenth, has developed into either a sturdy child of the common law or a hideous monstrosity, depending on the particular commentator's views about what has happened since 1932, when the House of Lords decided *Donoghue v Stevenson*.[2] Negligence has become the most important cause of action in the modern law of torts. Much has been written about negligence in the past few decades. It figures prominently in texts about torts: it has been the subject of monographs; aspects of negligence have been the topic of discussion in innumerable essays, case-notes, and other contributions to legal journals throughout the common law world. Surprisingly enough, however, despite all this literature, there is still much that is debated and debatable about the nature, ambit, and application of this tort.

Recent years have seen a conflict between courts or jurisdictions that seem eager to expand the role of negligence and those that approach liability for negligence more cautiously. The consequence has been that the common law, although "common" to many countries in one sense, has become less "common" as regards its content. That this should have been true in relation to England and the United States is readily understandable. Their paths diverged more than two centuries ago, and social, economic and political divergencies have multiplied since then. That it should have happened as between England on the one hand and Canada, Australia and New Zealand on the other (in different degrees and with

[1] OW Holmes, *The Common Law*, 1881, p 1
[2] [1932] AC 562.

differing results), is perhaps more surprising, given the close connection between these former colonies and the mother country until more recent times.

The same problems have plagued these various jurisdictions: and their courts have been obliged to consider the extent to which the law of negligence can or ought to be stretched to cover situations not conceived of by eighteenth, nineteenth, and even twentieth century masters of the common law. The answers may not always be the same: the philosophical and technical issues have not differed.

(b) Harm

The earliest kind of harm in respect of which an action in negligence lay was physical harm to the plaintiff's person or property. Prior to *Donoghue v Stevenson*, in the few cases in which a plaintiff claimed that he, or more usually she, had suffered what was then referred to as "nervous shock", decisions in favour of such plaintiffs were justified, inter alia, on the ground that the plaintiff had suffered what was physical damage, evidenced for example by the plaintiff's miscarriage of a foetus as a result of the shock inflicted by the defendant's negligence, or would have suffered physical harm if the defendant's negligence had resulted in direct impact on the plaintiff's body.[3] Even today, after several decades of case law concerning this kind of harm, it is necessary to prove that the "shock" led to physical manifestations. Mere emotional disturbance will not suffice.[4] However it is appropriate to say that the scope of liability for the infliction of this kind of harm has considerably broadened, although it remains subject to uncertain limits.[5]

Whatever its scope, liability for nervous shock is a form of liability for causing physical harm. In that regard the developments referred to above do not represent an extreme departure from the classical idea that negligence concerns physical damage. More startling, even revolutionary in view of nineteenth century decisions, has been the recognition and evolution of liability for what has been termed "pure economic loss", i.e. economic loss that is not caused by personal or proprietary physical damage. Originally such liability appears to have been confined to economic loss caused by a negligent misrepresentation, i.e. negligence by words. In the years since the seminal decision of the House of Lords in the *Hedley Byrne* case[6] courts in England, Australia, New Zealand and Canada have

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3 *Dulieu v White* [1901] 2 KB 669; *Hambrook v Stokes* [1925] 1 KB 141. See also *Wilkinson v Downton* [1897] 2 QB 57; *Janvier v Sweeney* [1919] 2 KB 316.

4 *McLoughlin v O'Brian* [1982] 2 All ER 298 at 312 per Lord Wilberforce.

5 *Attia v British Gas plc* [1987] 3 All ER 455; *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 All ER 1057; *Page v Smith* [1996] 1 AC 155.

6 *Hedley Byrne & Co v Heller & Partners* [1964] AC 465.

wrestled with the problem of determining the limits of liability for the infliction of such loss by negligent acts. In particular there has been much debate and disagreement about the recognition of liability when such loss to the plaintiff is the result of the negligence of the defendant causing physical damage to the person or property of X, someone who should have been in the contemplation of the defendant as being likely to be injuriously affected by a negligent act or omission on the part of the defendant.

At one time the decision of the House of Lords in *Anns v London Merton Borough Council*[7] seemed to open the way to a very broad conception of liability for economic loss in such circumstances. That case, and the language of Lord Wilberforce in particular, have been very influential in Canada, where the *Anns* case represents the state of the law according to the Supreme Court of Canada.[8] In Australia and New Zealand also the *Anns* approach appears to be favoured.[9] It is in England where the analysis of Lord Wilberforce has been treated as being overly generous towards liability. In several cases the House of Lords and the Privy Council, which for this purpose is in effect the House of Lords differently constituted, have criticised Lord Wilberforce's two-stage inquiry as to when and whether a duty of care may be said to arise so as to permit the imposition of liability for negligence in general and for causing economic loss in particular.[10] The result has been to produce a major divergence between the common law in England and elsewhere in the Commonwealth. It has meant that outside England there may be a greater number of circumstances in which a court will be prepared to hold a defendant liable for causing pure economic loss when the possibility of physical harm to the plaintiff was not foreseeable, as usually required before liability for negligence can be imposed on the ground that the defendant breached a duty of care owed to the plaintiff.

The common law now draws no distinction between physical damage and pure economic loss as long as the necessary "proximity" can be found to exist between the negligent act and the loss.[11]

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7 [1978] AC 728.

8 *City of Kamloops v Nielsen* [1984] 2 SCR 2; *Winnipeg Condominium Corporation No 36 v Bird Construction Co Ltd* [1995] 1 SCR 85; *Privest Properties Ltd v Foundation Co of Canada Ltd* (1996) 128 DLR (4th) 577.

9 *Bryan v Maloney* (1995) 182 CLR 609; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513; [1996] 2 WLR 367.

10 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Leigh & Sillavan Ltd. v Aliakomon Shipping Co Ltd* [1986] AC 785; *Curran v Northern Ireland Co-Ownership Housing Association Ltd* [1987] 2 All ER 13; *Yuen Kun-yeu v Attorney-General of Hong Kong* [1987] 2 All ER 705; *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163; *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499.

