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TORTS AND DELICTS

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"In the course of some twenty years' experience, I have found that, historical accidents apart, the differences between large portions of French and English Law are little greater than is necessarily incident to the expression of the legal concepts of one country in the language of another." The words quoted are contained in the recent Report of the Judicial Adviser of the Sultan of Egypt, Sir William Brunyate.¹ They will serve as a text for this article. To say that French and English law (or large portions of them) are fundamentally the same is to say that all the systems of law which govern the civilized peoples of the earth are fundamentally the same. More and more the civil law of Rome and the common law of England in one or other of their phases extend their influence into every corner of the world. The science of jurisprudence, so far as it pursues the comparative method, occupies itself in effect with a comparison of these two systems. If beneath the superficial differences which make each of them largely unintelligible to those who have been wholly trained to the other, there exists an essential unity, it is well that the surface should be removed so that the bedrock underlying the two systems may be made manifest. In this crisis of the world's history any process of inquiry directed to the discovery of a unity in the diversity of national institutions may be thought to contribute in some measure to bringing the nations more closely together. In the following pages I shall examine that branch of law which deals with civil wrongs in the two systems, and try to find whether and how far the fundamental resemblance which is alleged to exist between the civil law and the common law manifests itself in this particular field of inquiry.

¹ 39 JOUR. SOC. COMP. LEG. N. S. 281.

The common-lawyer who by choice or necessity pays attention to a codified system of civil law finds much to surprise him, and nothing more surprising than the scantiness of this branch of the law. The Code Napoléon under the caption *Des délits et des quasi-délits* contains but five articles. The Civil Code of the Province of Quebec reduces the five to three and adds one more peculiar to itself. Though the more modern codes are somewhat fuller, their statement of the principles of liability for civil wrongs is still insignificant in comparison with the space devoted to obligations arising from contract. In the German Code the subject of Illicit Acts (*Unerlaubte Handlungen*) occupies but one title extending to thirty-one articles. In the Swiss Code des Obligations the chapter *Des obligations résultant d'actes illicites* is even shorter (arts. 41 to 61). Evidently in each of these cases the code concerns itself merely with a summary statement of general principles. The development of the subject must be looked for in the great collections of decided cases which in one form or another are a distinguishing feature of the civil law system. The collections known as *Les Pandectes Françaises* and the *Répertoire* of Dalloz may be cited as examples. They consist in an immense accumulation of what the common-lawyer calls headnotes. The substance of the decision is given, and where necessary, an epitome of the facts; and it is seldom that the practitioner thinks it incumbent upon him to go behind them to the original report from which they are abstracted. Such collections as these contain what is called the "jurisprudence." They are cited not as authoritative (for no authority attaches to previous decisions), but as an indication of the course of decision or the custom of the court which may be expected to determine the decision in a later case. In civil law jurisdictions it is customary to distinguish jurisprudence and doctrine, the latter being the principles inculcated in scientific treatises on law. When the two are in accord the law may be regarded as substantially settled. When they differ the judge may follow whichever he pleases, though naturally his inclination is toward the former rather than the latter. Together, they play the part in civil law jurisdictions which decisions do in the common law, and particularly so when the articles of the code merely express a few general principles, as in the matter of civil wrongs. In such a case it is permitted and inevitable for the civilian to go to the decisions and the text-books for the detailed application of his system, just as the common-lawyer goes to his cases, always with this difference, however, that while for the one the sources which he consults are persuasive merely, for the other they are, within certain tolerably well-settled limits, conclusive.

THE DEFINITION OF TORT AND DELICT

The definition of a tort may be said to have baffled the text-book writers not so much on account of the inherent difficulty of the concep-

tion as because of the implication of the conception in questions of jurisdiction. It is a creation of the common law, a fact which rules out on the one side personal rights created by equity, and on the other, rights created by ecclesiastical or admiralty law.² Further, it is usual to exclude from the definition most if not all of the rights and duties arising out of family relations—that is, as regards the immediate parties.³ Again, a tort is usually defined negatively in such terms as to distinguish it from breach of contract, and sometimes also from the breach of duties, vaguely described as quasi-contractual. Perhaps none of the text-books succeeds in introducing all of these limitations into its definition. Bigelow speaks of a tort as a “breach of duty established by municipal law for which a suit for damages can be maintained; or, conversely, the infringement of a private right, or a public as a private right, established by municipal law”⁴—a definition wide enough, on the face of it, to include breach of contract. Salmond, who says that a tort is “a civil wrong for which the remedy is an action for damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation,”⁵ fails to exclude breaches of duties created by status; while Jenks, in stating a tort to be “a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages,”⁶ may be thought to offer a definition more proper to a work on jurisprudence than to supply a faithful index to a conception which, as limited in the common law, is the peculiar historical product of that system.

