TORTICLES

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> "Both major systems of law in the opening decades of the nineteenth century had to meet new problems with old tools: the French with a wide standard of liability; the British and Americans with a pigeonhole system of nominate torts." F.F. Stone.[1]

Professor Stone's observations describe the early nineteenth century. Almost two hundred years later, very little has changed. This small tribute to his memory speculates on the reasons for the persistence of the pattern. The first part offers a very general comparison of the intellectual and forensic approach to modern tort problems of the French on the one hand, and, on the other, of the common-law family. The second part attempts something not, apparently, done before: an alphabetical list of known torts. The third part considers the reasons for, and some consequences of, the common law's style of problem solving in this area of law.

A Brief Comparison

This paper's title coins a diminutive to express a curious characteristic of the common law, and one on which attention will be focused. Nonetheless, as a preliminary contrast it is worth recalling, in very general terms, the striking features of the modern French position. Leaving aside recent statutory intervention covering motor vehicles and defective products, liability in private law is attributed on a few broad grounds: that damage was caused deliberately or carelessly; or by a thing in the tortfeasor's custody;[2] or by someone (employee or child)

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1. *Touchstones of Tort Liability*, 2 STAN. L. REV. 259, 272 (1950).

2. Cass.ch.réun. 13 Feb. 1930, D. 1930 I 57, concl. Marc'hadour, note Ripert. Since this decision (known as Jand'heur), the caselaw has been fairly constant,

for whom the defendant must answer. All these grounds are deduced by the courts from Code provisions which have remained essentially unchanged since 1804.[3] If the damage was caused by a public body carrying on a public service, similar notions seem to apply by absorption into public law, where they may be afforced by constitutional principles such as that of equality before public burdens.[4]

Common-law methods of attributing liability remain (as will be demonstrated) much more fragmented. But at common law the mere imputation of liability may not suffice: we need to know if this defendant is liable to this plaintiff for this harm and have a number of ways of handling the separate problems involved. In other words, we treat liability as relative--in holding for the defendants in *Palsgraf*'s case, Cardozo, C.J. said of their employee's careless conduct, "*Relatively* to her [plaintiff] it was not negligence at all."[5] In striking contrast, once liability is imputed, the French technique becomes even more sweeping. They seem to have no fear at all of "a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[6] Consequently, very few control devices are used to limit the number of plaintiffs or the types of compensable harm. The simplest evidence is the limitation period: until 1985 it was thirty years and is now ten years from the manifestation of the damage.[7] In personal injury cases, the number of plaintiffs is not restricted to the direct victim, or, if dead, his or her dependents. Thus, the family can claim compensation for financial and emotional injury caused them by the presence of the living, or the absence of the deceased, victim, and this claim will descend on death.[8] The same is true of the owner of the pedigree poodle savaged by a German shepherd.[9] The husband may claim compensation for personal injury and later his wife can recover

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culminating in the 1984 decision of the Full Bench holding a three-year old strictly liable as custodian of his stick and his parents liable as custodian of their son: Cass.Ass.plén. 9 May 1984, DS. 1984 J 525, concl. Cabannes, note Chabas, at 529.

3. C.civ. arts. 1382-1386.

4. Cass.civ. 10 June 1986, J.C.P. 1986 20683, rapport Sargos. For a general account see René Chapuis, Droit administratif général, vol. 1, part 6 (3rd ed., 2 vols., Montchrestien, Paris, 1988).

5. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 347, 162 N.E. 99 (1928) (emphasis added). Classic English examples would be Gorris v. Scott (1874) L.R. 9 Ex. 125 (contract) and Bourhill v. Young [1943] A.C. 92 (tort).

6. Cardozo C.J. in Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931). For a general comparative account, see F.H. LAWSON & B. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW, vol. 1, chap. 2 (1982).

7. C.civ. 2270-2271, inserted by Loi 85-677 of 5 July 1985 art. 37.

8. Cass.ch.mixte. 30 Apr. 1976, DS.1977 J.185, note Contadine-Raynaud.

9. Trib.Gr.Inst. Caen 30 Oct. 1962, D.1963 J.92.

for her loss caused by his impotence.[10] Inevitably, therefore, along with the admission of numerous plaintiffs goes a disposition to compensate for all kinds of harm, physical, moral and economic. Examples are the loss of a chance to take an examination,[11] or to learn a language and gain promotion,[12] or even the insult sustained by an inventor and his heirs when his name was omitted from a history of wireless telegraphy.[13] The employer who, because of an industry-wide arrangement, has paid full wages during the injured worker's absence, may recover them from the tortfeasor.[14] The football club whose star player is injured or killed may claim the losses over and above his transfer value and even compensation for lower gate receipts, if they can prove that the player's absence caused a fall-off in ticket sales.[15] The buyer of a ship who pays a good price because of the vessel's careless classification by the French equivalent of Lloyd's may recover from it the cost of the repairs required to bring the vessel up to the mark.[16]

One of the greatest of the modern French jurists, Dean Carbonnier, observes that this technique "could not be more general. It has the knack of being everywhere at once which, to our somewhat prejudiced eyes, passes for excellence." He goes on to ask, however, whether "a system of separate torts, concrete, fragmentary, like that of the Romans once or of the English to this day, does not facilitate a more precise treatment of the different sociological and psychological types of civil wrongs and so, despite its apparent antiquarianism, match more closely our modern scientific concerns."[17] It is not the purpose of this paper to suggest that one approach is better than the other. Even the most general comparison, however, provokes some puzzling problems. The French system seems to ignore almost all of Cardozo's warnings without suffering ill effects. Decades have passed since *Ultramares v. Touche*, and yet the common law's fears persist

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10. Trib.Gr.Inst. Valence 6 July 1972, 1972 Gaz.Pal. 2 857, note Tunc.

11. Conseil d'Etat 22 Jan. 1986, A.J.D.A. 1986 719.

12. Cass. civ. 17 Feb. 1961, 1961 Gaz.Pal. 1 400.

13. Cass.civ. 27 Feb. 1951, D. 1951 J. 329, note Desbois. There was no claim for defamation or loss of royalties. A distinguished French scholar has criticised the decision as compensating "un préjudice impossible, venu d'une faute impalpable." Jean Carbonnier, "Le silence et la gloire," D. 1951 Chron. 119, 122.