11 *D'Amato v Badger* (1996) 137 DLR (4th) 129, relying on and quoting *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021. See also *Hill v Van Erp* (1997) 142 ALR 687. Note the particular problem of calculating economic loss where the cause

(c) The scope of negligence

(i) Negligence by words

A prime illustration of the way in which the scope of the tort of negligence has broadened in the latter part of this century is provided by the emergence of liability for a statement that, because of the carelesness of its maker, turns out to be untrue or inaccurate. From the late eighteenth century, when *Pasley v Freeman*[12] was decided, the common law accepted that there would be liability for a misstatement that was made fraudulently, with the intention of deceiving its recipient. Indeed the idea that fraud or deceit could support an action was instrumental in the development of the modern law of contract, since the writ of assumpsit developed out of the idea that one who made a promise with the intention of not performing it would be guilty of wrongdoing, which, in turn, led to the emergence of the action of assumpsit on which the law of contract was founded. This historical connection between tort and contract has led, or perhaps misled some modern writers to argue that there is no real distinction between tort and contract, and even to the suggestion, in the United States, that breach of contract is, or can be, a tort.[13]

However, perhaps this link between deceit and contract lay behind the view that only deceit could invalidate a contract and only deceit could found an action in tort, at least where the result was non-physical damage. Hence, perhaps, came the late nineteenth century opinion that mere negligence would not give rise to liability for such damage,[14] even though, gradually, maybe even reluctantly, and against some opposition the courts in England came around to the view that sometimes, in some situations, negligence could found an action for physical damage even where the parties were not bound by contract to exercise care in their dealings with each other,[15] the view that triumphed, at last, in *Donoghue v Stevenson*.[16]

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of action is what has been termed "wrongful pregnancy", in contrast with "wrongful birth" (where a child is born with birth defects) and "wrongful life" (where a child is born with defects and the parents, because of a doctor's negligence, are denied the opportunity to end the child's life): *Emeh v Kensington & Chelsea & Westminster Area Health Authority* [1985] QB 1012; *Thake v Maurice* [1984] 2 All ER 513, [1986] 1 All ER 497; *Kealey v Berezowski* (1996) 30 OR (3d) 37, where the English, American and Canadian authorities are discussed at length.

12 (1789) 3 TR 51.

13 On which see generally McLaren, "The Convergence of Tort and Contract: A Return to More Venerable Wisdom?", (1989) 68 *Can Bar Rev* 30; Swanton, "The Convergence of Tort and Contract", (1989) 12 *Sydney LR* 40; Burrows, "Contract, Tort and Restitution — A Satisfactory Distinction or Not?", (1983) 99 *LQR* 217; Hill, "Breach of Contract as a Tort", (1974) 74 *Columbia LR* 40.

14 *Derry v Peek* (1889) 14 App Cas 337.

15 See, for example, the judgment of Lord Esher MR in *Heaven v Pender* (1883) 11 QBD 503 at 507.

16 [1932] AC 562.

Notwithstanding that decision, the common law maintained its objection to the extension of liability for non-physical damage caused by verbal negligence. In holding to this view the law seems to have been influenced by two factors. One was the differentiation between physical harm and economic loss, the former being relevant where tort was concerned, the latter where the relations between the parties were governed by a contract. The other was the idea that verbal negligence was to be differentiated from physical negligence, the former being relevant where an obligation to exercise care was imposed by a contract, or an equitable, fiduciary relationship between the parties,[17] the latter being relevant where, in accordance with what was said in the *Donoghue* case, a duty to take care arose even though the parties were neither contractually nor equitably connected.

Hence on doctrinal grounds and for pragmatic reasons the majority of the Court of Appeal refused to extend the scope of the *Donoghue* case to verbal negligence when, in 1951, it was given the opportunity to do so in *Candler v Crane Christmas & Co.*[18] A dozen years later, in *Hedley Byrne v Heller & Partners*,[19] the House of Lords finally recognised that neither for doctrinal nor for pragmatic reasons was this valid. It should be noticed, however, that, in that case, there are to be found statements to the effect that the kind of relationship that would justify the imposition of liability for verbal negligence was what was called "a relation equivalent to contract".[20] The differentiation between tort and contract maintained its relevance, although more weakly than before.

Since that time the originally close connection between liability for verbal negligence and liability for breach of contract has become more attenuated, and the foundation of liability for verbal negligence on the essential elements of the tort of negligence in general has strengthened. In the latest cases where this form of liability has been considered and discussed the notion of "proximity", that has become vital for liability in negligence, has been stressed as being fundamental to liability for verbal negligence.[21] Liability for negligent misstatement or misrepresentation is now firmly assimilated to other varieties of negligence. In effect, therefore, the common law has recognised another way in which one person can be held responsible for a negligent act committed vis-a-vis another. But there remain questions about the extent of this liability and the precise circumstances in which the requisite duty to exercise care in making a statement or giving an opinion will be owed.

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17 *Nocton v Lord Ashburton* [1914] AC 932.

18 [1951] 2 KB 164. On which see Fridman, "Negligence By Words", (1954) 32 *Can Bar Rev* 638.

19 [1964] AC 465.

20 *Ibid* at 530 per Lord Devlin: see Fridman, "Negligent Misrpresentation", (1976) 22 *McGill LJ* 1.

21 *Caparo Industries plc v Dickman* [1990] 1 All ER 568. And for liability for pure economic loss: see *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021; *D'Amato v Badger* (1996) 137 DLR (4th) 912; *Hill v Van Erp* (1997) 142 ALR 687.

(ii) Non-vicarious liability for others

A second development in relation to the scope of negligence is contained in cases in which the loss suffered by the plaintiff was actually and directly inflicted by a stranger, someone not the servant, agent or independent contractor of the defendant.

