A NOTE ON TORT

Ryoyu Kita

Outline

Ⅰ. Definition and scope of tort.
Ⅱ. Relation of tort to other legal categories.
Ⅲ. Some comments from the viewpoint of the Civil Law.
Ⅳ. Tort from the point of view of the interests protected.
Ⅴ. Social functions of tort and factors affecting tort liability.

Ⅰ. Definition and scope of tort.

The word "tort" conveys little meaning to the average layman, because it etymologically comes to common law countries from the law-French t o r t, which in turn came from the Latin t o r t u s, meaning "twisted" or "wrung". Therefore, it is said that the law-French t o r t signified any wrong in its loose sense of the word as it is still used in France. Nowadays, however, a tort in its technical use is not any wrong but only a particular kind of wrong, or, more strictly, of civil wrong, such as assault, battery, false imprisonment, trespass, conversion, defamation of character, negligence, nuisance or seduction. These examples may visualize the general idea of tort clearly enough, but the exact definition of it is actually a matter of great difficulty even for the lawyer.[1)]

The law of tort is indeed a well-recognised subject in the law curriculum, and there are quite a few articles and books written about the topic.[2)] Nevertheless, no single definition of tort is entirely

1) Williams, Learning the Law (1957), 6th edn., p. 16.
2) The first real monograph on the English law of tort was written by Addison and was published in 1860. Especially in the United States there is a rich case-oriented literature on the law of torts.

satisfactory on both sides of the Atlantic Ocean.[3] In civil law countries the equivalent branch of the law is basically formulated in provisions of their Civil Codes, but in extremely broad terms.[4] Accordingly, its precise scope is likewise vague, or, we had better say, its boundaries are rather flexible as a matter of practical experience.[5]

There are several reasons for the difficulty of this intractability. (1) In the first place, the social change has so potent an influence on this part of the law that the latter is still growing.[6] Of course,

3) Addison, Law of Torts (1906), 8th edn., p. 1 ("It is well to state at the outset that there is no scientific definition of a tort."); Street, Foundations of Legal Liability (1906), vol. i, Introd. xxv ("No definition of tort at once logical and precise can be given."). These citations are only examples.

4) In the French Code Civil, Art. 1382 postulates a general liability in tort in the broadest terms: "Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer." So too the Italian Codice civile, Arts. 1151—1152. The German Bürgerliches Gesetzbuch states liability in a mode which, though it is more specific than the French code, is nevertheless framed as a general prohibition against wrongdoing. Art. 823 provides that any one who, in contravention of law, intentionally or negligently injures the life, body, health, liberty, ownership, or any other right of another person, is liable to compensate that person for the ensuing damage. Art. 826 enacts that any one who intentionally causes damage to another in such a way as to offend "gegen die guten Sitten" (to do an unsocial conduct) is liable to make good the damage to that other.

In the Civil Code of Japan, Art. 709 is much the same with Art. 823 of the German BGB, providing that any one who intentionally or negligently injures the right of another person is liable to compensate that person for the ensuing damage.

5) The draftsman of the French Code Civil allegedly submitted in his Report that a number of obvious gaps in this Code were expected to be gradually filled by progressing experience.

6) As Winfield pointed out, the law of tort is a branch of the law which has, as a matter of practice, been adequately kept in touch with the needs of the changing community (Winfield, The Province of the Law of Torts, 1931, p. 1). In the United States, Wilson also said, "The field of torts includes those socially imposed private duties, which in the light of changing experience it seems necessary to assert in promoting the common welfare of society, which are, in the light of experience and changing conditions, entitled to gain or keep recognition. Each rule must be measured by the social value it offers" (Wilson, Cases on Torts, p. 1).

the same may be said of other branches of the law, but here it is much more noticeable. From the law-maker's point of view it is exceedingly difficult to bring the rules of tort into a statutory code; if they were inappropriately molded, a great deal of harm would be done to the law practice in this particular field. Therefore, the recognition of a new tort is not so much frequently by the legislature as rather by the judges. In England, it is probably only the House of Lords which now has a free hand to pronounce judicially in favour of the existence of a new tort.[7] Even in France they boast of a historically collected agglomeration of rules in tort coming through the judicial process under the general provisions of the Code Civil.[8]