14. Cass.Ass.plén. 19 June 1981, DS 1981 J 641, note Larroumet.

15. Colmar 20 Apr. 1955, D. 1956 J 723, note Savatier.

16. Cass.req. 15 May 1923, S. 1924 J.81.

17. "Le silence et la gloire," D. 1951 Chron. 119, translated by the present writer.

(especially in England[18]), and in all its jurisdictions the litany of separate torts grows longer by the year. Of course, some torts have grown fat, some have married, and a few have been slain by court or statute; but others are born and (after some debate around the cradle) are given their *proper* name.

Half a century ago, on both sides of the Atlantic, there were confident expectations in some distinguished quarters that a general principle of liability at common law was emerging and waiting to be recognised. Pollock,[19] Winfield,[20] Prosser and Keeton[21] seem to have believed this, though Salmond[22] and Goodhart[23] were skeptical. But the purported principle is better called "residual" than "general." No one argued that the cluster of nominate torts would soon be subsumed in one great nameless whole. Instead the debate is a choice between, in Winfield's words, the "principle that (1) all injuries to another person are torts unless justified; or (2) there is a definite number of torts outside which liability does not exist."[24]

This use of language persists and displays two interesting features in the nomenclature of genus and species.[25] The first concerns

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18. Recent years have seen the highest court retracting the boundaries of liability: *see*, among others, Caparo Industries plc v. Dickman [1990] 1 All E.R. 568 (HL); Murphy v. Brentwood DC [1990] 2 All E.R. 908 (HL).

19. F. POLLOCK, THE LAW OF TORTS viii (1st ed. 1887). Although sanguine, the author was a realist--"we have no right, perhaps, to assume that by any fair means we shall discover any general principles at all" (p.5). By 1923 he was more confident of the residual principle: *see* 12th ed., pp. 21-23.

20. P. WINFIELD, PROVINCE OF THE LAW OF TORT (1931) [hereinafter cited as WINFIELD, PROVINCE]. *See also* his article *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1-11 (1927).

21. D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 1-4 (5th ed. 1984) [hereinafter cited as PROSSER AND KEETON]. The authors' position on the issue is not immediately clear from their text.

22. SIR JOHN SALMOND, LAW OF TORTS § 2(3) (6th ed. 1924). "Just as the criminal law consists of a body of rules establishing special offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability." His learned modern editor concludes that "he was probably right": R.F.V. HEUSTON AND R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 21 (19th ed. 1987).

23. A.L. Goodhart, *The Foundation of Tortious Liability* [1938] M.L.R. 1. In more recent times G. Edward White has stated his view that "torts is not a unified subject but a complex of diverse wrongs whose policy implications point in diverse direction." TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 233 (N.Y. 1980).

24. WINFIELD, PROVINCE, *supra* note 20, at 32-33.

25. Lord Diplock uses the language of genus, species, and sub-species in order to distinguish among different types of potentially tortious trade union action:

the way we describe the noncontractual liability of wrongdoers. The key word is in the plural--*torts*. Prosser and Keeton's first section is headed "What Are Torts?"[26] The eighteenth-century Chief Justice, still quoted today, tells us that "torts are infinitely varied, not limited or confined."[27] When the singular occurs, it is either in the phrase "the tort *of* [name]" or, as in the first words of a recent Australian book on the subject, in the question "What is *a* tort?"[28] or in the teacher's question, "Is this *a* tort?" The second semantic feature is interrelated: the answer to such questions often depends on whether the conduct in question has, or can be given, a name, and a great deal of intellectual energy is devoted to trying to construct some nominate category. When demonstrating the undoubted spread of noncontractual liability, Winfield argues as follows. "Innominate torts . . . have become nominate torts and in the present day it may safely be said . . . that there are specific torts in search of specific names."[29] Prosser and Keeton rightly point out that "there is no necessity whatever that a tort have a name"[30] but they then go on to "*name* but a few" of the various types of misbehavior (from "denial of the right to vote" to "entering [a] person in a rigged television contest"), and conclude, not that "this has been held to be tortious" but that "these have been held to be torts."[31] In 1988 the headline in an English newspaper's Law Report ran, truthfully enough, "Claim for tort with no name is not established."[32]

It is of course the case that a tort called negligence has grown to great size and that many of its brethren live in its shadow. Indeed it often arrogates to itself a separate volume in encyclopedic works so that the innocent inquirer who takes from the shelves the volume of Halsbury's Laws of England entitled Tort, or of Corpus Juris Secundum (Torts) will not find it there. It is also the case that certain types of commercial misbehavior ("unfair competition") have grown so

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Merkur Island Shipping v. Laughton [1983] 2 All E.R. 189 at p. 197a. Mr. John Davies kindly drew my attention to the passage.

26. PROSSER AND KEETON, *supra* note 21, at 1.

27. Chapman v. Pickersgill (1762) 2 Wils.K.B. 145 at 146; 95 E.R. 734, emphasis added. It is cited in the 1989 (16th) edition of the major English work, CLERK & LINDSELL ON TORTS (general editor R.W.M. Dias), at § 1-22.

28. F. TRINDADE AND PETER CANE, THE LAW OF TORTS IN AUSTRALIA 1 (1985).

29. WINFIELD, PROVINCE at 34-35.

30. PROSSER AND KEETON, *supra* note 21, at 3.

31. PROSSER AND KEETON, *supra* note 21, at 6 (emphasis added).

32. Independent 19 July 1988 p. 8. The whole debate recalls the problem which has long confronted readers of Genesis, 2:19-20: "and whatsoever Adam called every living creature, that was the name thereof" (King James version). The classical Jewish commentators on this last phrase explain that "he named each animal and its mate, indicating by name which species naturally belonged to which." A. COHEN, ed. THE SONCINO CHUMASH 11 (1947).

large that they are excluded altogether from the second Restatement of Torts. Yet the lesser fry--the torticles--are still with us and, before asking why, it seems useful to try to see what they are. It is easier to understand things when you know them.

70 Torts

A few preliminary remarks are needed as to the system adopted and the method of compilation.