Prior to the decision in *Home Office v Dorset Yacht Co*[22] there were few instances of the imposition of liability in such situations. Most, although not all of them, involved the use by children of a weapon, such as an airgun, that the child in question had been permitted by a parent to use.[23] Some were cases in which the occupier of premises such as a tavern or inn had failed to maintain order on the premises with the result that one patron had caused injury to another[24] Where the parent was held liable it was because the parent had been negligent in allowing the child to have the weapon when the child was too young to be given free use of the article. Where the occupier was held liable it was on the basis of the breach of an occupier's duty towards his invited guests. In *Carmarthenshire County Council v Lewis*[25] the liability of the defendant was founded not on any alleged negligence on the part of the child who ran out onto the road and caused an accident in which the plaintiff's husband was killed, since the child was too young to be guilty of negligence, but on the school's own negligence in leaving a gate unlocked so that the child was able to go out of it onto the road.

In the *Dorset Yacht* case the House of Lords held that the defendant could be liable when the officers of a Borstal institution, for whose acts the defendant was responsible in law, carelessly allowed inmates of the institution to escape and they later caused damage to the property of the plaintiff. Here there was no relationship of parent and child or occupier and invitee. Nonetheless the House of Lords held that there was a "special relationship" between the officers of the institution and the inmates, to use the phrase of Dixon J. of the High Court of Australia in *Smith v Leurs*[26]: and that relationship justified the imposition of liability on the defendant for the wrongful and deliberate acts of independent adults who

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22 [1970] AC 1004.

23 *Smith v Leurs* (1945) 70 CLR 256; *Newton v Edgerley* [1959] 1 WLR 1031; *Donaldson v McNiven* [1952] WN 466; *Gorely v Codd* [1967] 1 WLR 19; *Barnes v Hampshire County Council* [1969] 1 WLR 1563.

24 *Murgatroyd v Blackburn & Over Darwen Tramway Co* (1886) 3 TLR 451; *Pearson v Vintners Ltd* [1939] 2 DLR 198; Gardner v McConell [1946] 1 DLR 730; *Lehnert v Nelson* [1947] 4 DLR 473; *Hesse v Laurie & Morinville Hotel Ltd* (1962) 35 DLR (2d) 413. See also cases involving penal and similar institutions: *Leigh v Gladstone* (1909) 26 TLR 139; *Pullin v Prison Commissioners* [1957] 1 WLR 1186; *Ellis v Home Office* [1953] 2 All ER 149; *Greenwell v Prison Commissioners* (1951) 101 LJ 486; *Thorne & Rowe v State of Western Australia* [1964] WAR 147; *Holgate v Lancashire Mental Hospitals Board* [1937] 4 All ER 19.

25 [1955] AC 549.

26 Above at 262.

were not the defendant's servants agents or contractors. The imposition of liability in such circumstances was rationalised on the grounds of foresight and proximity. In particular the argument that there should be no liability because the damage in question was too remote a consequence of the negligence of which the officers were accused was rejected by the House of Lords on the ground that it was foreseeable on the part of such officers that should inmates get away from the institution they would be likely to commit wrongful acts of the kind in issue since those kinds of acts were the very acts for which they had been previously convicted and sent to the institution.

Courts in England, Australia and Canada have been willing to admit such non-vicarious liability for the acts of strangers where the defendant could have, but did not exercise control over the person or persons who perpetrated the wrongful acts causing physical or other damage to the plaintiff.[27] In this way, and by this means, the courts have subtly enlarged the scope of vicarious liability with this difference. In cases of traditional or true vicarious liability the defendant's liability is strict, i.e. it is unnecessary to show that the defendant was personally negligent either in the choice of servant or agent or in regards to the act which caused the harm to the plaintiff. Where this newer form of vicarious liability is involved it must be proved that the defendant was personally negligent, i.e. that the defendant owed the plaintiff a duty of care, founded on foresight of possible harm to the plaintiff and the requisite "proximity" between them, and carelessly breached that duty by failing to control the one who actually perpetrated the acts causing that harm. Hence, it may be said, this line of authority reveals an enlargment of the scope of the tort of negligence.

(iii) Public Authorities

A third example of the extension of negligence in recent years is afforded by what has happened with respect to the liability of public authorities. In the *Anns* case the House of Lords drew a distinction between policy decisions by such bodies and what were called "operational" decisions. Some years earlier, in *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg*,[28] the Supreme Court of Canada held that there was a distinction betwen the exercise by a municipality of legislative or quasi-judicial powers and the exercise of administrative or ministerial powers. There could be no liability for alleged negligence in the exercise of the former; but there could be for negligence in the exercise of the latter. Hence

[27] *Davis v Radcliffe* [1990] 1 WLR 821; *Chordos v Bryant (Wellington) Pty Ltd* (1987) 92 FLR 401, affirmed (1989) 91 ALR 149; *S(J) v Clement* (1995) 122 DLR (4th) 449.

[28] (1972) 22 DLR (3d) 470.

in that case a builder was unsuccessful when he sued the municipality for negligence when he spent money in reliance on a by-law which was later declared to be invalid in an action brought by ratepayers. The court refused to apply the expansion of the concept of duty of care in *Hedley Byrne* whether that was by way of an amplification or (as it has been argued here) extension of what had been held in *Donoghue v Stevenson*. What the House of Lords said and did in the *Anns* case was very much the same.

The justification of this differentiation lies in the immunity of such bodies from suit, when acting legislatively, in the same way as Parliaments and subordinate legislatures (and Ministers of the Crown or other officials) cannot be impugned for their "political" decisions (at least in the absence of evidence that such a decision was actuated by malice against a particular plaintiff, in other words by proof of an abuse of their power or authority).[29] It would be detrimental to the public interest to permit actions for negligence to lie against such bodies in the event that some individuals are damnified by a decision of that kind that has been reached with careless disregard for the consequences with respect to such individual,or to members of a particular group. But it is not harmful to the public, indeed quite the reverse, to allow an action for negligence to be brought by someone who has been injuriously affected by a careless act or omission on the part of a servant or agent of the body in question while carrying out a policy of such a body acting under its statutory or other powers.