A definition such as that of Mr. Jenks would be more completely at home in a codified system of civil law. The French Code, however, which has served as a model to most of the codes of the last century, while prodigal in abstractions and definitions, rather leaves the content of the word *délict* to be inferred than expressly states it. “Obligations,” it seems, “arise from contracts, quasi-contracts, offences (*délits*) quasi-offences (*quasi-délits*) and from the operation of the law solely.” Such is the language of the Quebec Code,⁷ which puts into express words the implications of its prototype. But when we come to the chapter which deals with offences and quasi-offences, we find no attempt to distinguish them or to indicate the nature of the distinction. It has been thought that the distinction intended is between the direct liability of the wrongdoer for his own culpable acts and omissions,

² Pollock, *The Law of Torts* (9th ed.) 5-6.

³ *Ibid.* 3.

⁴ Bigelow, *The Law of Torts* (7th ed.) 30. The author's use of the phrase “rights established by municipal law” excludes “consensual rights.” *Ibid.* 8.

⁵ Salmond, *The Law of Torts* (4th ed.) 7.

⁶ Jenks, *Dig. of Eng. Civil Law*, art. 722.

⁷ Art. 983.

and the vicarious liability which arises from his responsibility for persons and things within his control. Such a distinction is vaguely suggested by the language of the Roman law. But the consensus of opinion of commentators upon the French Code points to the difference between delicts and quasi-delicts as consisting rather in the intentional or unintentional character of the act or omission which constitutes the wrong. When the wrongful act or omission is accompanied by intention it is a delict. When the wrongful act or omission is accompanied by negligence it is a quasi-delict.⁸ This line of cleavage, which seems to have originated with Pothier,⁹ has nothing to commend it, and has been rejected with reason by the more modern codes which speak merely of *actes illicites—unerlaubte Handlungen*, without seeking to distinguish between faults of intention and faults of negligence.

ESSENTIAL ELEMENTS IN THE CONCEPTION OF TORT AND DELICT

By essential elements I understand those things which make "tort" or which make "delict" what it is within the limits assigned to it in the legal system to which it belongs, in other words the things which define it positively, not negatively. Thus, a tort being already defined as a creation of the common law, it is not an essential element in a tort that it is not the violation of an equitable right, any more than it is an essential element in a tort that it is not a steam-roller or a bunch of grapes. But it is of the essence of a tort that it consists in an act or omission, and it is of the essence of a tort that the act or omission be wrongful, *i. e.*, actionable at law. Even within these limits a distinction may be drawn between what is essential to tort or delict *quà* tort or delict—*i. e.*, as defined by a positive system of law, and what is essential to the underlying conception, of which the positive rule may be a more or less imperfect reflection. By pursuing the method of analysis we shall perhaps find that what legally is essential, or stated as essential, jurisprudentially is unessential; and thus by discarding what is merely superficial and unnecessary, lay bare the bed-rock of fundamental and necessary truth—the thing in itself—which is essential to every legal system, at all events to every system which has reached a degree of development consonant with the facts of modern life.

According to Professor Salmond:

"In general, though subject to important exceptions, a tort consists in some act done by the defendant whereby he has wilfully or negligently caused some form of harm to the plaintiff. That is to say, liability for a tort is commonly based on the co-existence of two conditions:—

(a) Damage suffered by the plaintiff from the act of the defendant;

⁸ 2 Baudry-Lacantinerie, *Précis de droit civil* (7th ed.) pars. 1346-7.

⁹ *Traité des obligations*, par. 116.

(b) Wrongful intent or culpable negligence on the part of the defendant."¹⁰

Retaining this analysis, but expressing it in three terms in place of two, the essential elements in tort may be stated as:

- (a) An act or omission;
- (b) Some form of damage;
- (c) Wrongful intent or culpable negligence.