(2) To make the matter worse, there are some more obstacles peculiar to the common law system in attempting to define "tort". Here the law of tort is for the most part based on decided cases as opposed to the statute law. Under such circumstances the chief concern of judges is to stick to the existing principles, but not to create a new rule. This cautious attitude makes them loth to indulge in broad general statements. Much more so to make up any abstract definitions. Thus the sharp outlines of definition are alien to the common law. Compared with the statute law it is as clay to brick.[9]

(3) A more historically founded obstacle lies in the fact that the law of tort has grown up, like other branches of the common law, behind a screen of legal procedure. The neat compartments, "Tort", "Contract", "Real Property", "Criminal Law", were wholly unknown to ancestors of the common law people. They only knew forms of

7) See, e. g., Brooke v. Bool (1928), 2 K. B. 578, in which a liability in tort for the default of an independent contractor was recognised. Winfield, supra at p. 35 et seq.

8) Cases in point are those of concurrence déloyale.

9) Winfield on Tort (1954), 6th edn., p. 2.

action usually commenced by a royal writ issued from the Chancery. Now the writs that remedied the injuries which in modern times are called "torts" were at first the writ of trespass and later writs of trespass on the case and writs on the case, thus covering a wider and wider range of application.[10]

(4) Furthermore, the ambit of the law of tort is complicated by the insecure limits of other fields of the law, and no exclusive definition of tort is possible without making them clear. This complementary task is particularly required of the law of property, and far more so of that equatorial belt between contract and tort which shades off into quasi-contract on the one side and into quasi-tort on the other.[11]

A short excursion into a thicket of difficulties now seems to convince us that we should not venture directly upon the task of definition. Although we have already had various definitions by authorities,[12] we had better say after all with Winfield that the following definition is less open to criticism than any other:[13]

Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

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10) Winfield, The Province, pp. 12—14.

11) Ibid., p. 6.

12) See, e. g., Pollock, Torts (1929), 13th edn., pp. 1—3 ("A tort is a civil wrong; it is a breach of a duty which is a general one, i. e. which is owed either to all fellow-subjects, or to some considerable class of them; it is fixed by the law and the law alone; and it is redressible by an action."); Salmond, Torts (1928), 7th edn., p. 7 ("A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."); Fraser, Torts (1927), 11th edn., p. 1 ("A tort is an infringement of a general right or right in rem."). The last definition is the most vulnerable, because my rights against common carriers or innkeepers are rights in personam but not in rem.

13) Winfield, supra at p. 32.

Starting with this definition, let us proceed to explore the complicated relations of tort to other legal categories, particularly the following:

Ⅱ. Relation of tort to other legal categories.

(1) Contract.

The relations of tort and contract are historically overlapping. As it has been seen, the early lawyers thought in terms of actions rather than in terms of substantive rights the ideas of "tort" and "contract" which we now understand. Therefore, legal remedies in contract were hampered by procedural technicalities. In the 14th century, however, a new remedy called "assumpsit" was introduced to allevilate such difficulties.[14] It was based upon the simple idea that if A undertook to perform some act for B, and A misperformed what he had undertaken and B was thereby damaged, B could recover against A. This action of assumpsit now began as a special kind of trespass on the case and was thus tortious in origin.[15] Then it derivatively developed the action of "indebitatus assumpsit" as an action on the case or on a genuine contract whether such a promise to pay the debt was express or implied. It is quite obvious that the way in which the seed of assumpsit has so sprouted contained all the possibilities of tort and contract overlapping each other. Although forms of action have already been abolished, their substantial effect on the law of both contract and tort still remains.[16]

Modern coincidence of tort and contract is found in the case of common calling. For instance, a dentist who contracts to pull out my

14) For full account of its history, Fifoot, History and Sources of the Common Law, pp. 330—394.

15) The earliest case is said to be The Humber Ferry case of 1348, 22 Lib. Ass. pl. 41. Winfield on Tort, p. 801.

