TORT-RELATIONS

ALBERT J. HARNO
Professor of Law, University of Kansas

Legal relations can exist only between persons as members of organized society. A societal system and the singling out of two of its members are the essentials upon which legal relations are predicated. In legal contemplation society is grouped in twos with complex permutations. Where one member has a legal right, some other member has a legal duty; where one has a privilege, another has a no-right, etc. The whole system is inherently correlated. Upon this basis society functions. Society formulates the policy which will promote its welfare. If an individual runs amuck society penalizes him. The pertinent question is, what will or will not society do on behalf of one of its members and against another? In either case legal relations exist.[1]

It should be emphasized that there are no "inalienable" or "absolute" rights, privileges, etc.[2] The term "right," when used in the Hohfeld sense, means merely that one member of society has an affirmative claim against another member, which claim society will enforce.[3] The basis

---

[1] It remained for the late Professor Hohfeld, in a constructive contribution to the law, to formulate a system of opposites and correlatives including eight concepts with which, it is believed, all the legal relations of persons can be expressed. See article by Hohfeld entitled *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16. His classification is as follows:

Opposites	right / no-right	privilege / duty	power / disability	immunity / liability
Correlatives	right / duty	privilege / no-right	power / liability	immunity / disability

Careful study should also be made of another article by Professor Hohfeld under the same title, (1917) 26 *id.* 710, and of an article by Professor Corbin entitled *Legal Analysis and Terminology* (1919) 29 *id.* 163, and one by Professor Cook, *Hohfeld's Contributions to the Science of Law* (1919) 28 *id.* 721. But see Kocourek, *The Hohfeld System of Fundamental Legal Concepts* (1920) 15 ILL. L. REV. 24.

It is to the merit of the Hohfeld analysis that it offers a systematic arrangement of legal relations, and that it gives to each of its terms a definite and specific meaning. Any system that tends to obviate the use of important words in double, triple, and even quadruple senses should be welcomed in the realms of legal thought. The word "right" is, perhaps, the most abused, being commonly used in as many as four different senses. One is reminded of the blind men of old defining an elephant.

[2] Relations based upon constitutional limitations which are frequently referred to as "inalienable rights" present a question outside of the scope of this study and are not discussed herein.

[3] Cf. Duguit, *Progress of Continental Law in the 19th Century* (Continental Legal History Series, 1918) 72-73.

of the "right" concept, as well as that of the other seven concepts in the Hohfeld scheme, is in policy. This policy prescribes what the legal relations between persons shall be. The individual is merely part of the scheme. A man has a right or a no-right, a privilege or a duty, as society dictates. And society issues or withholds its commands for purely practical reasons. A has a right and B a duty if the orderly functioning of society is thereby promoted; otherwise B has a privilege and A a no-right. Herein lies the test.

It is often said that A has a right that B shall not, without legal justification or excuse, cause A harm.[4] But when is there a right, and when a justification or excuse? This is a question of policy over which society deliberates and which it determines in its own interest. A and B are merely creatures of a system. The particular legal relation involved between A and B is but one of many existing between A and B, A and C, B and C, C and D etc., the aggregate of which we call organized society. Societal organization thus has its basis in the control society exerts for its own preferment over the specific legal relations between persons.

A tort always involves the violation of a right and the corresponding breach of a duty. The right violated is a primary one; the resulting right (to damages) is secondary.[5] The primary right and duty in torts are generally *in rem;* the secondary right and duty are always *in personam.*[6] A has a right not to be assaulted by B. A has similar rights against every member of society, each one of whom is under a corresponding duty to A. In this instance, A's right is primary and *in rem.* Should any person (B) assault A, a secondary right in A and a corresponding duty in B would immediately result. The secondary right and duty are *in personam,* since this relation exists only between A and B.[7]

Right-duty relations. In the Hohfeld scheme right-duty relations are of primary importance. Our immediate problem is to study the right and duty concepts in connection with torts. Pertaining to torts, when will society command an act or forbearance by one of its members at the instigation of another? The harm element comes first for discussion. A has a primary right that B shall not cause him harm. The

---

[4] See Pollock, *Torts* (11th ed. 1920) 1; Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1; Wigmore, *Tripartite Division of Torts, id.* 200.