(1) The order is alphabetical. It would be nice to have been able to aver that this method was selected for the reasons which appealed to the French jurist, Dean Carbonnier, who thinks that "the alphabetical approach is attractive both by the freedom it confers and by the discipline it imposes."[33] The truth is more mundane: it is that the alphabet is virtually the only instrument of intellectual order of which the common law makes use.[34] Innocent of any sense of a *Rechtsordnung*, and suspicious of formal reasoning,[35] the common law is happiest with techniques which, as Weber saw, "are not 'general concepts' which would be formed by abstraction from concreteness or by logical interpretation of meaning or by generalisation and subsumption; nor [are] these concepts apt to be used in syllogistically applicable forms."[36] A striking instance of the common law's hostility to abstract order is found in the way in which almost all of the few American states which did adopt civil codes have since split up their provisions and arranged them alphabetically in the numerous volumes of their legislation.[37]

(2) The compilation is eclectic. It is not thought that every entry on the list is to be found in every common-law jurisdiction. All that can be said is that each entry seems to be law in one or another of

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33. JEAN CARBONNIER, FLEXIBLE DROIT 201 (6th ed. 1988) translated by the present writer.

34. As Roscoe Pound observed, "the common law is little systematised . . .. The law books . . . are typically alphabetical abridgements, digest and cyclopaedias." *The Development of American Law and its Deviation from English Law*, 67 L.Q.R. 49, 50 (1951). The one twentieth-century English judge who displayed great concern for order and system (often learned from the French) was Lord Diplock.

35. *See* Robert S. Summers, *Theory, Formality and Practical Legal Criticism*, 106 L.Q.R. 407 (1990).

36. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, ed. Max Rheinstein 201-02 (1954).

37. A good example is the Century Code of North Dakota, scattered in whose numerous volumes can be found fossilised fragments of the once systematically integrated Civil Code of 1868.

them, and that the emphasis--because of the author's background--is on England.

(3) The list is not a dictionary. The obvious titles are left entirely unexplained, and comments on the rest are selective. In order to simplify citation, page references to the standard American authority, Prosser and Keeton, are given in the form PK.[38] Paragraph references to the major English work, Clerk and Lindsell, are CL.[39]

(4) The list is not encyclopedic. Apart from omissions occasioned by the author's ignorance, the approach seeks to be neither antiquarian nor exhaustive. It does not aspire to present an entirely complete catalogue of all known torts in all common-law jurisdictions in 1991, although those listed all occur in this century and most of them quite recently. The main purpose of the list, however, is to provide the material for the reflections which follow it.

A

Abduction of child: including enticement and harboring, and actionable at the suit of the parent. It may require proof of loss of services, but not in all jurisdictions (PK924-25). Abolished in England in 1982 insofar as the gist is loss of services.[40]

Abduction of spouse: (PK916-17). In England it seems to have been actionable only at the suit of the husband; at least this is all that was abolished (insofar as loss of services is the gist) in 1982.[41] See *Harboring*.

Abuse of process. The key element seems to be that the initiator of the process has grounds for the plaint but is using it to attain

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38. PROSSER AND KEETON, *supra* note 21.

39. R.W.M. DIAS, Gen. Ed., CLERK AND LINDSELL ON TORTS (16th ed., 1989) [hereinafter cited as CLERK AND LINDSELL].

40. Administration of Justice Act 1982 § 2(b).

41. Administration of Justice Act 1982 § 2(a).

some unrelated aim.[42] It is not to be confused with malicious prosecution,[43] in that the gist of it seems to be some special damage.

Adultery: Created in 1857 by the English statute which abolished the action for criminal conversation,[44] it was itself abolished in 1970.[45]

Alienation of spousal affections: (short of adultery) PK918.

Appropriation of name or likeness: If done for advertising purposes this became actionable under a New York statute of 1903,[46] and formed the starting point for privacy protection in the U.S.

Antitrust law violation: treble damages.[47]

Assault

B

Battery

Breach of confidence: CL § 31-01ff.

Breach of contract: "Over some twenty years the [Supreme Court of California has] progressively worked up to the conclusion that implied in every contract is a mutual obligation of good faith in performance, that breach of it is sufficiently tortious to support non-pecuniary damages . . . ."[48]

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42. For the procedural history in England, see J.A. Jolowicz, *Abuse of the Process of the Court: Handle with Care*, CURRENT LEGAL PROBLEMS 77-97 (1990). For the U.S., see PROSSER AND KEETON, *supra* note 21, at 897ff; RESTATEMENT (SECOND) OF TORTS § 682.

43. For England, see Speed Seal Products Ltd. v. Paddington and Another [1985] 1 W.L.R. 1327 (CA): Fox L.J. at 1333-34. "The defendants accept that, so far as the tort of malicious prosecution is concerned, it is necessary for the person asserting the tort to prove [certain features] . . . . But . . . they say that there is a tort of abuse of process of the court established by Grainger v. Hill (1838) 4 Bing NC 212."

44. Matrimonial Causes Act 1857 §§ 33, 59.

45. Law Reform (Miscellaneous Provisions) Act 1970 § 4.

46. N.Y. 126th Sess., ch. 132, § 2.

47. 15 U.S.C. § 15(a) (1982).

48. John G. Fleming, casenote 106 L.Q.R. 10 (1990). *See* Crisci v. Security Insurance Co., 66 Cal.2d 425, 426 P.2d 173 (1967) and JOHN G. FLEMING, AMERICAN TORT PROCESS, 182-83 (1988).

Breach of statutory duty: In England this is distinct from negligence, since it may escape a valid contractual exclusion of liability for negligence.[49] But the plaintiff's right must be "derived from statute and not from the Ten Commandments."[50]

C

Case: Far from dead, this is preserved by recent English legislation: "if apart from this section any action lies against a Justice of the Peace for an act done by him in the execution of his duty as such a justice, with regard to any matter within his jurisdiction as such a justice, the action shall be as for a tort, in the nature of an action on the case . . . ."[51]

Cattle trespass

Champerty: abolished in England in 1967.[52]

Conspiracy

Constitutional torts: the name given in the U.S. to a number of wrongs to civil and constitutional rights.

Conversion: In England, contributory negligence is no defence,[53] unless the thing is a check and the defendant is a banker.[54]

Conveyance to defeat a title: PK3.

Criminal conversation: abolished in England in 1857 (see *Adultery*). In some U.S. jurisdictions it has been abolished judicially: PK917.

D

Data inaccuracy: In England since 1984 "an individual who is the subject of personal data held by a data user and who suffers damage

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49. Murfin v. United Steel Cos. [1957] 1 W.L.R. 104.