16) Winfield, op. cit., p. 803.

tooth is, of course, liable to me for the breach of contract if he injures me by an unskilled extraction. But he is also liable to me for the tort of negligence; for every one who professes skill in such a common calling is bound by the law, agreement or no agreement, to show a reasonable amount of such skill.[17] Surgeons, attorneys and other professional men come within the same category. And common carriers, shipowners on bills of lading and bailees are in the same position. But it is only the courts themselves who can tell us what an exhaustive catalogue is in this respect.[18] In most of those cases the plaintiff may have alternative claim in tort or in contract, but he cannot recover damages twice over. Sometimes no contract is co-existent where a common carrier refuses to receive goods proffered to him for carriage. It should be noted that he is under a general duty towards the public to receive such goods. But he broke this duty, and so he is subject to an action in tort by the injured party. However, there is no breach of contract, for *ex hypothesi* no contract has been formed.[19] Another important case is where the plaintiff need not allege the existence of a contract although it is probable that one was made; e. g., where a medical man is called in and bungles the treatment of a patient.[20] If there is such a substantial claim in tort, a co-existent claim for breach of contract will not in general affect it. Much less can the defendant thrust upon the plaintiff a contract which he never alleged.

Now the above illustrations serve to elucidate the distinctions between tort and contract.

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17) Edwards v. Mallan (1908), 1 K. B. 1002.
18) Brown v. Boorman (1844), 11 Cl. & F. 1, 44. Winfield, supra at pp. 804—805.
19) Ibid., p. 804.
20) Cladwell v. Steggall (1839), 5 Bing. N.C. 733.

a) The duty which gives rise to tortious liability is from the first fixed by the law itself. But duties in contract are primarily fixed by the parties themselves. At this point torts are rather on the same side with crimes. The duties recognised by the law may be divided into two classes : First, those which arise from consent, and second, those which arise regardless of assent. The first class consists of contracts, the second consists of torts and crimes, and should probably includes quasi-contracts and constructive trusts. Of course this classification does not mean that every agreement will give rise to a contract, nor that a layman's idea of an agreement always coincides with that of a lawyer's. It is enough that there are facts from which the court can infer such ageement as will give rise to a contract, because then we can say that the duty which gives rise to a contractual liability is primarily based on agreement.[21]

b) The duty in tort is towards persons generally while in contract it is towards a specific person or persons. This element of generality is sufficiently workable in the majority of cases, but it is submitted that in some instances it is hard to say who exactly are "persons generally". For instance, liability for conversion is only to the person in possession or entitled at the time of the conversion to the immediate possession of the goods. The duty is owed to one person, and it can be called general only in the same sense as it may be said that everyone is under an obligation to perform all his contracts.[22]

c) Exemplary or vindictive damages are possible against tort-feasors, but the general rule is the other way in the law of contract.[23]

d) As regards remoteness of damages, the rules in tort and in

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21) Winfield, supra at p. 5 et seq.
22) Winfield, The Province, pp. 229—231.
23) Ibid., p. 40.

contract are disparate on at least one important point. In the case in tort, a tortfeasor is liable for all damages directly traceable to his act if such a damaging result of his act was reasonably foreseeable and so avoidable.[24] In the case of contract, however, a party breaking his contract is not liable for damages solely due to special circumstances under which the contract was made and which were wholly unknown to him.[25] The former rule brings forth a more extensive liability than the latter, for in tort a man is many times held liable for damages arising from special circumstances of which he had no knowledge.[26]

e) Costs of an action in tort will be awarded on the lower scale of the County Court, but those of an action upon contract on the higher scale prevalent in the High Court.[27]

f) As a general rule, there is no right of contribution among joint tortfeasors, but the rules as to contribution among co-contractors are not nearly so simple. Judgment against one joint tortfeasor bars an action against the other, but such is not the case with a judgment against a co-contractor. The other co-contractor may be subjected to an action, although he can claim recoupment against his fellow-contractors for damages.[28]

(2) Bailment.

A bailment is a delivery of goods, on a condition, express or implied, that they shall be restored to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered.[29] Now suppose that the bailee misuses or damages the

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24) In re Polemis (1921), 3 K.B. 560.
25) Hadley v. Baxendale (1854), 9 Exch. 341.
26) The Argentino (1889), 14 App. Cas. 519, carries this point.
27) Winfield, supra at p. 43.
28) Ibid., p. 44 et seq.
29) Sir W. Jones, Treatise on the Law of Bailment (1781), p. 1.

goods, he is, of course, liable in a civil action to the bailor. How is this liability distinguishable from liability in tort? Two points are quite clear.[30]

a) In tort the duty is towards persons generally as stated above, but the duties of the parties in bailment are towards each other, and do not travel beyond that. Therefore, the bailee's liability is for a breach of his duty in personam towards the bailor.

b) This liability arises from a relation which is created by the parties to the bailment, and is not a liability created primarily by the law. Bailment, like contract, originates in agreement of the parties. In fact many bailments are contracts. Most textbooks go so far as to say that all bailments are contracts.