But important exceptions are admitted. The last term in the series, in particular, excludes any reference to the cases of absolute liability which form an important chapter in the common law. The second term in the analysis, too, may be criticised. If damage means damage appreciable in money, certainly acts may be tortious without causing damage. Many, perhaps most, tortious acts do not leave their victim one cent worse off than he was before. A trespass to land is in most cases attended by no damage whatever, and the same may be said of many cases of libel and slander. Upon the whole, it seems that the requirement of damage in relation to tort simply implies that a tort is an invasion of a right; and it is this, not damage, which should find a place in an examination of the essential elements of a tort.

The writers on the French law say that the terms *délict* and *quasi-délict* (they may be treated as one for the purpose of analysis) imply:

- 1. An unlawful act;
- 2. Damage;
- 3. Fault.¹¹

Radically the result is the same as that arrived at by Professor Salmond for English law, but here again the same, or similar, difficulties accompany the analysis. With reference to the second element in particular the commentators dispute whether the damage must be material or may be merely moral. The prevailing opinion is that in certain cases (such as defamation) moral damage is enough.¹² This means, in fact, that damage (in the sense of material damage) is not in French law any more than in the common law a necessary incident. In one system as in the other, the essence of the wrong is the invasion of a right, giving rise to a consequent right of action. In some cases I can sue you with good effect only if I can prove pecuniary detriment. In other cases this is unnecessary. Damage therefore is not a necessary part of the analysis of tort or delict in general, though it is a necessary element in some torts or delicts, those namely, in which—to use the language of the common law—damage is “of the gist of

¹⁰ *Op. cit.* 8.

¹¹ 2 Baudry-Lacantinerie, *op cit.* par. 1348.

¹² 2 Planiol, *Traité élémentaire de droit civil* (7th ed.) par. 868; 1 Sourdat, *Traité général de la responsabilité* (5th ed.) par. 33.

the action." The essential thing, then, is not the damage, but the unlawful character of the act. This established, an action lies; and the question of damage is postponed to a later stage, when it is taken into consideration as an element in appreciating the amount of the reparation.

Two terms in the analysis remain, the act or omission, and the wrongful intent or culpable negligence, as Professor Salmond puts it; or the unlawful act and the fault, as the French writers have it. Perhaps these terms will also be found to require some further elucidation. Neither presentation is completely satisfactory.

To take the French formula first, the accumulation of the terms "unlawful act" and "fault" seems a redundancy. If the act is unlawful for me to do it is imputable to me as a fault. If the act is not unlawful it cannot be a fault in me to do it. Salmond's analysis avoids this tautology. He speaks not of an unlawful act, but of an act merely, and in this he is correct. In itself the act or omission is without legal significance. Regarded merely as an event, the killing of a man is no more a matter of legal interest than is the killing of a horse. But the event is the material basis of the right or liability. As such it must occupy the first place in the analysis. This established as fundamental, the next question is: Does the law impute the act or omission as a fault? or, to vary the phrase, does it condemn it as an invasion of a private right? If yes, the act (or omission) is tortious, if no, it is innocent. So the three terms of the analysis are found on examination to reduce themselves to two: first, the act or omission; second, the wrongful character of the act or omission. These are essential and at the same time exhaustive. As often happens in such inquiries the final conclusion is scarcely distinguishable from the first impression.

Salmond introduces an unnecessary element into the analysis by postulating wrongful intention or culpable negligence. It is true that his definition of tort which forms the starting point of the analysis is professedly subject to important exceptions. But it seems undesirable to analyze a tort in terms which exclude the admitted cases of absolute liability to be found in the civil law as well as in the common law. The essential thing is that the law condemns the act or omission. The consideration why it does so is secondary. This is the question to which attention must next be directed.

THE RATIONAL OR MORAL BASIS OF TORT OR DELICT

If the law condemns certain acts as tortious or delictual it does so not without reason. The reason may be moral or it may be historical. Speaking broadly, one may say that the law of torts or delicts at a given time will reflect the moral standards of the time, will approximate to them, so far as the nature of law permits. In order that a defendant

may be held liable to a plaintiff in an action founded on tort or delict, the defendant must have invaded some legal right of the plaintiff, *i. e.*, have been guilty of a breach of a duty owed to him. If we ask what right, what duty, the answer in most cases ultimately rests upon the moral law. But there are other cases in which the moral element is wanting. The common law furnishes many examples. I am guilty of trespass if I walk across your land without causing damage, believing for good reasons that the land is mine. I am guilty of conversion if in good faith I handle your goods as owner. Again, liability under workmen's compensation acts has no necessary relation to the moral guilt or innocence of the employer. Yet in all these cases if morality does not pronounce against the defendant, still it does not come to his aid by protesting against the law which condemns him; and in the last case it may be said that an employer may well owe a moral duty to his employee, and a moral duty fit to be expressed as a legal duty, although the duty alleged is not easily referable to any traditional legal formula. Such cases as these tend to blur the outline of the conception of tort or delict, but on the whole it is true to say that those acts and those only are tortious or delictual which morality reprehends and therefore law condemns.