[5] Corbin, *Legal Analysis and Terminology* (1919) 29 YALE LAW JOURNAL, 163, 171.

[6] For a discussion of *in rem* and *in personam* used see Hohfeld's article (1917) 26 YALE LAW JOURNAL, 710.

[7] See Pollock, *Torts* (11th ed. 1920) 2; see further, Pollock, *A First Book of Jurisprudence* (4th ed. 1918) 84-94, where rights *in rem* are referred to as "impersonal" rights, and rights *in personam* as "personal" rights. Cf. Bigelow, *Torts* (8th ed. 1907) 12, 13.

sufferance of harm by A is one of the operative facts which, together with others, gives rise to a secondary right in A to damages from B. Omit the harm and there is no violation of a right, and correspondingly no breach of a duty. This harm element may assume a variety of forms. The physical injury from a battery; the mere mental apprehension of a battery, called an assault; words uttered or written, or caricatures and the like affecting reputation; injuries resulting from deceit; injuries resulting from unfounded legal prosecutions; interference with copyrights and patents; injuries due to negligence; annoyances such as disagreeable odors, sounds, and the like; interference with privacy; interference with advantageous relations between persons—these are some of the specific harms, which, when suffered, form a basis for the recovery of compensation.

A person having suffered harm, organized society, at the instance of the injured party, seeks to fasten responsibility. This involves a discussion of the term "cause" and of the operative features of the causal act or omission. We have nothing to do with cause and effect in their broad significance; our problem is with legal cause. The causal conduct must be operative in the legal sense; otherwise new legal relations cannot arise.

Threading its way through much of the field of torts, and closely linked with causality, is the element of foresight. A man, it is said, must foresee such harm as the average prudent and intelligent person could have foreseen if similarly situated. The question, it is to be observed, is not what the individual who brought on the harm could have foreseen, but rather his conduct is judged by a standard—that which the average person could have foreseen. What this means is that a man's conduct is actually judged by twelve individual standards —the jurors who sit in the case—and the standard of the average man is the result, more or less, of a blending of the twelve. The problem as to foresight might be stated in this manner. If from the standpoint of the average man there was a strong likelihood that harm would result from a certain line of conduct, and harm has followed, it is said to have been done intentionally; if there was a fair probability of some harm (not necessarily any particular harm), it is said to have been done negligently; if there was no probability of harm, it is called an accident.[8]

In the case of intentional harms the question of causality is simple. The intentional act followed by the injury always bears the relation of legal cause and effect. What a man deliberately plans is the legal consequence of his act.[9] Where a man plans harm, and it results, he is

[8] Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1. Cf. Salmond, *Jurisprudence* (4th ed. 1913) 336, 337.

[9] "Any intentional consequence of an act is proximate." Terry, *Proximate Consequences in the Law of Torts* (1914) 28 HARV. L. REV. 10, 17. And see Pollock, *Torts* (11th ed. 1920) 334; Salmond, *Torts* (5th ed. 1920) 21-22.

often made to answer in damages, not only for the harm intended, but also for uncontemplated consequences. Thus, if A strikes B intending merely to knock him down, and B has a thin skull, which is fractured on the pavement, A must pay damages for B's broken skull. Further, if A intentionally strikes at B and hits C, the latter can recover damages from A.[10] Here, to be sure, A did not intend to strike C, yet he did intend harm, and it resulted. Observe that legally the inquiry is not into A's actual state of mind. The jury determines the intention from the consequences of the act. There having been a strong probability of harm, the inference is that it was done intentionally. But attend to the fact that even though legal cause is established, it does not necessarily follow that the person injured can recover damages. This right depends upon a rule of policy which will be further considered under privilege—no-right relations.

Where the likelihood of harm is not so strong, and yet there is a fair probability that some harm will result from a man's conduct, he must indemnify the party injured, provided the act or omission was the legal cause of the injury and provided the act or omission was without legal justification or excuse. Our inquiry is now in the field of negligence. The important elements to be considered in this connection are harm, foresight, causation, and legal justification or excuse. The harm element, previously discussed, is ever an important one in torts. The excuse or justification element will receive later consideration in connection with privilege—no-right relations. Our problem for immediate study is concerned with foresight and causation.