The precise issue in the *Anns* case was whether, in accordance with this idea, a municipality could be liable for economic loss caused to the subsequent owner of property which had been improperly built as a result of the negligence of a building inspector in regard to the plans submitted to the municipality at the time the property was being built. Later cases in Canada, Australia and New Zealand accepted the judgment of the House of Lords both in regard to the particular issue of liability for such loss and in regard to the distinction between policy and operational decisions by such bodies.[30] Indeed in one of these cases[31] the Judicial Committee of the Privy Council agreed with the approach of the New Zealand Court of Appeal, which followed the *Anns* case, even though by that time the House of Lords had rejected its own earlier decision.

The *Anns* case, and those which followed it in England, Canada, Australia and New Zealand, could only have been decided as they were in consequence of the expansion of liability for negligence, particularly

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[29] *Roman Corp v Hudson's Bay Oil & Gas Co Ltd* [1973] SCR 820.

[30] *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340; *Bryan v Maloney* (1995) 182 CLR 609; *City of Kamloops v Nielsen* [1984] 2 SCR 2; *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd* [1995] 1 SCR 85; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed [1996] 2 WLR 367.

[31] *Invercargill City Council v Hamlin* above.

negligence causing economic loss without physical damage, by *Hedley Byrne*. Subsequently in England the House of Lords resiled from the approach adopted to such loss in the kind of situation dealt with in *Anns*.[32] There was also critical reaction to the distinction drawn by the House of Lords in that case betweeen policy and operational decisions or actions.[33] However in Canada, despite the later decisions in England in which the *Anns* approach was attacked, the Supreme Court has continued to accept and follow the line indicated in the *Anns* case [34] so, it would seem, has the High Court of Australia.[35]

(iv) Negligence and trespass

Where a medical or dental practitioner, who had been consulted by a patient for treatment, performed an operation on the patient, with the patient's consent, but did something that amounted to the infliction of injury on the patient in a manner or to an extent not contemplated when the patient agreed to the operation, it used to be considered that the practitioner was guilty of trespass, i.e. battery. The consent that otherwise would have meant that no trespass was committed by the practitioner when he handled the patient's body[36] did not stretch to cover the unauthorised, unwarranted, or wrongful handling that caused the injury.[37] There may still be situations in which a surgeon, physician, dentist or other medically trained person may be guilty of trespass, i.e. battery, for example, if such a person were to perform an operation on someone without that person's consent (save where there is an emergency and the patient is unconscious[38]), or after consent obtained by fraud (for example,where the doctor fraudulently tells the patient that sexual intercourse with the doctor is necessary to cure the patient's complaint[39]). Apart

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[32] *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177; *Murphy v Brentwood District Council* [1991] 1 A.C. 398; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499.

[33] *Rowling v Takaro Properties Ltd* [1988] AC 473; *Lonrho plc v Tebbit* [1992] 4 All ER 280; *Stovin v Wise* [1994] 1 WLR 1124. See also *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, especially at 736.

[34] *Just v The Queen in right of British Columbia* [1989] 2 SCR 1228; *Swinamer v Nova Scotia (Attorney-General)* [1994] 1 SCR 18; *Brown v British Columbia (Minister of Transportation & Highways)* [1994] 1 SCR 420.

[35] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[36] *Attorney-General's Reference (No 6 of 1980)* [1981] 2 All ER 1057 at 1059.

[37] *Marshall v Curry* [1933] 3 DLR 260; *Mulloy v Hop Sang* [1935] 1 WWR 714; *Allan v New Mount Sinai Hospital* (1980) 28 OR (2d) 356, reversed and new trial ordered, (1981) 33 OR (2d) 603.

[38] *Marshall v Curry*, above; *Murray v McMurchy* [1949] 2 DLR 442. But see *Malette v Shulman* (1987) 47 DLR (4th) 18, blood transfusion for person against his religious convictions: no consent).

[39] *R v Harms* [1944] 2 DLR 61. *Cp. Norberg v Wynrib* (1988) 50 DLR (4th) 167, [1992] 2 SCR 226.

from such situations, however, it appears that the modern approach to cases of medical or dental mishap is to treat such instances as cases of negligence.

This approach was adopted by the Supreme Court of Canada in *Reibl v Hughes*.[40] It has also been adopted by the House of Lords[41] and the High Court of Australia.[42] The issue in such cases therefore is whether the patient who consented to the operation or medical procedure in question has validly consented to the risk inherent therein. Of course if the practitioner does something that is not correct, according to the standards of the reasonable practitioner undertaking such operation or procedure, the practitioner will be guilty of negligence: and consent will not be an available defence. It will be available, however, if what happens is within the ambit of the risk that is involved in the kind of operation or procedure that is undertaken by the patient. In such situations the House of Lords has held that the doctor or other practitioner will not be liable as long as he has not performed the operation or procedure negligently, i.e. otherwise than in accordance with the standards of the reasonable practitioner in his situation.[43] The Supreme Court of Canada and the High Court of Australia have held differently.[44]

According to their decisions, wherever there is a risk involved in an operation or procedure before the patient's consent to undergoing such operation or procedure will exonerate the practitioner should the risk eventuate and the patient suffer damage or injury it must be proved that the patient was told about the risk so that he or she could give what has been termed an "informed" consent. Once again there is a divergence between the common law in England and the common law in Canada and Australia. All three jurisdictions treat cases of malpractice of this sort as cases of negligence, not as trespasses. Where they differ is in respect of the defence of *volenti non fit injuria*. Whatever the reason or explanation for this difference in attitude, it seems that courts in Canada and Australia expect a higher standard of care from medical and dental practitioners than their counterparts in England. Note, however, that it is standards of care that are involved. Physical handling of a patient outside the scope of consent will not suffice for liability, as it would if the cause of action were properly framed in trespass. There must be evidence of negligence, that is the failure to observe the standards of the reasonable practitioner. In England what that entails is that he or she must perform his or her task, i.e. the actual operation or procedure, the treatment, with reasonable care and skill. In Canada and Australia it means that, wherever

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40 [1980] 2 SCR 880.