But the better opinion is that it is possible for bailment to exist independently of contract.[31] There are at least two proofs for this.[32]

a) Gratuitous bailment has nothing to do with the law of contract at all, because there is no consideration in that kind of bailment though the courts have tried many times to explain away the bailee's possession in terms of consideration.

b) Even where bailment is created by a contract, the bailment does not necessarily cease when the contract comes to an end. This occurs when perishable goods are entrusted to a carrier to deliver at a wrong address, or when, by reason of sea peril, the cargo becomes incapable of being carried to its destination. In such a case the bailee may be liable to the bailor, because possession still remains on the part of the former.

The salient feature of bailment is thus the element of possession.[33]

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30) Winfield, supra at p. 99.
31) Winfield on Tort, p. 7.
32) Paton, Bailment in the Common Law (1952), pp. 40 et seq.
33) Winfield, The Province, p. 101.

Therefore, this part of the law is more fittingly regarded as a distinct branch of the Law of Property rather than viewed in the light of the Law of Contract.[34]

(3) Trust.

The action for unliquidated damages is one pretty sure test for distinguishing a tort from a breach of trust. Even if the plaintiff bringing an action in tort specified a particular sum of money for damages in his pleadings, he will recover such an amount as the court, in its discretion, is at liberty to award. Of course, this is by no means the only remedy for a tort, and for some torts it is not even the primary remedy. There are other remedies for tort such as self-help and injunction, and the very injunction is the primary remedy for the tort of nuisance. But in any case it does not follow that the possibility of bringing an action for unliquidated damages is fettered.[35] Because of this possibility, the action for unliquidated damages is a workable test of tort, which may be used to distinguish this category from a breach of trust.

Suppose a beneficiary of a trust claims compensation to the trustee for his misappropriation of the trust property, that compensation is measured by the loss which the trust property has suffered.[36] It is ascertainable before the beneficiary commences his action. Therefore, it is not an "unliquidated" sum of money, nor any kind of damages, but rather a matter peculiar to the law of trusts as a division of the Law of Property. This is why the administration of trusts has for centuries been within the province of a special court which is now

34) Ibid., p. 100.
35) Winfield, supra at pp. 231—233.
36) Lewin, Law of Trusts (1950), 15th edn., p. 734.

represented by the Chancery Division of the High Court.[37]

Ⅲ. Some comments from the viewpoint of the Civil Law.

According to another line of analysis it seems necessary to make some brief comments on the definition of tort as distinguished from other legal concepts. Among others, trusts are peculiarly within the province of Equity and are destitute of any true counterpart in continental law,[38] so that we had better omit all reference to the relation of tort to trust in this part of our discussion. But its relations to contract and bailment deserve revaluation and are open to criticism from the viewpoint of the continental Civil Law.

(1) In civil law countries, a statutory code frames in its general provision a civil liability in tort as an infringement of a right which is not contractual. But this construction of tortious liability naturally leads to too much strained an interpretation of the statutory provision, because many other interests worthy to be protected by the law of tort may be left outside the domain of "right" (*Recht*). If a certain interest is to be assessed as a right, it must contain something positively claimable, such that a man can do with his own thing any way he likes as the owner of it. But here the interests falling short of the right are no more than negative, and so not claimable unless invaded by an unsocial force coming from outside. They may be better called reflective effects of the law. Art. 823, parag. 2, of the German Civil Code contains such a general clause: "A person who infringes a statutory provision intended for the protection of others, is liable to pay compensation for any damage arising from this violation."[39] But the

37) Winfield, supra at Chap. VI, for a full discussion of the topic.

38) Ibid., p. 114.

39) Manual of German Law, by Foreign Office (1950), p. 102 et seq. Examples: Police ordinances requiring householders during the winter to strew sand on the road in front of their houses.

same treatment is prevalent even in those civil law countries whose codes make no mention of it. This fact suggests to us that the better juristic explanation of tort consists in making a switchover from the right of an injured person to the duty of an injuring person.