The elements of foresight and causation are often confused.[11] Foresight is important in establishing negligence. Negligence is determined by the probable results of a man's acts as foreseeable by the average man similarly situated.[12] If harm was not foreseeable, there need be no further inquiry for in that event there was no negligence. Only in case it is determined that harm was foreseeable, does the further problem of legal cause become material. Observe that probability of harm and want of foresight do not establish legal causality. For example, where the defendant, a town, had wrongfully left open an excavation in its streets, and the plaintiff, a constable, in passing with a prisoner, was thrown into the pit by the prisoner and was injured, it was held that no matter how negligent the defendant was, the negligence was not the legal cause of the injury.[13]

Assuming, then, that both harm and negligence have been established, when can it be said that the act and the harm bear the relation of

[10] *James v. Campbell* (1832, C. P.) 5 C. & P. 372.

[11] *Smith v. London and S. W. Ry.* (1870) L. R. 6 C. P. 14, 21; *Christianson v. Chicago, St. Paul Ry.* (1896) 67 Minn. 94, 69 N. W. 640.

[12] Bohlen, *The Probability of Natural Consequences as the Test of Liability in Negligence* (1901) 40 AM. L. REG. 148, 161.

[13] *Alexander v. Town of New Castle* (1888) 115 Ind. 51, 17 N. E. 200.

legal cause and effect? Beginning with Lord Bacon's maxim, *in jure non remota causa sed proxima spectatur*,[14] various rules have been offered.[15] None, however, has been entirely satisfactory. Much of the difficulty has been due, as has been suggested, to a want of differentiation between foresight and causation. Further, the distinction is often overlooked between a fact and an inference from a fact. Legal cause is a mental conception.[16]

Harm may result from an act or an omission. If from the latter, to establish legal cause, there must have been a primary duty to act. Further, this duty is broken only in case the doing of the act would have prevented the harm, for if the result would have happened notwithstanding the omission, legal cause is not established. This principle is illustrated in the following case: A negligently left a hole unguarded in some ice near a highway, and B's horses, which had become frightened, ran into it and were drowned. It was held that, since the speed of the horses was so great that even if the guard required by statute had been erected it would not have stopped them, A's omission was not the legal cause of the injury.[17]

Where there is a primary duty not to do an act, the doing of which will probably result in harm, our inquiry, in relation to legal cause, can be stated as follows: (1) Did the act directly cause the result; or (2) did the act become the direct and efficient cause of setting another force or forces in motion which directly caused the result; or (3) did the force of the act come to rest in a position which exposed it to the force of a non-voluntary agency which in the light of common experience would probably create a new risk or increase an existing one, from which the harm directly resulted?[18] In any case, it is submitted, legal cause has been established. We shall consider these proposals in their order.

Where there is the relation of cause and effect between the act and the harm, legal cause is established when the harm is the direct result of the act. Of the three proposals stated, this one offers the least difficulty. Examples are numerous. Ordinarily in cases of this nature the question of cause is not litigated. The following facts were, perhaps, unusual enough to deserve notice. The defendant negli-

[14] Bacon, *Maxims*, 1.

[15] See discussion by Smith, *Legal Cause in Actions of Tort* (1911-1912) 25 HARV. L. REV. 103, 223, 303.

[16] "Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the courts as the test by which to ascertain whether a particular harm is to be ascribed to a particular act or omission as its consequence as a prerequisite to the imposition of legal responsibility therefor." Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233, 234.

[17] *Sowles v. Moore* (1893) 65 Vt. 322, 26 Atl. 629.

