LAW AND MORALS*

Two years ago I delivered a lecture, the second Maccabaean Lecture, which has been published in the proceedings of the British Academy, in which I sought to examine the relationship between the moral law and the criminal law. I reached the conclusion that the criminal law of England was based on the moral law, although in many respects it had lagged behind it for there are many sins which are not punishable as crimes. I do not propose to strain my prerogative as President of the Holdsworth Club by decreeing that the lecture shall be compulsory reading for all its members and I shall not presume that any one of you has read it. I refer to it only in order to introduce the topic I have chosen for my address to you this evening. I want this evening to examine the relationship between on the one hand the moral law and on the other hand what I shall call the quasi-criminal law and the civil law of wrongs, that is the law of torts.

When I used the word " criminal " just now and when I talked in that earlier lecture of crime and sin, I had in mind that part of the criminal law which covers offences *mala in se*. Much of the modern criminal law is concerned with offences that are *mala prohibita*, and this is the part that I call quasi-criminal. The relationship of the moral law to the quasi-criminal law is in my view of it quite different from its relationship to the real criminal law and more like its relationship to the civil law. So I can usefully begin by examining the difference.

*This Address was delivered at the opening of the new Birmingham University Law Library at Edgbaston, on 17th March, 1961.

In a celebrated passage in his speech in *Donoghue v. Stevenson*, [1932] A.C. 562 at 580, Lord Atkin said:

> " Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply."

Earlier in his speech Lord Atkin spoke of " a general public sentiment of moral wrongdoing for which the offender must pay." The idea that you must not seek without restraint your own profit and wellbeing but must be careful that in so doing you do not injure others is a moral idea that is part of the foundation of every good society. This idea provides a moral base for much of the law, civil and criminal, and in particular for the quasi-criminal law. Some parts of the quasi-criminal law keep closer to the base than others. There are statutes that forbid acts that may be injurious to the health of the community. Then there are statutes like the Food and Drugs Act, designed to protect the public in what they eat, and like the Weights and Measures Act which helps to ensure fair trading. Such statutes may be closely connected with " the general public sentiment of moral wrongdoing " in that many of the things which they require to be done are the very things which the honest, careful and considerate citizen should wish to do in the interests of others. At the other extreme there is a statute like the Road and Rail Traffic Act 1933 which demands

of the citizen that he shall not use his vehicle on the roads for the carriage of goods for hire or reward unless he holds in respect of it an "A" licence. The Act is designed to regulate the flow of goods traffic and to make the best use of roads and vehicles so as to provide an efficient transport system. It aims at an economic rather than a moral target. Even so, in obedience to a law like that there is yet some sort of a moral element. When regulations are made for the economic welfare of the community it may be immoral for a man to obtain by breaking them an advantage for himself at the expense of his fellow citizens who accept the restriction. At a time of crisis, when the survival of the nation may depend upon the efficacy of the restriction, this would be generally recognised; but there are also many fussy regulations whose breach it would be pedantic to call immoral.

The distinction between the real criminal law and the quasi-criminal in their relationship to morals is that in the former a moral idea shapes the content of the law and in the latter it provides a base upon which a legal structure can be erected. In the former the law adopts a particular moral idea, usually taken from a divine commandment. In the latter no more is required of the law than that it should maintain contact, more or less remote, with the general moral idea that a man, if he cannot reach the perfection of loving his neighbours, should at least take care not to injure them and should not unfairly snatch an advantage for himself at their expense.

Real crimes are sins with legal definitions. The criminal law is at its best when it sticks closely to the content of the sin. Of course it must trim the edges so that they present a line sharp enough for the clear acquittal or condemna-

tion which the administration of justice requires. There cannot be a theft without an asportation ; there must be an intent not merely to take possession of the stolen article but also permanently to deprive the owner thereof ; these are the sort of definitions which the temporal law, whose servants cannot enter into the mind of man, requires for its working. The criminal law is at its worst when for ease of enforcement it extends the area of the sin. For centuries past it has done this in the case of murder, constructing synthetic states of mind in substitution for the real intent to kill that makes the sin of murder. But at least there is sin at the heart of the crime.