But the law is not commensurate with morality. It would be going too far to say that an immoral act which causes me damage is actionable.¹⁸ The transition from the rule of morality to the particular legal situation is too abrupt. The mind seeks a middle term in a rule of law. But it is the peculiar weakness of this branch of law that the middle terms are rather conspicuously wanting. In the common law their place was taken by the forms of action which have left their indelible impress on the substantive law; hence the queer irrational entanglements of the common law of slander, libel, malicious prosecution, etc. Indeed the efforts which have been made by text-writers and juristically minded judges to reduce the law of torts to a few general principles have failed to leave their mark upon the course of judicial decision. What is asked in a given case is not: Does the plaintiff complain of a violation of a right in which the law protects him—right to personal freedom—right to reputation—right to property? but: Has he established what is necessary to constitute an action for false imprisonment—for libel—for trespass to goods? In the common law, then, the middle terms are present, but they consist not in the statement of general principles, *i. e.*, rules of law, but in the formulation of causes of action. The process by which the moral right is converted into the legal right is tortuous and intricate. Moral rights, it is to be feared, often die by the way and fail to find admis-

¹⁸ The German Code seems to go this length when the injury is wilful (*vorsätzlich*). B.G.B. art. 826. Cf. Swiss Code des Obligations, art. 41, cited below.

sion to the legal forum. An instance may be cited in the action of deceit. If you intentionally deceive me and I act to my detriment I may sue you for damages. If you carelessly mislead me, I may not. Yet there is no more reason to distinguish between intention and negligence in this case than in any other sphere of liability.

If the common law errs in one direction by particularization of causes of action, the civil law perhaps incurs the opposite reproach of failing in precision. The language of the Code Napoléon seems designed to annex the whole field of morality to the domain of law. Article 1382 declares that "Any act by which a person causes damage to another binds the person by whose fault the damage occurred to repair such damage;" and article 1383 adds: "Every one is liable for the damage which he does, not only by his wilful acts but also by his negligence or imprudence." The same generality of expression appears in the Swiss Code des Obligations, which declares in article 41: "He who causes in an unlawful manner a damage to another, whether intentionally or by negligence or imprudence, is bound to make it good;" and "He who intentionally causes damage to another by acts contrary to morality is equally bound to make it good." No one who has had the smallest experience of the administration of the law in a civil law jurisdiction can have failed to remark the all-embracing character of these and similar articles. To the common-lawyer it often seems that the civil law casts its net too wide, that the very elect can scarcely escape its meshes. I am answerable for my faults.—Granted.—But when am I in fault? One is almost tempted to say that I am in fault whenever you can get a judge—or a jury, when the trial is by jury—to disapprove of my conduct. If you fix a quarrel on a man and go on quarrelling with him, it will be strange if before long it cannot be said with some show of reason that there are faults on both sides. From this it follows that charges of fault are easily advanced and not very easily resisted. The antidote for this unwholesome vagueness is the fact, too often overlooked, that every private wrong is the invasion of a private right. If the defendant is in fault, it must be because he has violated the plaintiff's right.¹⁴ The Japanese Code

¹⁴ Planiol, amongst French writers, lays proper emphasis on this point. Thus he says, 2 *op. cit.* par. 863:

"La faute est un manquement à une obligation préexistante, dont la loi ordonne la réparation quand il a causé un dommage à autrui;" and again (*par.* 865): *"On dit à tout moment qu'une personne est tenue de ses fautes 'en vertu de l'art. 1382.' Cela est vrai dans un certain sens, car c'est cet article qui oblige l'auteur de la faute à en réparer les conséquences; mais ce texte n'a que la valeur d'une sanction: il est, pour les obligations légales, ce qu'est l'art. 1142 pour les obligations conventionnelles; il en garantit l'exécution, en réprimant toute contravention par la nécessité d'indemniser celui qui en souffre; par lui-même, il ne contient aucune obligation particulière. Il nous dit que celui qui a causé à autrui un dommage par sa faute est obligé de le réparer, mais il ne nous dit pas, et ne pouvait pas le dire, quand l'auteur du dommage sera en faute; c'est au juge à l'apprécier; or il n'y a de faute concevable que s'il y avait antérieurement obligation d'agir ou de s'abstenir."*

is quite as general in its terms as the French Code, but seems more than the other to direct the mind to the essential question. By article 709, "A person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence." The real question, then, is not whether the defendant has acted badly (this is what we usually understand by being in fault) but whether he has violated any right of the plaintiff.