41 *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871: though the House of Lords did not agree with or adopt other aspects of the Canadian decision; see below.

42 *Rogers v Whitaker* (1992) 175 CLR 479.

43 *Sidaway v Board of Governors of the Bethlem Royal Hospital*, above.

44 *Reibl v Hughes* above; *Rogers v Whitaker*, above.

neessary, the practitioner must ensure that the patient has appreciated a risk of possible injury that is inherent in the treatment, and, in the knowledge of that risk, has agreed that the treatment should be administered.

(v) Negligence and strict liability

Trespass, in general, whether to the person to goods or to land, used to be a form of absolute or strict liability. Certain forms of trespass to the person are now more appropriately dealt with as instances of negligence. Other interferences with the person of the plaintiff or his real or personal property can still be remedied by an action in trespass, in accordance with the classical distinction between direct and indirect injury. However it is now clear that trespass to the person, where it is not committed deliberately must be committed negligently if an action is to be available to the plaintiff.[45] And, although this has not been as definitively held, trespass to land or to goods also involves either the deliberate intention of the defendant to act wrongfully or some negligence on his or her part that results in the commission of the trespass in question.[46] The cause of action in all such instances remains trespass. It has not yet become negligence (although, save where the act is intentional, it might as well be).

In respect of actions for individual damage or loss caused by a breach of statutory duty, that alteration has come about, in Canada,[47] which followed the example of the United States in this respect, but not in England,[48] nor, it would appear, in Australia.[49] The English approach is to treat such breaches as ipso facto giving rise to liability, without proof that any negligence was involved (subject to questions about the scope of the statutory provision, causation and remoteness[50]). A recent example is afforded by the case of *Garden Cottage Foods Ltd v Milk Marketing Board*[51] where the statutory duty alleged to have been breached was contained in the EEC Treaty, incorporated into English law by statute. The Canadian attitude now, since the decision in *The Queen v Saskatchewan Wheat Board*,[52] is that breach of statutory duty may be evidence of negligence:and the cause of action is, in effect, negligence. What the Supreme Court of Canada did in that case was to extend the reach of negligence and eliminate one instance of strict liability.

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45 *Fowler v Lanning* [1959] 1 QB 426; *Letang v Cooper* [1965] 1 QB 232.
46 *National Coal Board v Evans* [1951] 2 KB 861; *League Against Cruel Sports v Scott* [1985] 2 All ER 489.
47 *The Queen in Right of Canada v Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9.
48 *Lochgelly Iron & Coal Co Ltd v M'Mullan* [1934] AC 1; *London Passenger Transport Coard v Upson* [1949] AC 155; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633.
49 *Northern Territory of Australia v Mengel* (1995) 69 ALJR 527.
50 *Fridman on Torts*, 1990 at pp 444-448.
51 [1984] AC 130.
52 Above.

Curiously, although courts in England seem to maintain the differentiation of breach of statutory duty from common law negligence, they have whittled away at some other previously recognised and accepted forms of strict liability,namely nuisance and liability under the doctrine of *Rylands v Fletcher*.[53] The Privy Council, on appeal from Australia, achieved this in relation to nuisance in *The Wagon Mound (No 2)*.[54] The House of Lords may have done the same in relation to *Rylands v Fletcher* in *Cambridge Water Co v Eastern Counties Leather plc*.[55] A similar approach can be seen at work in the judgments of some members of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd*.[56] What these decisions indicate is the growing tendency of common law courts to require an element of negligence, i.e. foreseeability of harm and failure to prevent it from occurring, before there can be liability under these hithertofore types of strict liability. Once again negligence is reaching out to comprehend situations to which neither had been relevant.

III New Torts

The modern law of torts has begun to recognise new ways in which injury or damage can be caused by one person to another, and has progressed to some extent to accepting the need to fashion new torts providing causes of action in such instances. To the classical list of torts additions are being made, or, at the very least, are being suggested by some courts in some jurisdictions.

(a) Privacy

One such tort deals with what has been called "invasion of privacy". As yet it is of doubtful validity, except where, as in some Canadian provinces (and in Australia under Commonwealth legislation) statutory provisions create a limited cause of action in certain limited circumstances.[57] In a sense the invasion of one person's privacy, or private life, by another has long been a basis for a cause of action at common law, through the medium of nuisance, trespass and libel and slander. These causes of action could only be brought where stipulated conditions were satisfied: and those conditions did not, and to this day do not necessarily apply to

[53] (1866) LR 1 Ex 265, (1868) LR 3 HL 330.
[54] [1967] 1 AC 617.
[55] [1994] 2 AC 264.
[56] (1994) 179 CLR 520.
[57] Canada: RSBC 1979, c 336; RSM 1970, c 74; S Nfld. 1981, c 6; RSS 1979. c P-24; Australia: *Privacy Act* 1988 (Cth).

all instances of what would be considered an invasion of privacy. Hence courts were faced with the problem of determining whether, within the confines of the doctrine of precedent, it was possible to give a plaintiff a remedy for what was undoubtedly aggravating and annoying behaviour by the defendant but did not amount to the commission of a recognised, traditional tort such as nuisance or trespass.