Quasi-criminal offences are entirely the creature of statute and because of that are sometimes called statutory offences. But the distinction between what is really criminal and what is quasi-criminal is not the distinction between common law and statute law. Nearly all the crimes that originated in the common law are now codified by statute. Many of the statutes that create quasi-criminal offences deal also with real crimes of dishonesty. Thus, the new Weights and Measures Bill s.16 (2) makes it an offence if any fraud is committed in the use of any weighing equipment. Dishonesty of this sort could probably be brought within one of the old common law crimes ; but it was evidently thought to be more convenient that a specific offence should be created which could be dealt with summarily.

The distinguishing mark between the criminal and the quasi-criminal lies not in the use of a special statutory provision but in the presence or absence of moral content in the statutory provision containing the offence. Let me try to explain it by an analogy—a comparison between a

citadel and fortified outworks. To protect the sanctity of life against the sins of murder and manslaughter the law builds a citadel. Whatever the sin, it is unlikely that the area enclosed will be no more and no less than the area of the moral principle that has to be protected. This is because the architecture of the law runs in straight lines and at regular angles and thus either something has to be left outside the walls or a plot has to be included to square the enclosure off. I have suggested that, as against the sin of murder, quite a large extra piece has been included, but not enough to destroy the character of the enclosure which remains one that is dominated by a moral principle.

But sometimes the law finds a moral principle too difficult to enclose. Let me take as an example of this the special duty that is owed towards children. An adult can look after himself and must be strong enough in himself to resist temptation ; but it is a moral duty to look after a child in this respect and to keep him out of bad ways and not to indulge him unduly. It is impossible to express such a duty in precise terms though it is easy to say how it should be applied to particular cases. There is nothing wrong in giving a child an occasional glass of wine, but it would be quite wrong to give him too much to drink. Most boys have smoked quite a number of cigarettes before they are 16 but it would be wrong to allow any child to make a regular habit of it. Now, how does the law deal with this situation ? All it can do is to build an outpost against the direction from which it thinks danger is most likely to come. So legislation is directed against selling alcohol to children (Licensing Act 1953 s.128), selling them tobacco (Children and Young Persons Act 1933 s.7) and allowing them to go

into bars (Licensing Act 1953 s.126). There is nothing in the least immoral in a responsible child buying tobacco for an adult or accompanying his parent into a respectable bar. A child of 13 could probably take delivery of a pint of bitter in a jug without injury to his moral health. But this class of legislation is justified as the defences which the law throws up to protect a sound moral principle. There is much other legislation of the same sort—restriction upon children taking part in public entertainments (Children and Young Persons Act 1933 s.22) or having transactions with a marine store dealer (Merchant Shipping Act 1894 s.540)—a character whom the law has always regarded with exceptional suspicion. All these are punishable offences.

It is in relation to this sort of offence that I use the simile of an outwork. The law by this means seeks, as it were, to prevent the enemy from getting anywhere near his objective ; it means that he must be denied admission to territory where he could go without any moral offence at all. Even here the law, so far as the stiffness of its masonry will allow, tries to adapt itself to the ordinary man's notion of propriety. It recognises, for example, that there may be occasions when " a person under 14 " has to pass through a bar, and so provides that his presence there shall not be an offence if he " is in the bar solely for the purpose of passing to or from some other part of the premises, not a bar, being a part to or from which there is no other convenient means of access or egress." It is indeed not easy to translate morality into legal terms !

Even where it constructs a citadel the law may build outposts as well so as to be an added protection. Thus in

the Weights and Measures Bill it is not content with making it an offence for a trader to use a weighing machine dishonestly or to have in his possession for use in trade any weighing machine that is " false or unjust " (s.16 (2)). In order to make it difficult for a seller to give short weight and easy for a buyer to detect it, if he does, there are five Schedules of the Bill which will cover 26 pages of the Statute book requiring in respect of innumerable categories of goods that they should " be sold only by quantity expressed in a particular manner or only in a particular quantity " (s.23). If you can surround a citadel with a system of outworks of this sort you may prevent the enemy from even approaching the walls that defend honest trading.