50. C.B.S. Songs Ltd. v. Amstrad Consumer Electronics plc. [1988] A.C. 1013 *per* Lord Templeman at 1057.

51. Justices of the Peace Act 1979 § 44.

52. Criminal Law Act 1967 § 14.

53. Torts (Interference with Goods) Act 1977 § 11(1).

54. Banking Act 1979 § 47.

by reason of the inaccuracy of the data shall be entitled to compensation from the data user for that damage and for any distress . . . ."[55]

Deceit

Denial of right to vote

Detinue: abolished in England in 1977.[56]

Disparagement of property: see *Injurious falsehood*

E

Enticement of servant: (including rape, seduction and harboring). Since 1982 in England "no person shall be liable in tort on the ground only . . . of enticement of a servant or harboring a servant."[57]

Enticement of spouse: Unlike *abduction* and *harboring*, this was actionable in England at the suit of the wife.[58] It was abolished in England in 1970.[59]

Eurotorts: So called by Henry, J.,[60] these were created by the U.K.'s accession from 1973 to the Treaty establishing the European Economic Community. Arts. 85 and 86 of the Treaty deal with cartels and monopolies. Lord Denning M.R. said of them: "They create new torts or wrongs. Their names are 'undue restriction of competition within the common market' and 'abuse of dominant position within the common market.'"[61]

F

False arrest: In the Federal Tort Claims Act, Congress lists this separately from false imprisonment.[62]

False attribution: Originating as the innominate ground of an injunction to restrain the defendant from attributing bad verse to Lord

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55. Data Protection Act 1984 § 22.
56. Torts (Interference with Goods) Act 1977 § 2(1).
57. Administration of Justice Act 1982 § 2(c)(iii).
58. Gray v. Gee (1923) 39 T.L.R. 429.
59. Law Reform (Miscellaneous Provisions) Act 1970 § 5(a).
60. Barretts and Baird (Wholesale) Ltd. v. I.P.C.S. [1987] I.R.L.R. 3 at p. 5.
61. Application des Gaz S.A. v. Falks Veritas Ltd. [1974] Ch. 381 at 396 (CA).
62. 28 U.S.C. § 2680(h).

Byron,[63] it is now protected in the U.K. under this name as part of the moral right of authors.[64] It need not be defamatory. In the U.S. it is often called "false light in the public eye." PK863.

False imprisonment

Fraud: see *Deceit* (for England), *Misrepresentation* (for U.S.)

H

Harboring spouse: In England this was separate from enticement, but actionable only at the suit of the husband.[65] Until its abolition in 1970 (see *Enticement*), it displayed the fragmentary tendency of the common law because "every moment that a wife continues absent from her husband, it is a new tort, and everyone who persuades her to do so does a new injury."[66]

Homicide: In England this became actionable at the suit of dependents by the Fatal Accidents Act of 1846. At the suit of the victim, through personal representatives, it became actionable in 1934[67] and included compensation for having been killed in the shape of damages for loss of expectation of life and for earnings in the lost years. These claims were abolished in 1982, so the quick, clean killing of a person without kinfolk or other dependents is only trivially tortious (i.e., burial costs).[68] Even the more courageous American common law provided no response to this problem and nowadays federal and state legislation presents a complex patchwork.[69]

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Injurious falsehood: See *Libel*, and the sundry slanders for injury to reputation: for injury to trade (or marriage prospects), this tort

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63. Lord Byron v. Johnston (1816) 2 Mer. 29, 35 E.R. 851.

64. Copyright, Designs and Patents Act 1988 § 84.

65. Winchester v. Fleming [1958] 1 Q.B. 259; reversed on other grounds [1958] 3 All E.R. 51 (CA).

66. (1745) Winsmore v. Greenbank, Willes 577, *per* Willes C.J. at 583-4; 125 ER 1330, 1332.

67. Law Reform (Miscellaneous Provisions) Act 1934 § 1.

68. Administration of Justice Act 1982 §§ 1,3.

69. For details see STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH (2d ed. 1975).

survives. In England it is also called malicious falsehood, slander of title and slander of goods.[70]

Interference with contractual relations: PK978-1004.

Interference with prospective advantage: PK1005-31. In England this seems to be called interference with business, a "clearly recognised" but "relatively undeveloped tort."[71]

Interference with dead bodies: the name used by the Restatement (Second) of Torts § 868.

Intimidation: "*A* commits a tort if he delivers a threat that he will commit an act, or use means, unlawful as against *B*, as a result of which *B* does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to *C*. The name of 'intimidation' was attached by the House of Lords in 1964."[72] (CL § 15-13).

Invasion of privacy: In the U.S. "no other tort has received such an outpouring of comment in advocacy of its bare existence" (PK850). In England, however, the "law has not yet recognised the invasion of privacy as a tort" (CL § 1-45).[73]

L

Levying an unlawful market: In 1988 an English court held that "the levying of an unlawful market is a tort."[74]

Libel

Loss of consortium: In England this was available, but only to the husband, until 1982.[75]

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70. Defamation Act 1952 § 3, and *see* W.R. CORNISH, INTELLECTUAL PROPERTY §§ 16-037ff. (2nd ed. 1989).

71. *Per* Henry J. in Barretts and Baird (Wholesale) Ltd. v. I.P.C.S. [1987] I.R.L.R. 3 at 6, 10.

72. Rookes v. Barnard [1964] A.C. 1129.

73. *See* Malone v. Metropolitan Police Commissioner (No. 2) [1979] 2 All E.R. 620.

74. Stoke-on-Trent City Council v. W. & J. Wass Ltd. [1988] 3 All E.R. 394 (CA) *per* Nourse L.J. at p. 397.

75. Administration of Justice Act 1982 § 2(a).

M

Maintenance: in the sense of supporting another's lawsuit, abolished in England in 1967.[76]

Malicious prosecution

Mayhem: Blackstone classifies this separately from assault or battery.[77]

Misfeasance in a public office: In 1982 two Australian jurists wrote "a new tort seems to be emerging . . . . Its title is 'misfeasance in a public office.' It is early yet, but if this tort does exist then it exists independently of other torts, such as trespass, negligence, or breach of statutory duty."[78] In an Australian appeal to the Privy Council reported in the same year, the judge called it "well-established."[79]

Misrepresentation: See *Deceit*

N

Negligence

O

Occupiers liability: In England the common law's sundry subdivisions have been abolished and replaced by statutes.[80]

Operating differential retirement ages: "The amending Sex Discrimination Act 1986 introduced . . . the statutory tort of operating differential retirement ages."[81]

Outrageous conduct causing distress: Defined in Restatement (Second) of Torts § 46. Prosser and Keeton explain that "around 1930

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76. Criminal Law Act 1967 § 14.

77. COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769), Vol. III, 120 (1768).

78. ARONSON & WHITMORE, PUBLIC TORTS AND CONTRACTS 120-21 (1982).

79. Dunlop v. Woollahra Municipal Council [1982] A.C. 158 at 172F *per* Lord Diplock. *See also* Bourgoin SA v. Ministry of Agriculture [1986] 1 Q.B. 716 (CA).

80. Occupiers Liability Acts 1957 and 1984.

81. Duke v. GEC Reliance [1988] A.C. 618 *per* Lord Templeman at pp. 641-42. Reference kindly supplied by Mr. Peter Cane.

it began to be recognised [as] a cause of action in itself" (PK60). An early (1897) example is the English practical joker.[82]

P

Passing off

Private nuisance

Procurement: "Procurement of the violation of a right is a cause of action . . . ."[83]

Products liability

Public nuisance

R

Replevin: The American counterpart of the English detinue.[84]

RICO: Treble damages for acts of "racketeer influenced and corrupt organisations."[85]

S

Seduction: North Dakota enacts that "the damages for seduction rest in the sound discretion of the jury."[86] The English do not seem to discuss whether it might be a tort to the woman (see *Statutory Rape*). But for loss of her services, her parent could sue until 1970[87] and her employer until 1982.[88] It does not seem to have been asked whether she was a joint tortfeasor.

Slander

Slander of goods: see *Injurious Falsehood*

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82. Wilkinson v. Downton [1897] 2 Q.B.D. 57.

83. Lumley v. Gye (1853) 2 El & Bl 216 *per* Erle J. at 232; 118 E.R. 749, 755.

84. FOWLER V. HARPER, FLEMING JAMES JR. AND OSCAR S. GRAY, THE LAW OF TORTS § 2.7 (2d ed. 1986).

85. 18 U.S.C. §§ 1961-1968 (1982).

86. N.D. Cent. Code § 32-03-06.

87. Law reform (Miscellaneous Provisions) Act 1970 § 5(b).

88. Administration of Justice Act 1982 § 2(c)(ii).

Slander of women: in England the Slander of Women Act of 1891 ensures that this is actionable per se.

Slander of title: see *Injurious Falsehood*

Statutory rape: "It is to be noted that criminal statutes fixing the age of consent are construed to provide a civil action in nearly all [U.S.] jurisdictions, where the plaintiff is below that age." PK926 n. 48.

Strict liability: an omnibus term to cover the American "ultrahazardous activity" doctrine, and the English theory, which, for want of a better name, is often called (for instance in the index to CL) simply "Rylands v. Fletcher."

T

Trespass ab initio: "Notwithstanding vigorous and unanimous denunciation on the part of all writers who have discussed it, the fiction has survived, at least until recently." (PK151).

Trespass to chattels

Trespass to land

Trespass to the person

Trover: see Conversion

U

Unfair competition: so large a field that the American Law Institute has excised it entirely from the Restatement of Torts.[89] Prosser and Keeton say that it "describes a general category into which a number of new torts may be placed when recognised by the courts" (PK1015).

Unlawful racial discrimination: In 1988 an English judge observed that "damages for this relatively new tort of unlawful racial discrimination are at large . . . ."[90]

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89. RESTATEMENT (SECOND) OF TORTS, introductory note to division nine.

90. Alexander v. Home Office [1988] 2 All E.R. 118 *per* May L.J. at p. 122g.

V

Vexatious litigation: "a legal process in itself perfectly well founded may amount to a legal wrong if vexatiously and unnecessarily repeated." (CL § 19-48)

W

Wrongful civil proceedings: This is to civil actions what malicious prosecution is to offenses. It is also called maliciously instituting civil proceedings and, in England, is "separate and distinct" from abuse of process.[91]

Some Reflections

(1) The List

Perusal of the list confirms some obvious points. Firstly, there is room for debate as to whether its entries present a fair picture of the common law. On the one hand it may be thought that too many are merely curios. On the other hand the list could have been longer. As it stands, it refrains from enumerating separately the various infringements of commercial good dealing, and gives only the older and distinct types of unfair competition. The same is true of intentional emotional harm--for instance, there is a rich harvest of American litigation concerning corpses (including those of suicides) which could have been sheaved into separate causes of action. Animals also cover a wide variety of distinct heads of liability and partial immunity (man hurts dog biting sheep),[92] but only cattle trespass has been named. Similarly, the American "constitutional torts" could be subdivided, as could the English "breach of statutory duty."

Secondly, there is an underlying *a fortiori* type of reasoning: if careless killing is tortious, so is murder; if mislaying a corpse can be actionable, so can withholding it. One result may be that the older intentional torts lose some of their theoretical importance. In rejoinder, it can be observed that *a fortiori* reasoning, though attractive, is not always accepted. Take for instance the problem of classifying the deliberate release of a dangerous thing:

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91. Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette, Inc. and another [1989] 3 All E.R. 14, *per* Slade L.J. at 50j, 52d.

92. The English Animals Act 1971 devotes a lengthy section (§ 9) to this event.

> Counsel for the plaintiff . . . argues that if strict liability attaches in respect of an escaping tiger, the duty can be no lower in the case of a deliberately released tiger. The defendant's duty, he says, is to keep the tiger in at his peril. That makes sense, but begs the question whether the liability for release is in trespass or *Rylands v. Fletcher*.[93]

Thirdly, some of the named torts seem to be ways of committing others, and appellations of appropriate generality can often be devised to cover several smaller categories. For instance a Kentucky court said in 1975: "the tort is interference with the marriage relation . . . criminal conversation, enticement and alienation of affections are no more than methods by which this tort may be committed."[94] One enduring problem, however, is the limits of this process, and indeed much forensic debate concerns the appropriate level of generalisation and subsumption. On the whole the list of seventy-odd torts seems a not unfair picture of a persistent way of thinking which comes naturally to the legislator, judges, and jurists of the common-law world.