English judges have stated categorically that there was no such tort as invasion of privacy.[58] In New Zealand there seems to be some ambivalence.[59] Canadian judges, albeit with some reluctance, found themselves able to justify relief in some circumstances, notably where what occurred was what has been called "appropriation of another's personality".[60] In such cases the defendant has utilised a picture, photograph or other representation of the plaintiff to advertise or promote the defendant's own product or business, thereby possibly precluding the plaintiff from making some economic gain from such use. Such actions, in effect, resembled the well-established tort of passing off, although they were not cases of passing off in the true sense. In one Canadian case[61] the law of nuisance was stretched beyond the limits contained in earlier English case law so as to give a plaintiff a remedy by way of injunction when the defendant continuously made unwanted and unpleasant telephone calls to the house where the plaintiff lived with her husband, who was the legal owner of the premises. In this instance the plaintiff, the wife had no legal interest in the property such as normally required for the maintenence of an action for nuisance. Nonetheless the Alberta court found itself able to permit her injunctive relief, although it is doubtful if that court would have given her a remedy in damages. Other alleged instances of invasion of privacy, such as the publication of true, but damaging information about the plaintiff for the defendant's own purposes, not necessarily in the public interest or for the public benefit, were not so easily assimilated to the existing law. Hence the courts were dubious about permitting the plaintiff any redress. In some cases, where the defendant sought to have the plaintiff's statement of claim struck out on the ground that it disclosed no cause of action, a Canadian judge has been unwilling to make so definitive a decision and has allowed the action to proceed (though, it would appear, there has been no decided case which holds affirmatively that such an action will lie, or, by way of contrast, that it does not).[62]

Despite the uncertainty that surrounds these attempts to enlarge the jurisdiction of the courts so as to allow an action where conduct that is

[58] *Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479; *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620.

[59] *Tucke v News Media Ownership Ltd* [1986] 2 NZLR 716; *T v Attorney-General* (1988) 5 NZFLR 357; *Smith v Auckland Hospital Board* [1965] NZLR 191.

[60] *Racine v CJRC Radio Capitale Ltee* (1977) 80 DLR (3d) 441; *Athans v Canadian Adventure Camps Ltd* (1977) 80 DLR (3d) 583.

[61] *Motherwell v Motherwell* (1976) 73 DLR (3d) 62.

[62] *Heath v Weist-Barron School of Television (Canada) Ltd* (1981) 18 CCLT 129.

not a nuisance or trespass and is not defamatory or otherwise wrongful according to classical tort notions, it cannot be said that the common law has ruled out entirely the possibility that, in the future, a person's interest in his or her privacy (however that elusive term will eventually be defined) will not be protected by the granting of an action. In the past little by little the common law has come to recognise various interests meriting protection by legal action. These have related to personal safety, the plaintiff's mental state in contrast with physical health: to reputation, when the common law absorbed the old jurisdiction of the Court of Star Chamber over instances of libel and slander: to economic or financial well-being, by the acceptance of an action for procuring or inducing a breach of contract, and, as will be seen later, for interference with contract or with the trade or business of the plaintiff without causing an actual breach of contract. In light of such developments it would appear not unreasonable to speculate that, in the course of time, the common law will also view an unjustified invasion of privacy as the kind of wrongful act in respect of which the plaintiff may obtain appropriate relief, whether in the form of damages or an injunction to restrain the defendant from performing or continuing to perform the objectionable act.

(b) Harassment

Harassment may be looked upon as an offshoot of the idea of invasion of privacy. The term refers to conduct that amounts to an intolerable interference with a plaintiff although it does not involve physical acts constituting a trespass, i.e. a threat to the physical safety of the plaintiff. The Alberta case referred to above[63] could be considered to involve harassment by what was, in effect, the improper use of the telephone. A subsequent English case, similar in nature, was greatly influenced by this earlier Canadian one, and came to the same conclusion.[64] Under the guise of nuisance these courts seem to be holding that conduct of the kind involved in these cases was a new form of wrongdoing, harassment. Admittedly the conduct in question resembled, indeed might be called, conduct amounting to a nuisance. However the status, or lack thereof, of the plaintiff technically precluded the plaintiff from being able to maintain an action in nuisance. Nonetheless in the opinion of these courts the misconduct of the defendant warranted some form of relief for the plaintiff. Hence their willingness to restrain the defendant from continuing the course of action that harmed the plaintiff. By recognising the need for intervention the courts tacitly approved the idea that harassment, even if not actually nuisance, could be tortious and actionable.

[63] *Motherwell v Motherwell*, above.
[64] *Khorasanjian v Bush* [1993] QB 727. See now the *Protection From Harassment Act*, 1997.

A special case or instance of harassment involves a sexual element. Sexual harassment is a type of conduct that has achieved greater importance in modern society and, therefore, inevitably, in modern law. Unfortunately there is no generally accepted concept of what constitutes sexual harassment. Certain kinds of misconduct clearly fall within everyone's comprehension. But the outer limits of what is such harassment are uncertain. Documents such as policy statements by Universities or businesses purport to state what kinds of conduct amount to sexual harassment. These, except possibly as being contractual terms of employment, are not of legal effect. Moreover they are couched in language that seems very wide, at least to any lawyer concerned about the clarity and specificity of language that can entail legal liability. Nonetheless decisions by Human Rights Commissions in various jurisdictions, for example in Canada, or by quasi-judicial bodies in Universities determining issues of liability that can affect the contractual position of employees, are being based upon the broad, tenebrous verbiage according to which they are obliged to act and decide. What would seem desirable is some attempt by common law courts to define and to some extent confine the meaning of sexual harassment in such a way that it can easily be understood and applied in appropriate instances. Were this to be done, it might then be possible to recognise such misconduct as actionable as a tort, quite apart from any statutory or contractual liability.

If non-sexual harassment of the kind already enjoined by the cases to which reference has been made is capable of grounding an action for appropriate relief, there would seem to be no reason why sexual harassment, properly defined and regulated by the courts, should not also be a basis for an action for whatever relief might be considered necessary, whether by way of damages, injunction, or both. At the present time, as decisions in Canada clearly indicate, some forms of such harassment, where physical contact, particularly sexual intercourse, albeit allegedly consensual, has occurred, may be actionable as trespasses.[65] And the alleged consent by the adult victim may not be an operative defence where it has been obtained by fraud, coercion, or, as in the case where a doctor obtained such consent by providing the woman with drugs which she craved, by a breach of trust on the part of the doctor.[66] It has further been held in Canada that where such conduct occurred in years past and the victim was the daughter or step-daughter of the perpetrator, the normal limitation period will not apply to defeat an action.[67] Society manifests such an aversion to or horror or disgust at such conduct that the law is prepared not only to adopt a strict attitude to the issue of consent but also to reformulate the rules about limitation of actions to accommodate the

[65] *N(JL) v L(AM)* [1989] 1 WWR 438; *G(ED) v D(S)* (1990) 21 ACWS 3d 974; *Wiebe v Haroldson* (1989) 48 CCLKT 93; *Harder v Brown* (1989) 50 CCLT 85.