WHAT RIGHTS BEING VIOLATED GIVE RISE TO AN ACTION IN TORT?

How, then, are we to determine the category of rights from whose violation an action *ex delicto* arises? The French Code is so entirely silent on this subject that Professor Planiol, the author of an excellent commentary on the code, finds himself obliged, just as a common-lawyer in like case, to seek inspiration from the decisions of the courts. They lead him to the conclusion that the law imposes on every person the following duties (thereby guaranteeing the corresponding rights):

1. To abstain from all violence to things or persons;
2. To abstain from all fraud, that is, from any act designed to deceive another;
3. To abstain from every act which demands a certain strength or skill which one does not possess in the desired degree;
4. To exercise a sufficient superintendence over dangerous things which one possesses, or over persons of whom one has the care.

"Of these obligations," Planiol continues, "the first two are absolute; violence and fraud are condemned in themselves, and those who employ them are necessarily in fault and responsible. Corresponding with them is the group of delicts properly so called [in French law] *i. e.*, intentional injuries caused *dolo*. In the two last cases the person responsible has not acted *dolo* but merely *culpa*: his conduct involves a certain appreciation, because the fault committed is susceptible of degrees. . . . When an act is not specially prohibited by a text of the law it cannot be unlawful (and this is necessary to constitute the fault) except on the condition of falling within one of these categories."¹⁵

Here then we have—inductively determined—the mesne principles which Planiol formulates as rules of law. But the doubt must arise whether they *are* rules of law. If the individual case does not make law, neither can a generalization from many decisions make law. It seems a radical defect in the civil law system that the rule of law scarcely admits of formulation except as *lex scripta*. When the statute limits itself to a vague general statement, the whole law in that particular field remains vague and general. It is scarcely possi-

¹⁵ 2 Planiol, *op. cit.* par. 865.

ble to read the *considérants* which, according to the practice of the French courts and of the courts of the Province of Quebec, constitute the logical process which concludes in the judgment of the court, without feeling that the "considerations" which move the court often hardly fall within the field of law at all. Unimpeachable moral sentiments, maxims of the utmost vagueness—and then the conclusion. Similar methods might lead to an opposite result with equal justification. The fact is that in law as in private conduct, abstract principles have little value in themselves. They are too remote from fact. They become useful in being made applicable to the situations in which men find themselves. The strength of the common law consists in its having been able to solidify into the law the fluid conceptions of morality. Its weakness lies in the fact that the rule of law is often irrational. The apparently cynical remark that no common-lawyer ever confounded law with morality is in fact a most penetrating comment on the system, expressing at once its strength and its weakness. The law of torts is rich in illustrations of the truth of the criticism.

The merits and the demerits of the civil law are the precise opposite of these. It is the boast of the civilians that their system claims allegiance *non ratione imperii sed imperio rationis*. Certainly, in comparison with the common law it is logical and coherent, and no civilian judge need ever tamely follow the previous determinations of any court if they seem to his trained intelligence irrational or unjust. But it has the defect of its qualities, and this lies principally, as it seems at all events to the writer, in the absence in this particular field of law, of those mesne principles in which morality incarnates itself as law, which are in fact the very flesh and blood and bones of a legal system. The nineteenth century was an era of codification—the codification of the civil law. The twentieth century, if the writer may venture a prophecy, will also be an era of codification—the codification of the common law, but of a common law illuminated, systematized, and rationalized by all that the civil law, its secular rival, has to teach it. The task remains to be undertaken. No less labor than went to the making of the German Code must be brought to bear upon it. If a judgment may be founded upon the English experience of such partial codifications as the Bills of Exchange Act of 1882 and the Sale of Goods Act of 1893, a rationalized and codified version of the common law promises no less for the development in this century of the legal systems of the world than was effected in the last century by the codification of the civil law of France. In realizing this great future for the common law, the law schools of this continent may play a decisive part.