(2) Civil law countries have no separate torts as these are understood in the English law, and do not classify them as the English law does into separate wrongs, such as assault, trespass, conversion, nuisance, defamation, deceit, negligence, and so forth. It is a historical difference. In England the law of tort has grown up piecemeal, and each of the separate torts has peculiar incidents and requires separate consideration. The Civil Law, on the other hand, consists of the varied applications of the broad principle of civil liability for wrongs causing damages.[40] By and large, it can be safely said that the English law has been familiar to a stricter treatment of cases in tort than the Civil Law. For instance, the latter admits an action in tort by heirs as representing the deceased while the former carried to an unreasonable length the common law principle that death put an end to an action for tort.[41]

(3) Of course, there are quite a few points of similarity between the two systems.[42]

a) Both of them make no distinction between intentional and unintentional wrongs.

b) Assignment of the rights of action for tort is impossible in both Civil and English laws.

c) In the Civil law as in the English law, it is admitted that the same act may constitute a tort and a breach of contract, and that there is an option between the two remedies.

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40) Amos & Walton, Introduction to French Law (1935), p. 215 et seq.
41) Ibid., p. 219.
42) Ibid., pp. 222—227.

d) It is not necessary in the Civil law that the plaintiff should have suffered material damages. He can recover for moral damages. In England, in theory, damages are understood to be compensation for material loss, but the amount of damages is left to the jury, and so there is in practice considerable latitude. Moreover, it is a settled rule that "exemplary" or "vindictive" damages may be awarded for wilful wrongs such as seduction, assault, libel, etc. This amounts to compensation for moral prejudice.

(4) However, the greatest difference can be found in the theory of causation. In this respect, the Civil law takes the same position with that of contract damages. If it is impossible to say that the act of the defendant is the sole cause of the event, the damages are proportionately reduced. In the English law there is never any reduction of damages, because the proximate cause is to be considered as the sole cause.[43] But the recent thought shows a growing tendency to come close to the way of measuring damages in tort, making the defendant more and more liable for damages arising from special unknown circumstances under which he made the contract.[44] Now emphasis is shifted from the side of the defendant to the side of the plaintiff who has made a change of position in reliance on the plaintiff's promise, and here is a great need for curing harms occasioned by reliance and for facilitating reliance on business agreements, especially because there is institutionally no considerable difference between present goods and future (promised) goods under the present-day conditions of credit economy.[45] The plaintiff's such reliance interest may often be injured by special circumstances wholly

43) Ibid., p. 228.
44) See the text and notes under II (1) d) supra.
45) Fuller & Perdue, "Reliance Interest in Contract Damages" (1936), 46 Yale Law Journal, p. 59.

unknown to the defendant, but the lost reliance interest is reasonably foreseeable to the latter in so far as it does not exceed the expectation interest which would be realised if the promise was performed.[46] This rationale is substantially the same with the sections of the German Civil Code which accord protection to the reliance interest, providing that the recovery shall in no event exceed the expectation interest.[47]

Ⅳ. Tort from the point of view of the interests protected.

We are afraid that much ink has been spilt in trying to define a tort, but it is truly said with Pollock that a definition in the strict sense of the word is nothing but an abbreviation in which the user of the term defined may please himself.[48] What matters more is the purpose of the law of tort. From this viewpoint, the law of tort is concerned with those situations where the activities of persons cause or threaten harm to the interests of others. "Interest" in such context may be defined as "a claim or want or desire which a human being or group of human beings seeks to satisfy, and of which, therefore, the ordering of human relations in civilised society must take account."[49]

Interest jurisprudence (*Interessenjurisprudenz*) may thus divide the interests protected by the law into two classes:

a) Those which are common to the public at large and protected primarily by punishment from the invaders. This class of interests

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46) In their discussion of the problem of Hadley v. Baxendale Fuller & Perdue referred to cases in which courts have deliberately restricted to the reliance interest even where the expectation interest could be easily proved. In this connection, they enumerated three purposes of contract damages: i) to protect restitution interest, ii) to protect reliance interest, and iii) to protect expectation interest. Ibid., p. 54.

47) Arts. 122, 179, 307, BGB, using the substantially same language "jedoch nicht über den Betrag des Interesses hinaus, welches der andere Teil an der Gültigkeit des Vertrags hat." Cf. Art. 416, parag. 2, Japanese Civil Code.

48) Book review, 47 L.Q.R. (1931), p. 588.