[66] *Norberg v Wynrib* (1992) 92 DLR (4th) 449.

[67] *KM v HM* (1993) 96 DLR (4th) 289.

sociological and psychological facts pertaining to such incidents.

Such decisions suggest that in time the common law may well be willing to accept as a social fact, and therefore as a legal fact, that sexual harassment whether of adults or children should be considered as a tort in its own right, distinct from trespass to the person, nuisance or any other current type of liability in tort. The technical rules governing such liability would be developed in the way that similar rules have emerged for other torts over the centuries.

(c) Interference with trade

Such a development has been taking place in recent years in relation to a very different form of wrongdoing, namely, interference with trade or business which does not involve procuring or inducing a breach of contract. In various jurisdictions this novel type of liability has been recognised and accepted. What began as the tort of inducing or procuring a breach of contract has been extended, little by little, to give rise to liability where the defendant's improper acts have led to the disruption of existing contractual relations between the plaintiff and a third party without any breach of contract taking place, or to the prevention of the creation of such relations between the plaintiff and a third party.[68]

An important consequence of such development is that the language of Bowen LJ in the nineteenth century, which, at the time, represented an exaggerated view of the law, may have to be regarded as a prescient foretelling of what the law was to, and has become. In *Mogul SS Co Ltd v McGregor, Gow & Co*[69] in 1889, Bowen LJ suggested that the intentional infliction of harm without just cause or excuse was actionable. Given the state of the law in 1889, that pronouncement was far too broad. It is interesting to note that around and about the same date there were judicial statements that foretold what eventually was to be the state of the law regarding liability for negligence as a consequence of the decision, fifty years later, in *Donoghue v Stevenson*. Just as the tort of negligence emerged in the twentieth century out of isolated instances of liability for negligent conduct which had been recognised in the nineteenth century, so there may be emerging a tort of intentionally inflicted harm out of specific instances of liability for such conduct that were recognised in the nineteenth century, such as conspiracy and inducing a breach of contract, and the twentieth, such as intimidation and wrongful interference with trade or business.

It may be too soon to accept this as having taken place. Nevertheless it is possible to write that the language of Bowen LJ has achieved greater

[68] Fridman, "Interference with Trade or Business" (1993) 1 *Tort LR* 19, 99.
[69] (1889) 23 QBD 598 at 613.

validity and relevance as a result of what has been happening in the courts of England, Canada, Australia and New Zealand in this regard over the past number of years. If a party intentionally and without just cause or excuse acts in such a way as to interfere with existing or potential contractual or economic relations between two other parties and causes damage to one or other, or, presumably, both, such party may be liable in tort to any party who has suffered loss or damage. There is now no longer any doubt about this, whatever may have been the situation in 1889.[70] Nor can there be any doubt that this is the result of judicial activity founded upon the need to cope with conduct that has now been recognised by society as being harmful to its interests. What was justifiable in law as actionable on the ground that it involved either a wrongful interference with a property right, i.e., a contract, or a combination by two or more persons, which was treated as being more serious than the same conduct perpetrated by one person acting alone, has now become justifiable as supporting a right of action on the ground that it involves wrongful, unlawful conduct that, in itself, merits being treated as a cause of action should it cause damage. Unquestionably, this represents a notable step for the courts to have taken.

(d) Abuse

Such instances may be characterised as constituting the abuse by a party of his or her rights to act for his or her own economic or financial benefit. Everyone is entitled to act for their own purposes and advantage. But there are limits to this freedom, limits which are defined by the law, just as freedom of speech is limited by, for example, the law of defamation or injurious falsehood. To defame another or to cause harm to one person by a deliberate lie told to a third party is to abuse the power, privilege or licence of free speech. Some cases also indicate that a person may abuse his or her right of property, as where what might otherwise be a legitimate act, such as shooting at rabbits, is performed in order to harm the proprietary interests of a neighbour, when it can be regarded as the commission of the tort of nuisance.[71]

In much the same way courts have begun to realise that official power may be used or employed to injure someone, when it is no longer protected but can be the basis of liability in tort.[72] A distinction must be drawn here between a negligent exercise of such a power and a malicious or intentionally harmful exercise. In the case of the former there will be no

[70] See the cases cited in Fridman, *loc cit* above.

[71] *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468.

[72] *Bourgoin v Ministry of Agriculture Fisheries and Food* [1986] QB 716; *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228; *Jones v Swansea City Council* [1990] 3 All ER 737; *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 588.

liability unless the body or official alleged to be guilty of negligence owed a duty of care to the person claiming to have been harmed. Thus sometimes police and police authorities can be liable for negligence in the performance of their duties: and at others it has been held that, for various reasons such as lack of proximity or the public interest, no such liability should be imposed. Where what is alleged is the malicious exercise of a power in a harmful and improper manner, there can be liability. Such conduct amounts to what has been termed misfeasance in a public office. Misfeasance in a public office "...must at least involve an act done in the exercise or purported exercise by the public officer of some power or authority with which he is clothed by virtue of the office he holds and which is also in bad faith or (possibly) without reasonable care."[73] Lack of reasonable care, as already stated, may not suffice for this purpose. Bad faith undoubtedly will.