The first distinguishing mark of the quasi-criminal law then is that a breach of it does not mean that the offender has done anything morally wrong. The second distinguishing mark is that the law frequently does not care whether it catches the actual offender or not. Owners of goods are frequently made absolutely liable for what happens to the goods while they are under their control even if they are in no way responsible for the interference ; an example is when food is contaminated or adulterated. Likewise, they may be made liable for the acts of their agents even if they have expressly forbidden the act which caused the offence. This sort of measure can be justified by the argument that it induces persons in charge of an organisation to take steps to see that the law is enforced in respect of things under their control. In most cases it is simply a mild form of collective punishment. In some of our colonies where the police force is sparse and the populations scattered and the detection of crime exceptionally

difficult, the law provides for imposing a collective fine on a village where there has been disorderly behaviour. That helps to ensure that the inhabitants will keep order among themselves. In England a more refined form of vicarious liability prevails. The majority of quasi-criminal offences are committed in the course of trade or commerce and the fines that are imposed in respect of them fall upon the shareholders of a limited company or the proprietors of the business.

It is, I think, a pity that the distinction between the criminal and the quasi-criminal, the *mala in se* and the *mala prohibita*, has become blurred. According to the Austinian theory of law, which, although it has lost influence in academic circles still retains its grip upon many practising lawyers who imbibed it when they were young, the distinction does not exist. The force of law is to be derived simply from the power to command obedience and no distinction is to be drawn between the commandment "Thou shalt not kill" and the commandment "Thou shalt not drive on the right of the road." For myself, I find the theory advanced by Dr. Goodhart much more satisfying.* Following in the steps of Sir Frederick Pollock, he regards the force behind the law as the citizen's sense of obligation. The sense of obligation which leads the citizen to obey a law that is good in itself is, I think, different in quality from that which leads to obedience to a regulation designed to secure a good end. In the first the judgment of the State and the citizen on what is good and what is evil should coincide and so obedience to the law is an end in itself; in obeying it the citizen is doing a good thing. In the

**English Law and the Moral Law*, (1953) p. 18.

second their judgment that the end is good should coincide but their judgment on the efficacy and propriety of the means chosen to serve that end need not coincide. Frequently it does not, but the citizen accepts that the choice of means must be left to the State and for that reason will obey a law that he may think very silly.

It is a pity that this distinction, which I believe the ordinary man readily recognises, is not acknowledged in the administration of justice. The lack of an overt distinction has damaged the law. It would have damaged it far more than it has were it not that the ordinary man still retains the distinction in his mind ; he still thinks of the word " crime " as disgraceful or morally wrong. But he cannot be expected to go on doing so for ever if the law jumbles morals and sanitary regulations together and teaches him to have no more respect for the Ten Commandments than for the woodworking regulations. Meanwhile, so long as the distinction still means something to the ordinary man it may cause him unnecessary distress if for some petty offence which he may not even himself have committed, he is classed among criminals and if in the machinery of the law he is processed as if he were one. There is in truth no reason why the quasi-criminal should be treated with any more ignominy than a man who has incurred a penalty for failing to return a library book in time.

The distinction between the *mala in se* and the *prohibita*, if it could be revived and clarified, might play a useful part in constitutional law. It has for centuries past been a principle of the constitution that a man should not be imprisoned unless he be condemned by his countrymen. During the last hundred years encroach-

ments on this principle have been allowed. It has, I think, become important to establish as a convention a clearer line than that which exists at present to mark the boundary beyond which any further invasion should not go. Let me endeavour to show the part the distinction might play in this.

The basis for the distinction between *mala in se* and *mala prohibita*, between what one might call a crime and an offence—or between what one might call a felony and a misdemeanour, if one could modernize those terms so that the latter was given its natural meaning—is that crime means to the ordinary man something that is sinful or immoral and an offence at worst a piece of misbehaviour. A jury is a good tribunal for trying crime in that sense because it handles naturally issues involving moral guilt. It is not so effective for trying breaches of good order and discipline where every juryman can identify himself too readily with the accused. An offence that does not involve moral guilt rarely calls for serious punishment. Offences against the State, such as treason and sedition, and wilful and continued defiance of the law may call for serious punishment, but I regard them also as offences against morals. That may be contraversial; but at least they are offences against society of the same gravity as moral offences because they strike at the health and life of society. They are *mala in se*. If we renewed the distinction between *mala in se* and *mala prohibita* and if it were accepted, as I think it should be, that in a civilised society the former are properly punishable by imprisonment and that the latter generally are not; and if we confine the jury to its traditional role—*nullus liber homo capiatur, vel imprisonetur . . . nisi per*

legale judicium parium suorum—we should build a strong defence against the tyranny of the State. Let the State have a regulated power over the purse of the citizen and support it with the aid of the magistracy, but let it have no power over his body unless it can persuade his fellow countrymen to deprive him of his liberty.