[18] See article by Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633. The writer finds himself much indebted to Professor Beale for this able article.

gently ran his tug against the fender of a bridge. The force of the blow was transmitted through the intervening piles to where the plaintiff stood and his foot was caught. The defendant's act was held to be the legal cause of the plaintiff's injury.[19]

Where the result was not the direct consequence of the act, and other forces have contributed, an act may yet be the legal cause of the harm where the force of the act directly sets other forces in motion and these in turn directly cause the result. The celebrated squib case furnishes an illustration. A threw a lighted squib into a building full of people. It fell near a person who instantly cast it from him. Another did the same. The last time it exploded near B and blinded his eye. A's act was held to be the legal cause of B's injury.[20] So where A, driving a horse hitched to a sleigh, negligently ran into another horse hitched to a sleigh which B was driving, causing B's horse to run away, and as a result C was injured, C's injury was the legal consequence of A's act.[21]

When the force of a man's act has spent itself, a court will not, as a rule, follow it further than to its quiescent state. Yet where through negligence it comes to rest in an exposed position where it is subjected to non-voluntary agencies, which ordinarily create a new risk or increase an existing one, and from which harm directly results, the act is the legal cause of this consequence. Such a case arose where a cutter, as a result of negligent navigation, struck a shoal just outside of the plaintiff's sea-wall. The vessel there became unmanageable and was driven by wind and tide against the sea-wall and was damaged. The court held that the damage was the legal consequence of the defendant's act.[22] Ths case should be distinguished from the following one: The defendant negligently permitted water to run down a gutter to a grating where it would have harmlessly flowed into a sewer had it not been for an exceptionally severe frost which caused the grating to freeze over, resulting in injury to the plaintiff's horse which slipped on the ice. There the frost was not an ordinary risk and the plaintiff did not recover.[23]

We have been dealing with cases in which the element of foresight was an important ingredient in establishing a duty. In some instances, however, a duty may arise irrespective of foresight. Here it may be said in all truth that a man acts at his peril. Such cases frequently arise in relation to trespasses to property by men or animal, violation of statutory duties, injuries received from vicious and wild animals, and in certain cases in connection with the use of land.

A, the owner of land, has a right that B shall not enter his land.

[19] *Hill v. Winsor* (1875) 118 Mass. 251.
[20] *Scott v. Shepherd* (1773, C. P.) 2 W. Bl. 892.
[21] *McDonald v. Snelling* (1867, Mass.) 14 All. 290.
[22] *Bailiffs of Romney Marsh v. Trinity House* (1870) L. R. 5 Exch. 204.
[23] *Sharp v. Powell* (1872) L. R. 7 C. P. 253.

If B enters without permission, he has committed a trespass for which he is answerable. The harm and causative elements are present, but foresight does not enter in at all. A right has been violated by B, causing new legal relations between him and A irrespective of B's intention, or of any knowledge that he is breaking a duty.[24] The same is true in trespass to, or the conversion of, goods.[25] The rule is fully as strict in relation to animals. The owner of an animal may have taken all reasonable precautions to prevent its escape, yet if it merely crosses another's boundary, a trespass to real estate has been committed for which the owner of the animal is answerable.[26]

The risk connected with the keeping of dangerous animals bears a close analogy to the above. If the animal is domesticated, the owner is answerable for harm caused by it, in cases other than trespass to land, only if he knew it to be vicious. But where he aware of such propensities and it does mischief, he is held accountable without proof of negligence.[27] In case the animal is *ferae naturae* the owner is said to "secure it at his peril," and it is immaterial whether he knew it to be dangerous or not.[28] In connection with these cases it should be observed, however, that the owner of a wild or vicious animal is only answerable for the consequences of its ferocity. In other respects he is responsible only in case negligence is proved against him. To illustrate, A, the owner of a bear, was leading it upon a highway and B's horse, also on the highway, was frightened by the bear and ran away injuring B. It was held that B could not recover from A since it was not established that A was negligent.[29]

In 1866 the Exchequer Chamber in England laid down a rule in the famous case of *Fletcher v. Rylands*[30] as follows:

"We think the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is

---

[24] Pollock, *Torts* (11th ed. 1920) 9; cf. Holmes, *The Common Law* (1881) 97.

[25] *Bruch v. Carter* (1867, N. J.) 3 Vroom, 554.

[26] *Noyes v. Colby* (1855) 30 N. H. 143. This rule has been relaxed in some jurisdictions of the United States. See *Wagner v. Bissell* (1856) 3 Iowa, 396.