(2) The use of nominate categories

a. *Statute*. That the legislator thinks in terms of separate nominate torts is easy to demonstrate. The Federal Tort Claims Act, for instance, after making the U.S. "liable . . . to tort claims in the same manner and to the same extent as a private individual . . ."[95] goes on to provide exceptions for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[96] In England in 1977 an elderly and inoffensive torticle was slain by three statutory words: "Detinue is abolished." The following sentence prudently provides that "an action lies in conversion . . . in a case which is not otherwise conversion, but would have been detinue before detinue was abolished."[97]

b. *Caselaw*. To this day, a great deal of courtroom time and ingenuity is devoted to classifying, distinguishing, and cataloguing different types of torts. This is done for a number of purposes, typically to get a claim off the ground, to defeat a particular type of

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93. Rigby v. Chief Constable of Northamptonshire [1985] 2 All E.R. 985 *per* Taylor J. at p. 996e. Mr. John Davies kindly drew my attention to this passage.

94. Skaggs v. Stanton, 532 S.W.2d 442 (1975).

95. 28 U.S.C.A. § 2674.

96. 28 U.S.C.A. § 2680(h).

defence, or to make use of a particular remedy. That perceptive outsider Max Weber noted this feature and described the common law's development of trespass as a means whereby "the most diverse phenomena are thrown together in order to obtain *actionability by indirection*" (um auf einem Umweg den Rechtszwang zu erlangen).[98]

(i) *Motions to dismiss.* The technique of listing names occurs frequently nowadays in motions to strike out a proceeding on the grounds that it discloses no cause of action. The pleader who proffers some unnamed type of misbehavior risks getting no further; and it is interesting to see how the various nominate torts will be put forward first and, if possible, a name invented for the newcomer. Thus when Iowa decriminalised adultery, an action for criminal conversation looked unlikely to succeed. But the torts of "criminal conversation and alienation of affections are separate and distinct," and the motion to dismiss was unavailing.[99] In England, the recent litigation about the acquisition of Harrods department store has led to some interesting applications of the technique of naming. The defendant was the successful take-over bidder; the loser alleged that his failure had been occasioned by fraudulent statements made by the winner to the Secretary of State, which led to the successful bid's not being referred to the Monopolies and Mergers Commission. The statement of claim against the winner and their bankers pleaded (a) conspiracy, (b) negligence, (c) "an innominate tort which they defined in the course of the hearing."[100] At first instance, all were struck out. By the appeal stage, the third cause of action had acquired a name: "the common law tort of wrongful interference with trade or business" whose "existence . . . is conceded by the defendants" and which "may still be described in our law as new."[101] On this point the appeal succeeded.

On the other hand, a recent and robust English judgment deals with a novel name thus: "the causes of action . . . are four: copyright, passing-off, breach of confidence, and the strange tort called 'fraudulent interference with trade.'"[102] After disposing briskly of the

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97. Torts (Interference with Goods) Act 1977 § 2.

98. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 36, at 221. The translation is elegant but perhaps too concise: the original is taken from WEBER'S RECHTSSOZIOLOGIE, ed. J. Winckelmann, 214 (1960).

99. Bearbower v. Merry, 266 N.W.2d 127, 130 (Iowa 1978), citing Giltner v. Stark, 219 N.W.2d 700, 704 (Iowa 1974).

100. Lonrho plc v. Fayed and others [1988] 3 All E.R. 464 *per* Pill J. at 466.

101. Lonrho plc v. Fayed and others [1989] 2 All E.R. 65 at 68f, 71f.

102. Swedac Ltd. v. Magnet & Southerns plc [1989] 1 F.S.R. 243 *per* Harman J. at p. 247.

first three, Harman J. held "there is no such tort"[103] and struck out that claim.

A similar intellectual process was analysed rather more deeply in recent English litigation about a Goya.[104] The painting was about to be sold at auction, having been exported from Spain under documentation which that country's government (though not claiming any title whatever to the painting) asked the court to declare was fake. On a motion to strike, plaintiff's counsel put forward the nominate torts of passing-off, malicious falsehood, and defamation. Sensing that these were failing, he then pleaded "the basic right of a citizen not to have untruths told about himself."[105] The futility of relying at common law on a right rather than a wrong was made clear by the judge:

> In the pragmatic way in which English laws have developed, a man's legal rights are in fact those which are protected by a cause of action. It is not in accordance, as I understand it, with the principles of English law to analyse rights as being separate from the remedy given to the individual.

The very existence of the nominate torts was then used by the defence and accepted by the judge so as to deny a general right: "if there were any such general right as [plaintiff] contends for, it is impossible to see why the specific constituent elements of passing off or malicious falsehood have ever developed."[106]

(ii) *Defences.* The names of torts may also be deployed in order to permit or deny a particular defence. In the U.S., for instance, if a surgeon in a veterans' hospital cuts the wrong leg off and his action is classified as "battery," the plaintiff loses to the defence of government immunity; were it called negligence, he would win.[107] Conversely when an English plaintiff's legs were run over while she was sunbathing and she sued in trespass, the Court of Appeal held that "when the injury is not inflicted intentionally . . . the only cause of

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103. *Id.* at 249.

104. Kingdom of Spain v. Christie Ltd. [1986] 1 W.L.R. 1120.

105. *Id.* at 1129.

106. *Id.* at 1129. In the end the claim was not struck out, as the government had an arguable "equitable right" to deter the use of forged public documents; *id.* at 1130-31.

107. Moos v. U.S., 225 F.2d 705 (8th Cir. 1955), affirming 118 F. Supp. 275 (D. Minn. 1954).

action is negligence" and so was barred by the Statute of Limitations.[108]

The defences to a defamation action are numerous. In 1987 the plea of qualified privilege available to the writer of a reference was neatly avoided by the English plaintiff who sued in negligence.[109] This prompted a New Zealand plaintiff whose defamation claim was met by the defence of truth to plead negligence; but on appeal it was held that "the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common-law duties of care not to publish the truth would be to introduce a distorting element."[110]

(iii) *Remedies*. By changing the name it is sometimes possible to make use of a particular remedy. It is in order to award punitive damages that the California courts hold breach of contract to be tortious (see the list above). By contrast in England, where a "cruel and wicked" landlord broke the lease contract, the Court of Appeal overturned a small award of punitive damages, saying "I am not satisfied that there is a tort of eviction."[111] A somewhat similar technique was used recently to deny damages to an insured who claimed to be injured by the insurer's failure to disclose certain relevant matters.[112] The English Court of Appeal held that the power to give relief stemmed from the equitable jurisdiction to grant rescission and therefore, under that heading, there could be no award of damages.[113] For such a remedy we must turn to the common law, and accordingly Slade L.J. reasons that ". . . a breach of the obligation must, in our judgment, constitute *a tort* if it is such as to give rise to a claim for

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108. Letang v. Cooper [1965] 1 Q.B. 233 *per* Denning M.R. at 240.