We may think now that we begin to perceive a gradient leading from the depths of the criminal to the heights of the moral law. Gross and deliberate breaches of the moral law that are deeply injurious to society are corporally punished. Disregard of social obligations is also punishable though more mildly ; thereby the secular law comes nearer to the precept that a man should act, if not with love towards his neighbour, at least not without consideration. The civil law, one might suppose, should come nearer still ; for it contains no penal provisions and so ought to be able to regulate the conduct of one man towards another without that attraction towards the minimum that must inevitably be felt by a law which is prescribing what is punishable.

But that is not the way in which the law of torts has grown up nor is it the function which it now performs. Normally the relevant question in this branch of the law is not : " Who is to blame ? " but " Who is to pay if things go wrong ? " ; and the judgment is expressed as a sum fixed not as punishment for blameworthiness but as compensation for damage done. I do not think that a branch of the law whose object is to provide compensation for damage can be used directly to serve a moral purpose. The reason, put shortly, is that while liability can be made to depend upon moral guilt, full compensation for injury done cannot be made to depend on the *degree* of moral

guilt : guilt depends upon a state of mind but damage done does not. But for the moment let me put that difficulty on one side and consider to what extent liability in the law of tort depends upon moral guilt. That is tantamount to asking what part is played in the law of tort by malice or the deliberate intent to injure or by negligence sufficiently gross to constitute a moral fault. We all know that negligence in some degree, great or small, plays a considerable part : malice on the other hand as an element in liability has except in a few specific torts a very small part to play. I shall begin by considering negligence.

Much of English law, both civil and criminal, originated as rules for payment for wrong done, blameworthiness being irrelevant. At a very early stage the concept of *mens rea* was introduced into the criminal law and the rules for compensation were left to the civil law. For a long time these were based on absolute liability. A man trespassed at his peril on the person or property of his neighbour and created or kept at his peril sources of danger or nuisance, such as fire, wild beasts and accumulations of water. These liabilities were and still are separately classified as specific torts. The big chance came when all the large area left uncategorised was partly filled with the tort of negligence. The creation and development of that tort was not deliberately designed to serve a moral purpose. But because its efficacy depended upon proof of a state of mind, the state of carelessness, it had, as *mens rea* had on the criminal law though to a much more limited extent, a fertilizing influence upon the civil law and brought it into contact with moral fault. It affected not only the uncategorised area which it helped to fill, but the classified torts as well.

The area of absolute liability for physical injury at common law has now dwindled almost to nothing. The elastic concept of negligence enables liability to be graded to fit the circumstances. The greater the risk of injury the greater the care that must be taken. When the danger is high, then, as Lord Macmillan put it in *Donoghue v. Stevenson*, [1932] A.C. 562, at p. 611 : " the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety." Even the ancient torts of trespass and assault may be beginning to yield to this treatment.*

But there is also another influence upon the law of torts which has been flowing in the opposite direction. In the important field of industrial injury the common law has been stiffened by statute. The Factories Acts and the mass of regulations made under them go a long way towards making the employer absolutely liable for accidents occurring in the handling of machinery or as a result of factory conditions or of the special dangers that arise in the course of particular operations such as building. This does not mean that the legislature adopted the view that an employer was morally bound to pay, irrespective of fault, for injuries arising out of employment and decided to take a step towards that end. The Acts were passed as part of the quasi-criminal law ; their object was to diminish the number of industrial accidents by prescribing rigid precautions and punishing the employer if they were not taken, whether the fault was his or another's. They became part of the civil law by virtue of the common law doctrine that if an Act of

*See the discussion in Pollock on *Torts* (15th edn.) p. 128, and since then *National Coal Board v. Evans* [1951] 2 K.B.861 and *Fowler v. Lanning* [1959] 1 Q.B.426.

Parliament is considered by the Courts to have been passed not merely as a matter of public order but for the protection of individual members of the public, a man hurt by its breach, may, notwithstanding that the Act itself is criminal in form and prescribes only penalties for the breach of it, recover compensation from the wrong-doer. The Factories Acts are now far more important as a source of civil law than as part of the quasi-criminal law: minor infringements, too slight to give rise to prosecution, are constantly invoked in actions brought by workmen. The common law is letting out absolute liability by one door and bringing it in by another, but all without any conscious purpose.