It has been suggested that this is not something new in the common law but can be traced back to the nineteenth century.[74] Whether or not this is so, this is a kind of tortious liability that has recently become more manifest, and would appear to be well-established and likely to prove a fertile field for development. Given the enlargment of the powers granted by the state to individuals and governmental authorities of various kinds, the opportunities for such misfeasance would seem to be growing. Hence it is not unreasonable for courts to be open to the suggestion that some remedy should be available to a person aggrieved by such misconduct. Indeed the exercise of such a jurisdiction can be regarded as an extension of the jurisdiction of the common law courts to control administrative bodies by the issuance of writes such as certiorari, prohibition and mandamus. These were and are utilised to prevent maladminstration, misfeasance of a certain kind. A tort action enables the injured or affected party to recover damages to compensate him or her for losses resulting from such misconduct, which was not possible by the invocation of these old writs. Once again the common law, perhaps building on earlier precedents, has been enlarged in scope to deal with a modern problem.

In this context it is noteworthy that Canadian courts have recently attacked what was previously believed to be the immunity of governmental officials from liability for malicious prosecution. As a consequence of the decision of the Supreme Court of Canada in *Nelles v The Queen in right of Ontario*,[75] it is now open to victims of malicious prosecution to sue the Attorney-General of a province and the Crown attorneys responsible for bringing the relevant proceedings against the plaintiff. Although the Crown was still immune from suit, the Crown's servants or agents could not hide behind the Crown's immunity in such instances. Whether the

[73] *Calveley v Chief Constable of the Merseyside Police* above at 1240 per Lord Bridge of Harwich.

[74] *Forsyte v Thomson* [1959] VR 286; *Little v Law Institute of Victoria (No 3)* [1990] VR 257.

[75] (1989) 60 DLR (4th) 609.

same situation exists in England is a matter for debate. It has been held that the fact that a prosecution is initiated and pursued by the Director of Public prosecutions or that the Attorney-General has given his fiat will not conclusively negate the existence of malice or prove that there was reasonable and probable cause for the prosecution.[76] This may open the way for actions against officials.

IV Conclusions

From the above sketchy account of some of the developments in the law of torts in recent years certain themes emerge.

A prominent motif seems to be fault. The "anomalous vestiges of strict liability", as they were once called,[77] are gradually giving way to the idea that no one should be held liable in tort failing proof that the person in question has been guilty of either a deliberate, wrongful and unjustifiable intention to cause harm or at the very least the neglect of some duty to exercise care so as to refrain from, or prevent the causation of harm. The mere fact that one person has been harmed, injured or suffered loss in consequence of the acts of another will not be enough to affix the former with liability. Even in England, despite the maintenance of the older non-transatlantic version of liability for breach of statutory duty, the House of Lords has made clear the proposition that breach of a statute will not be a basis for liability unless the transgressor intended the act in question to harm the plaintiff, and directed the act towards and against the plaintiff.[78]

However the notion that an intent to cause harm may suffice enunciated by the High Court of Australia in the *Beaudesert* case[79] has more recently been rejected by the same court,[80] after it was called in question in England and New Zealand.[81] It remains necessary to establish that the act causing harm constituted a recognised wrong. Nevertheless it is possible that courts will come to accept that where there is an intent to injure liability may ensue. The House of Lords, reviewing the law of conspiracy, held that an intent to injure the plaintiff was necessary:[82] but the Supreme Court of Canada, in a subsequent decision, held that, in certain instances, foresight of harm may be enough to render concerted action wrongful.[83]

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[76] *Riches v DPP* [1973] 2 All ER 935 at 941 per Stephenson LJ.
[77] *Read v J Lyons & Co Ltd* [1947] AC 156 at 173 per Lord Macmillan.
[78] *Lonrho Ltd v Shell Petroleum Ltd (No 2)* [1982] AC 173.
[79] *Beaudesert Shire Council v Smith* (1966) 120 CLR145.
[80] *Northern Territory of Australia v Mengel* (1995) 69 ALJR 527.
[81] *Lonrho Ltd. v Shell Petroleum Co Ltd (No 2)* [1982] AC 173; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314; *Van Camp Chocolates Ltd v Aulsebrooks* [1984] 1 NZLR 354.
[82] *Lonrho Ltd v Shell Petroleum Ltd (No 2)*, above.
[83] *Canada Cement LaFarge Ltd v BC Lightweight Aggregates Ltd* [1983] 1 SCR 452.

In other words the intent to injure may be presumed, inferred or implied from the disregard of the defendants for the welfare of the plaintiff. From this it can be deduced that the courts seek some improper aim,motive or intent in order to characterise actions as wrongful.

Alongside the substitution of fault for the causation of harm as a basis for liability is the expansion of the nature and scope of responsibility. Situations and circumstances that previously stood outside the reach of the law are now being recognised as potentially capable of supporting a cause of action. Admittedly not all the common law courts that have been considered in this essay are of a like mind. Tensions have appeared in the once uniform common law. This is particularly, but not exclusively true of the law of negligence. Perhaps this is explicable in terms of the more cautious and conservative approach of courts in England in contrast with the apparently greater willingness of courts in the younger jurisdictions to extend the scope of protection to the "little" man against various kinds of authority. That authority may be governmental: but it can also be authority derived from a difference in status, such as that between doctor and patient.

One reason for this may be what has long been suggested by commentators, namely the greater incidence and effect of insurance, in other words acceptance of the idea of loss spreading among the community at large, whether it be the community of doctors, builders, employers or the general public, the taxpayers. Another may be that courts in "Western", common law countries, in modern times, consider their role to be closer to the original role of the common law courts in the mediaeval period, as arbiters of the standards of social behaviour, than to the more restricted role undertaken by courts in Victorian England, in the days of laissez faire and "every man for himself" (and every woman too). At a time when these countries have embraced the idea of the Welfare State it would seem that courts may conceive themselves as an integral part of that state and fashion liabilities and remedies along those lines and in accordance with its principles. If the current mode of thought is consistent with the notion that people should be more caring for each other and for each other's wellbeing there is nothing extraordinary in the courts, as one organ of the state, developing legal principles sympathetic to that notion.