49) Pound, Selected Essays, p. 86.

. creates criminal liabilities.

b) Those of individuals rather than of the public. This class of interests brings about civil liabilities and is further subdivided into two types. The one is a single limited interest, for the protection of which a contractual liability is created. The other consists of various interests, rather than one interest of the same sort only, in respect of which the law of tortious liability considers the compensation of individuals for the losses suffered.[50]

The purpose of the law of contract is always to protect the same single interest: the interest in the performance of promises by others, whereas the law of tort aims at adjusting the diverse losses which result from the ever-increasing activities of persons living in a common society by providing compensation for harm suffered by persons as the result of conduct of others.[51] Therefore, it is very important to analyse those losses or invaded interests before contemplating adjustment of them to legally recognised remedies in tort. Herein lies a feasible reason for emphasising the interests protected in tort, although it is usual to expound the law of tort by stressing the wrong of the defendant than the interest of the plaintiff.[52] We might say that the former is a sociological approach as against the latter juristic method of explanation, and we need both.

(1) The following is a list of the various interests protected by the law of tort.[53] They are personal and proprietary interests. The protection of the person from physical harm and restriction on freedom of movement and the protection of interests in tangible property, especially the right to non-interference with land and

50) Prosser, Torts, 2nd edn., p. 8; Winfield on Tort, p. 13.
51) Street, The Law of Torts (1955), p. 3.
52) Ibid., p. 5.
53) Ibid., pp. 5—6.

chattels are dealt with here.

a) The invasion of these interests by intentional or negligent conduct — conversion, detinue, negligence, and trespass.

b) The invasion of these interests by conduct which is not necessarily intentional or negligent — nuisance, tortious liability under the rule in Rylands v. Fletcher, liability for animals, and action for breach of a statutory duty.

c) Reputation — Libel and slander.

d) Interests in economic relations — conspiracy, interference with contract, action for loss of services, passing off, injurious falsehood, and deceit.

e) Interests in family relations. The extent to which parents may sue in respect of injuries to their children, and spouses in respect of harm to their marriage partners.

f) Interference with judicial process — malicious prosecution, abuse of judicial process.

g) Miscellaneous interests — interference with the right to vote and the right to accommodation at an inn.

(2) The above list may be more or less associated with an array of many other interests legally unprotected. But the law of tort is essentially practical in this respect. Judges have little patience with trivial claims. For instance, they deny a remedy by way of trespass to the person for mere touching. They recognise the limits of the wrongs which the law is capable of redressing, however morally reprehensible they may be — e. g., avarice, brutal words, ingratitude.[54] The American Restatement of Torts, Sect. 1, says, "The word 'interest' is used to denote anything which is the object of human

54) Ibid., p. 8.

desire", but hastily adds that, although emotional tranquillity, for which the great mass of mankind feels a keen desire, is as much an interest as the "interest" in the possession of land or the security of one's person, yet the former is given little or no protection while the latter is regarded as of sufficient social importance to be protected by the law imposing liability on those who thwart its realisation.[55] The common law has thus from its very beginning given the fullest protection to such latter interests. In so far as an "interest" so defined is protected against any form of invasion, the interest becomes the subject matter of a "right" according to the Common Law language.[56]

(3) Now it is noted that there are the following four kinds of human desire for interest.[57]

a) Society may regard a particular desire as improper and may, therefore, by common law or by statute impose criminal responsibility or civil liability upon an effort to satisfy the desire.

b) Society may recognise the desire as so far legitimate as to make criminally punishable or civilly liable those who defeat its realisation.

Between those two extremes these two types of desire are intermediate:

c) Those which are recognised as so far legitimate that one who acts for the purpose of satisfying them is protected from criminal responsibility or civil liability, but which are not recognised as so important as to make the interference with their realisation a criminal offense or a civil wrong.

d) Those as to which the law stands completely neutral, nei-

55) The Restatement of the Law of Torts (1934), vol. 1, p. 2.
56) Ibid.
57) Ibid., p. 3.

ther protecting nor prohibiting them.

Tortious liability is mainly concerned with the second kind of human desire, and, if society recognises this desire so far legitimate as to make one who intereferes with its realisation liable in tort, the interest is given legal protection, generally against all the world.