109. Lawton v. BOC Transshield Ltd [1987] 2 All E.R. 608.

110. Bell-Booth Group Ltd. v. Attorney-General [1989] 3 N.Z.L.R. 148, *per* Cooke P. at p. 156. The plaintiff also pleaded, unsuccessfully, the tort of misfeasance in a public office.

111. Perera v. Vandiyar [1953] 1 W.L.R. 672 *per* Evershed M.R. at 675.

112. Banque Financière de la Cité SA v. Westgage Insurance Co. Ltd. [1989] 2 All E.R. 952 (upheld by House of Lords [1990] 2 All E.R. 947). For a general overview, see Bernard Rudden, *Disclosure in Insurance: The Changing Scene* in LECTURES ON THE COMMON LAW, vol. 3, p. 1 (1991), B.S. Markesinis, ed..

113. Banque Financière v. Westgage Insurance Co. [1989] 2 All E.R. 952 at 996f. May L.J. used similar reasoning in The Good Luck [1989] 3 All E.R. 628 at 659g. In fact the right to relief from a contract of insurance on the grounds of either party's failure to disclose relevant matters stems from neither equity nor the native common law. It is a child of the European law merchant and dates from at least the fourteenth century: L. GOLDSCHMIDT, UNIVERSALGESCHICHTE DES HANDELSRECHTS, HANDBUCH DES HANDELSRECHTS, vol. 1, pt. 1, p. 376 (1891).

damages. There is no authority whatever to support the existence of such a tort."[114]

In the tort of defamation, we have seen how plaintiffs try to evade defences by suing under some other tort's name. The same is true of remedies. An injunction to forbid publication is normally not available in England where the claim is in defamation and the defence justification--as an American lawyer would say, there is to be no prior restraint. Yet if the plaintiff sues in conspiracy, an interlocutory injunction may issue.[115]

c. *Doctrine.* A master like John Fleming uses the names with great deftness: "While it is injurious falsehood for a defendant to claim that your goods are his, it is passing-off for him to claim that his goods are yours."[116] But many interesting if rather less elegant contributions to the taxonomy--or more often physiognomy--of torts appear constantly in the Law Reviews. It is in no way the present writer's wish to disparage these studies or to suggest any deficiency in their scholarship and shrewdness. All that need be done here is to call attention to their intellectual technique. They do not, for instance, approach a given area by asking such questions as: has *P* suffered harm; was the harm caused by *D*; how; ought *D* to compensate for that harm caused in that way? Instead these and similar issues are addressed by focusing on the names attributed to particular categories of specific torts. For instance, in one recent discussion of commercial misbehavior we read "it will be necessary to analyse the specific economic torts" and are told that recent developments "have revealed a variety of torts under [an] umbrella title . . . . It is necessary to separate out and rename the individual varieties in order to avoid confusion."[117] A very recent contribution to the Cambridge Law Journal on this area of law states that "the purpose of this article is to argue that there is an important division in principle between the tort of conspiracy to injure another by lawful means and the tort of conspiracy to injure by unlawful means" and ends by concluding that they "are not two examples of the same general tort of conspiracy."[118]

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114. [1989] 2 All E.R. at p. 996e (emphasis in original).

115. Gulf Oil Ltd. v. Page [1987] 3 All E.R. 14 (CA); Femis-Bank (Anguilla) Ltd. and Others v. Lazar and Another (Browne-Wilkinson V-C) Independent Newspaper Law Report 11 Feb. 1991.

116. JOHN G. FLEMING, THE LAW OF TORTS, 675 (7th ed., 1987).

117. Hazel Carty *Intentional Violation of Economic Interests: The Limits of Common-Law Liability*, 104 L.Q.R. 250, 251, 255-6 (1988).

118. Philip Sales, *The Tort of Conspiracy and Civil Secondary Liability*, 49 CAMB. L.J. 491 and 514 (1990).

(3) Concluding comments

It ought to be possible to disentangle the two different questions to be raised about the intellectual structure of the common law on the noncontractual liability of the wrongdoer. The first asks why we fragment the topic into distinct categories; the second concerns the felt need to name them. Unfortunately for the analyst, the two issues are rarely distinguished in the process of making and applying the law.

Presumably the main reason for this approach by legislator, judge and jurist is tradition. Common lawyers seem always to have thought like this, perhaps because of a connection between civil and penal redress which is still evident in our language. We "commit" a tort as we "commit" an offense. We can be "guilty" of either or both; and all our crimes are nominate.

It is rather more difficult to account for the *persistence* of this mode of thinking, especially when compared with our approach to contract. It is true, of course, that there are the great contractual figures and that they have names: sales, hire, loan, partnership, and the like. But common lawyers are quite happy to reason within the "general part" of the law of contract and, indeed, are much less likely than the civil lawyer to make use of its nominate categories. A similar objection may perhaps be made to Peter Goodrich's more sweeping depiction of law itself as being primarily the great baptiser, exercising

> the power to name which has increasingly come to define the principal territory of the legal profession . . . . By diverse scribal and epistolatory rules it is the legal oracle alone that can legitimately call up the immemorial past and through its originary signs, its self-presence in the legal text, can determine and limit the contours--the shapes and likenesses--of the future.[119]

While there may be much truth in his description, the problem in the context of this paper is why we so unthinkingly treat tort like this, but not all other branches of law.

At a more humdrum level, it may be said that for trial lawyers the persistence of both categorisation and naming is understandable. As to the first, Professor Stone once pointed out that "the most readily accepted authority is that which is most mechanically applied."[120] As

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119. PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS, 141 (1990).