Another factor bringing negligence and absolute liability closer together is the change that has taken place in the standard of care. It is becoming much stricter than it used to be. Almost any departure from the high standard that is set for the prudent man is sufficient to sustain a claim, and not infrequently a judge consoles a defendant by telling him that while he—it would generally be truer to say his insurance company—must pay for his error, he need not regard himself as morally to blame. Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others. When Rolfe, B., in his celebrated dictum said that gross negligence was only negligence with the addition of a vituperative epithet, it was tantamount to saying that in the law of negligence moral fault was irrelevant.

One way or another, either by way of absolute liability or upon proof of negligence, the English law of torts

**Wilson v. Bratt* (1873) 11 M. & W. 115.

provides comprehensively for physical injury. The tort of negligence fills the gaps that would otherwise have existed between specific torts, but only those such as assault and trespass which are based on physical injury. It can be taken as a general principle that if a man ought to foresee that his act will probably cause injury to the person or property of another and he does not take proper care to avoid that consequence, he will be liable. No general principle of the same sort covers injury to another's purse or reputation. In that field the law of torts retains unaltered its primitive form of division into specific categories, each with its own characteristics. Some, like defamation, retain absolute liability as the basis. In libel and slander there need be no intent to injure reputation; a fiction writer who accidentally portrays an unpleasant character that can be mistaken for a living person is liable. In the common law of libel negligence has no part to play: Statute has recently given it a limited application. Under the common law a man was absolutely liable if he distributed a newspaper containing libellous matter of which he was entirely ignorant, but the Defamation Act 1952 has modified that. Other torts, such as fraud and malicious prosecution, depend upon proof of a guilty mind. There must be an intention to injure and carelessness is not enough. As the law at present stands, a man has no redress for a careless statement made to him personally which causes him to act in a way that injures him financially even if the maker of the statement actually foresaw that he would so act, unless there is between them some special relationship, such as that of a solicitor, created by contract or otherwise. There is no general duty to take care not to cause financial loss to another.

The influence of malice (the law includes within that term any wilful intent to injure as well as a malicious or spiteful state of mind) is much smaller than negligence. Where physical injury is done, there is no need for it since negligence is wider. In the case of other types of injury malice is, as I have already mentioned, an ingredient in some specific torts : but that is all. There is a tort of negligence but no tort of malice ; and as for malice as an ingredient in other torts, the general rule is that either the act is unlawful without malice or it is not unlawful at all. This feature shows more clearly than any other the nature of the English law of torts ; that it is grounded on absolute liability, in parts overlaid and in parts modified by the concept of negligence : that is almost all there is to it. If the mental element in the law of tort had not been an afterthought, malice could never have been deemed almost wholly irrelevant. In this respect English law contrasts unhappily with the law in those countries, such as France and Germany, where there is a civil code.*

Apart from the four specific torts, there are two ways by which malice enters the law of tort, one by way of the common law and the other by way of equity. The former operates through the law of damages. There is power to award punitive damages in a limited class of torts, of which the chief are defamation, assault and seduction. The law departs from its normal rule that it is irrelevant to the amount of damages whether the injury was caused deliberately or accidentally, and permits an award in excess of the true compensation for injury done so as to punish the defendant for his malice and express indigna-

*See Lawson, *Rational Strength of English Law* (1951), pp. 115 and 116.

tion at the outrage done to the plaintiff. This is not very satisfactory either in principle or in practice. In principle there is no good moral reason why an injured person should make a profit out of another's vice. Sometimes the profit is enormous. A sum large enough to punish a wealthy newspaper may be a small fortune (free of tax) for a libelled person. A soiled reputation often rates in the Courts much more money than a crippled limb. In practice, such awards are not coolly assessed. They are almost invariably made by a jury without time for reflection and maybe in a gust of indignation—perhaps caused by the defence tactics at the trial if they have not come off, for that can be taken into consideration. *Loudon v. Ryder* [1953] 1 All E.R. 741 is an example of a case in which a jury awarded an enormous sum for quite trivial injuries. There was a dispute between a mother and a daughter about the ownership of a flat and a male friend of the mother's invaded the flat in an attempt to turn the daughter out. In the course of this he struck her on the shoulders and head. It was an outrageous thing to do, but no real injury was inflicted; and apart from some nervous shock no harm was done. The jury awarded her £5,500 damages. This was no modern development for in the course of the hearing a case was referred to in 1814 in which the judge said that he remembered a case where a jury gave £500 damages for merely knocking a man's hat off.