V. Social functions of tort and factors affecting tort liability.

The law of tort is designed for the better welfare of society. In an ideal state of society no one would cause harm or loss or injury to another. There would be no mistake, no carelessness, no wrong, no unfairness to correct. But human beings are not perfect, their wrongful acts do exist, and, if society were not protected therefrom, it could not exist.

Moreover, society is constantly changing while the law tends to stand still. It should be again noted that the interests to be protected by the law are in close relation to the changing community. From the viewpoint of such a living society, the situations where a clash of interests occurs are continually increasing and taking on new forms, calling for development and expansion of the law. As already stated, the entire history of the development of Tort law shows a continuous tendency to recognise as worthy of legal protection interests which previously were not protected at all. And it is highly probable that such a tendency will continue. Obvious examples for this probability are broadcasting and defamation; railway, road and air traffic in the case of personal injuries; complex economic organisations (in relation to marketing, labour relations, trade associations, involved company structures and the like) in respect of conspiracy, passing off and other economic torts.[58] The discussion of the topic "tort or torts?" is

58) Street, op. cit., p. 4. Because of this probability, the American *

thus rendered superfluous. It is inconsistent with the authorities to contend that the infliction of unjustifiable harm is always a tort. On the other hand, there is no fixed catalogue of circumstances which alone and for all time mark the limit of what are torts.[59] Therefore, what is the most important for future judicial consideration is perhaps to keep a close watch on social factors affecting a tort liability. This point deserves further explanation.

It is commonly said that the law of tort simply seeks for compensation but not for punishment. More technically, compensation in this saying means "to restore the status quo ante". With such a superficial observation, however, we cannot come to grips with the social functions of the law of tort, and particularly of the action in tort for damages. Until those functions become clear to us, we are not in a position to point out social factors affecting a tort liability.

Now, possible bases of the action for damages in tort are analysed as follows:

(1) Appeasement. In a primitive society coming to a certain stage of maturity human beings if injured seek for emotional pacification instead of bloody retaliation. Crime and tort have common historical root here. To some extent the law of tort can still be regarded as having this pacificatory aim, as in the case of the torts of defamation, seduction and enticement, for these are the only torts which do not survive the death of the victim or the tortfeasor.[60]

(2) Justice. With the growth of moral ideas people proceed to ethical retribution from the viewpoint of the offender and then to

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* Restatement of torts contains numerous "caveats" for future judicial consideration. Rest., supra at p. 5.

59) Street, op. cit., p. 6.

60) Williams, "The Aims of the Law of Tort" (1951), Current Legal Problems, p. 139.

ethical compensation from the viewpoint of the victim. Aristotle and Thomists supported this viewpoint in terms of equal justice. The modern law of tort still operates on the basis of equal justice in one way or another, as in the case of replacement of a borrowed and then lost book.[61]

(3) Deterrence. As Bentham maintained, the law of tort is in some respects designed to control the future conduct of the community in general. It creates a sense of safety and security in two ways: a) by preventing injurious acts through its psychological effect on the prospective wrongdoer, and b) by promising the injured party that he shall receive damages in reparation. Of course there is still a preventive role of tort as in the case of road safety, but damages in tort may be far greater than are needful as a warning.[62]

(4) Compensation. The question here is simply one of who ought to bear the risk. A satisfactory answer is given by the so-called "entrepreneur" theory which regards liability for torts connected with an enterprise as a normal business expense. Nothing can be undertaken without some risk of damage to others, and if the risk eventuates it must be shouldered by the undertaker in the same way as the cost of his raw materials.[63]

Under the last theory the conventional principle described as "no liability without fault" is no longer allowed to pass. All enterprisers must be liable without fault as undertakers of business risk. Herein lies the most potent factor affecting a liability in tort. With the growing tendency of business risk in the present-day society, the second and third theories will be dropped from the law of tort, but

61) Ibid., p. 141.
62) Ibid., pp. 144—146, 150.
63) Ibid., p. 152.

on the other hand the purpose of this law may be regarded as better realised by an administrative law such as the Workmen's Compensation Acts which, instead of the employer's tort liability to his employees, created a system of industrial insurance that has since been taken over by the State in the form of a national insurance.[64]

N. B. Materials arranged in the present paper were collected for the student use at classroom. —— 1957, London.

64) Ibid., p. 172. See also W. Friedmann, Law and Social Change in Contemporary Britain (1951), pp. 73—101.