120. *Touchstones of Tort Liability*, 2 STAN. L. REV. 259, 262 (1950).

to the second, we may take the rational view that naming is merely for convenience: "the Supreme Court of Judicature Act, 1873 abolished forms of action. It did not affect causes of action; so it was convenient for lawyers and legislators to continue to use . . . the names of the various 'forms of action' . . . ."[121] Yet this view, while true in part, does not explain the real problem, which concerns the act of naming, rather than any particular name. Perhaps one may surmise that, because of the resonance that clings to a known name--assault, trespass, libel--pleaders may naturally hope that the act of naming will in itself confer actionability. Similarly, most common-law judges take it for granted that they ought to respond to a dispute in the mode of discourse by which it has been presented, and so--as the earlier examples show--will hold that "there is no such tort as" eviction, or harassment, or whatever. It is not so easy to explain why the jurists adopt the same approach.

In discussing the characteristics of the common law, René David speaks of "the formulation of the mould of thought by which the law is articulated, that is to say the *legal rule*."[122] He then goes on to call attention to the fact that "the English legal rule is situated at the level of the case for which--and only for which--it has been enunciated in order to decide it. If it were placed at a higher level, it would make English law 'doctrinal' and would distort it."[123] If one of the tasks of this doctrine is to help us organise, understand and evaluate the raw material of the law--the statutes and cases--the technique of which examples have been given is one of the common ways in which that task is performed. Much of the process seems to be a search for the appropriate level of generality. The examples quoted convey the attraction to the common lawyer exerted by the precise and the particular. "Unfair competition" may be a good title for a general category in which, as Prosser and Keeton say, "a number of new torts may be placed," but standing by itself it is not felt to be enough: indeed an English judge has recently held that "unfair competition is not a description of a wrong known to the law."[124]

An argument in favor of the common law's method might be that the familiar names instantly convey to lawyers vital information about, for instance, whether damage to the plaintiff has to be proved, or what must be shown about the defendant's state of mind or conduct.

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121. Letang v. Cooper [1964] 2 All E.R. 929 *per* Diplock L.J. at p. 935A. Mr. John Davies kindly drew my attention to this passage.

122. RENÉ DAVID AND JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY § 320 (3rd ed., 1985) authors' emphasis.

123. *Id.*

124. Swedac Ltd. v. Magnet & Southern plc [1989] 1 F.S.R. 243 *per* Harman J. at 249.

There is a difficulty with this view. Such information is rarely immanent in the name alone; it comes only by training and association, not by any quality of the tort's title. Indeed the very invocation of a given name may conceal important similarities or distinctions. For instance, Prosser and Keeton debate whether words can be an assault.[125] A few pages later (but under a different name) they deal with the practical joker who untruthfully told the plaintiff her husband had been injured, thereby making her ill. All he did was to say some words, but he was of course liable.[126] This splitting of the treatment into small nominate torts here blurs the real issue, which is whether nondefamatory harmful words should be actionable without proof of damage.

The twentieth-century development of this branch of the law seems to be a two-way process. On the one hand, wrongs which might go under general names, such as unfair competition or breach of statutory duty, are subject to pressure to fragment into more precisely named torts; the quotations above provide some illustrations of this, and there is abundant evidence in the law reviews and law reports. On the other hand, there has undoubtedly been, in Clerk and Lindsell's words (§ 1-26), "a collation of a miscellany of careless wrongs into the tort of negligence."[127] Even here, however, very recent English caselaw at the highest level shows a marked retreat from the bolder generalisations of the 1970s. Within the tort called negligence there is to be found a resurgence of specific categorisation, and one comment made by an Australian judge in 1985 has been repeated again and again: "It is preferable, in my view, that the law should develop novel categories of negligence incrementally, and by analogy with established categories . . . ."[128]

It is true that doctrine, on both sides of the Atlantic, concentrates now on negligence. But reflection on the list given above provokes two last comments. First, negligence is a tort which happens relatively infrequently. Granted that it forms a large proportion of the 800,000 tort claims filed annually in the U.S.[129] But every year in that country there must be 50,000,000 torts not one of which is negligence. The source for this piece of information is, of course, the U.S. crime

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125. PROSSER AND KEETON, *supra* note 21, at 44-45.

126. *Id.* at 60.

127. CLERK AND LINDSELL, *supra* note 39, at § 1-26.

128. Sutherland Shire Co. v. Heyman (1985) 60 A.L.R. 1 *per* Brennan J. at 43-44 cited, for instance, in Murphy v. Brentwood DC [1990] 2 All E.R. 908 by Lord Keith of Kinkel at p. 915b.

129. JOHN G. FLEMING, THE AMERICAN TORT PROCESS 1 (1988).

figures.[130] It is there, under the titles homicide, rape, larceny and the like, that we find assault, battery, conversion and Blackstone's mayhem. Crimes are none the less tortious for being rarely sued on.

The final function of the list is to support the sceptics. In England, Carol Harlow's excellent study of government torts warns us that "the law of torts is not the scientifically designed machine for the allocation of losses which many modern writers would like it to be."[131] In the U.S., Professor White draws from his wide-ranging intellectual history of the topic the moral that "the capacity of the law in America to resist serving as an orderly system of social control is at least as strong as the impulse of legal theorists to make it so serve."[132]

This paper began with a brief account of the French method of generalisation. Certainly, their technique of operating at a higher level of abstraction has the advantage of enabling the law to be expounded very clearly and systematically. But whether the final result is any better is not something that can be measured. Dean Carbonnier's description of his system's style has been quoted earlier; and it is salutary to recall his verdict on the great mass of twentieth-century French caselaw in this field: "an enormous waste of intelligence and time."[133]

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130. The U.S. Bureau of Justice Statistics Office estimates that in 1989 36,100,000 household and personal crimes were committed. Press Release BJS 1-202-724-7782, 13 May 1990. The total does not include commercial crime (theft from stores, etc.), vandalism and the like.

131. CAROL HARLOW, COMPENSATION AND GOVERNMENT TORTS, 40 (1982). For a witty and penetrating proof of this, see Tony Weir, *Abstraction in the Law of Torts*, 15 CITY OF LONDON L.R. [1974].

132. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 243 (1980).

133. JEAN CARBONNIER, DROIT CIVIL, vol. 2, *Les biens et les obligations* § 192 (P.U.F., 1967, translated by the present writer).