The other way in which malice is relevant comes from equity and, as in the case of punitive damages, its field of operation is limited. A plaintiff, whatever his motives, can get damages if his rights are infringed, but he cannot get as of right the equitable remedies of injunction and

specific performance. These superior remedies are not often appropriate anyway—they are drastic and could be used, for example, to make a defendant pull down a building if it transgressed the boundary line—but they will never be granted if asked for out of pure spite.

This brief survey of the scope allowed in the law of torts for malice and negligence shows, I think, that while moral forces have been at work in shaping parts of it, the law as a whole is without any consistent moral purpose. It does not stand in an auxiliary relationship to the moral law. Is not that inevitable, one may ask. The object of this branch of the law is to repair injury, usually by means of money ; its chief sanction is the judgment for damages and that is not a weapon that can conveniently be used for a moral purpose. It cannot, as can a fine, be adjusted to the means of the offender ; nor on the other hand does it always reflect the enormity of the injury. It is, for example, cheaper to kill than to maim ; for dead men cease to suffer and the Courts, in despair of doing justice, have fixed a nominal sum as compensation for loss of expectation of life. But almost invariably a sum awarded as damages is far higher than the fine which would be imposed in respect of the same act if it were treated as a crime—out of all proportion higher, so that if the real object was as a punishment or deterrent, it would be immoral and unjust because so crushing. In fact in England the real wrongdoer hardly ever pays for the damage he does. He is not usually worth suing. The payer is either his employer or his insurance company. As a rule the only sanction which the law of torts enforces against a man who is morally guilty is the possibility of disfavour in the eyes of his employer or the probability that his insurance premium will be increased.

I conclude therefore that it is wrong to regard the law of torts as associated with the criminal and quasi-criminal law in the work of promoting good standards of behaviour in the community. An illusion that there is a close association of this sort is largely created by the name given—torts or wrongs—to this branch of the law. "The words 'tort' or 'tortious' have, perhaps, a somewhat sinister sound, but, particularly where the tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract."*

It is true that some torts are sins ; deceit is an obvious example, but generally speaking legal wrongdoing is quite a different concept from moral wrongdoing. Malice or wilfulness or gross negligence (not just the sort of inadvertence that often is enough to amount to negligence in law) is an essential element in moral wrongdoing ; it may or may not have to be present in a tort, and whether it is a necessary ingredient or not can be learnt only from an examination of that particular tort and does not depend on general principle. Most tortfeasors are innocent of any moral offence. The fact is that the law of torts is not generally concerned with behaviour. Its attitude is : "You can do what you like so long as you pay for it." Its function is to decide how and by whom, in the absence of agreement, damage is to be made good. There is no need for it to perform any other function. If an injury done to another involves social misbehaviour, it can be dealt with under the criminal or quasi-criminal law with a penalty commensurate to the degree of moral blame ; if it does not, the doing of the injury does not infringe the moral law.

Per Viscount Simonds in *The Wagon Mound* [1961] 2 W.L.R. 126 at 137.

But this does not mean that because the law of torts is not to be regarded as an adjunct of the moral law in the sense that the criminal law and the quasi-criminal law are, its provisions are immune from test by moral standards. Its relationship to morality is much more casual but is not wholly detached. The question whether a man should pay for the damage done to another is one which can be—and frequently is, especially in the smaller affairs of life which are not litigated—settled as a matter of morals. " You ought to make that good " or " You are morally bound to pay for that " are common expressions showing that without the assistance of the law the ordinary man has an idea of what justice requires. When he uses such expressions, he is not necessarily condemning the other man for having done something wrongful ; he is merely saying how a loss ought to be adjusted. The law of torts, as the branch of the law which is concerned with that adjustment, ought to be in accord with the ordinary man's sense of justice. Granted all that I have said about the effect of insurance and vicarious liability in diverting the payment for the loss from the pocket of the person who has actually caused it, there remains a sound sentiment* that a person who has without good excuse caused loss ought to be held liable for it and an equally sound sentiment that there are injuries which ought to be redressed as well, maybe, as punished.

This is not saying much more than that justice is a moral idea. It would not, morally speaking, be satisfactory simply to say that it does not matter which side, the active or the passive, pays for the loss so long as there is a rule that makes it clear in advance on whom the loss

*Recently expressed once again in *The Wagon Mound* (supra) at p. 138.

is going to fall. There is, not invariably but frequently, a right and a wrong about who should pay for a loss. That is what makes moral justice and it should be the target of legal justice.

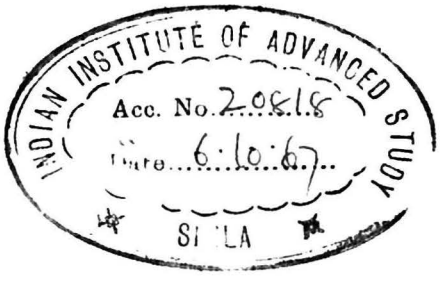
But this branch of the law is more remote than usual from moral justice. Ideally there are only two forces that need separate the secular and the moral law. The first is the need of the former for a greater degree of rigidity and uniformity : the legal judgment has to express itself with greater precision than is needed for a moral judgment and cannot, since it may be used as a precedent, afford to pay the same attention to individual circumstances. The second is that the secular law, because its function is to impose a sanction, must be framed to comply with lower standards than those aimed at by the moral law. The first of these forces operates with unusual strength when questions of compensation arise, particularly when the act giving rise to them is accidental or inadvertent. For example, the means of the parties will properly be taken into account by a moralist. It might be thought as wrong for a rich man to refuse to compensate a poor man for an accident which he brought about as it would be for a rich man in a similar case to exact compensation which might be the ruin of a poor man ; but the notion of responsibility based on what a man can afford cannot easily be introduced into a code of legal liability. In many cases with which the law of torts has to deal the only moral principle that can be invoked is that a man ought according to his means to do his best to help a neighbour in misfortune, together with the sentimental addendum that the obligation should weigh especially heavily on him if any act of his, innocent or not, has contributed to the misfortune.

There are many principles in the law of tort which, if they touch morality at all, raise questions that are unlikely to get the same answer from all moralists. Should a master always be responsible for the acts of his servants ? Should an employer be absolutely liable to his employees for accidents in the course of their employment ? If a man keeps a dog, ought he to be liable for any harm it does ? The moral law provides no universal answer to such questions. The utmost that can be expected from the law of torts is that no part of it ought to be positively repugnant to the ordinary man's sense of moral justice, because it is from that that all law draws its strength. That is the only point at which the law of torts comes into contact with the moral law, and subject to that it is free to make its own rules.

Judged in this way, how does the English law of torts appear ? I do not regard it as a blemish that absolute liability still plays a substantial part in it. It is usual to think of absolute liability as a primitive idea which the superior notion of liability based on negligence is gradually driving out of the common law. But absolute liability is not *per se* morally bad ; there is nothing immoral about the idea that there are acts which a man does at his peril in the sense that if they go wrong he must pay for the consequences. To my mind the great blemish on the law of torts is its failure to provide adequately for injury other than physical done maliciously or carelessly. This seems to me to be due simply to under-development. The concept of negligence has been exploited up to a point, but has not apparently retained sufficient of its initial impetus to jump the barrier between the corporeal and the incorporeal. The concept of malice is hardly used at all. This deficiency affects not only the jurisprudential

quality of the law of torts but creates an unnecessarily wide gap between the law of torts and the moral law. It leaves far too large an area of culpable injury without redress, and far too many cases in which the good citizen should feel under a moral obligation which the law does not enforce.

To my mind the law of torts is the least satisfactory branch of English law. It may not be accidental that it is also the one which of its nature has least to do with morals. The criminal law is shaped by the moral law ; the quasi-criminal is based on it ; the law of contract is the legal expression of the moral idea of good faith ; the law of divorce formulates the permissible relaxations from the moral ideal of the sacramental marriage. The judges of England have rarely been original thinkers or great jurists. They have been craftsmen rather than creators. They have needed the stuff of morals to be supplied to them so that out of it they could fashion law ; when they have had to make their own stuff their work is inferior.



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