[27] *Mason v. Keeling* (1699, —) 12 Mod. 332; cf. *DeGray v. Murray* (1903) 69 N. J. L. 458. The German Civil Code, sec. 833, provides: "If a human being is killed, or if the body or health of a human being is injured, or a thing damaged by an animal, its keeper is bound to indemnify the party injured for the damages arising therefrom."

The Civil Code of Spain, art. 1905, has this provision: "The possessor of an animal, or one who uses the same is liable for any damages it may cause, even if such animal shall escape from him or stray away. This liability shall cease only in case the damage should arise from *vis major* or from the fault of the person who may have suffered it."

[28] *May v. Burdett* (1846) 9 Q. B. 101.

[29] *Bostock-Ferari Co. v. Brocksmith* (1905) 34 Ind. App. 566, 73 N. E. 281.

[30] (1866) L. R. 1 Exch. 265.

the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major,* or the act of God."

The decision in this case was later affirmed in the House of Lords.[31] This case has been followed in England and to some extent in this country. Some jurisdictions in the United States have, however, flatly refused to accept its lead.[32] It is maintained by these courts that the element of foresight should be a determining factor in cases of this nature. And even in England the tendency of the later cases has been to encourage exceptions to the rule of *Rylands v. Fletcher.*[33]

Another class of cases in which foresight is not an element of responsibility, arises in connection with the violation of statutory duties. It is important, in this relation, to distinguish between prohibitory legislation and legislation requiring affirmative conduct.[34] A violates a statute by selling liquor to B the husband of C. B, as a result, becomes intoxicated to the extent that he loses the natural control of his mental faculties and is killed while driving a team of horses. Before the passage of the statute, A's civil responsibility depended upon proof of the probability of harm resulting from his act (i. e. proof of negligence), and upon proof of legal causation. After the statute the sole pertinent question was whether the breach of the statute was the legal cause of the harm.[35] If it was, the plaintiff recovers. The court held, in the case stated, that C was entitled to damages from A.[36] All question as to foresight had disappeared. Observe that this case involved a prohibitory statute.

Should the statute require affirmative conduct and the violation complained of be an omission, a civil action may be based thereon only in case the harm resulting is of a nature which the statute sought to prevent. The case of *Gorris v. Scott*[37] here serves as an illustration. In that case cattle carried on a ship were washed overboard for want of appliances prescribed by an act of parliament for certain sanitary purposes. The ship owner was held not to be responsible to the owner of the cattle by reason of the breach of the statute. The act was passed for the purpose only of preventing the spread of disease among animals. The plaintiff's loss was due to other reasons and his case, if any, was a common-law action for negligence.

---

[31] *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330.
[32] *Brown v. Collins* (1873) 53 N. H. 442.
[33] See *Nichols v. Marsland* (1876) L. R. 2 Exch. 1.
[34] See article by Thayer, *Public Wrong and Private Action* (1914) 27 HARV. L. REV. 317.
[35] 1 Street, *Foundations of Legal Liability* (1906) 172.
[36] *Wall v. State* (1894) 10 Ind. App 530, 38 N. E. 190.
[37] (1874) L. R. 9 Exch. 125.

Privilege—no-right relations. A clear conception of the term "privilege" together with its correlative "no-right" and its opposite "duty" is of importance to an understanding of tort-relations. Privilege denotes permission. It is the absence of a duty. If A has a privilege, some other member of society (B) has a no-right. Where A has the privilege to walk on the highway, B has a corresponding no-right that A shall not walk on the highway. Where A has the privilege of defending himself against the attack of B, the latter has no right that he shall not do so.

Conduct is often of such a nature that it is difficult to determine its legal significance. A is in the habit of taking an afternoon nap.. His siesta is permissive as long as he is under no duty to B (or some other person) to keep awake. But, were A a flagman and were B injured for want of a danger signal from A because A had fallen asleep, society would at the instance of B penalize A. In the first example A had a privilege to take a nap; in the latter he was under a duty not to take one. The illustrations given are extreme. Often it is a difficult question whether the duty or the privilege element shall control. In such cases conduct is scrutinized in its minutest details for the decisive fact. The privilege may hinge on a spoken word or the duty upon a gesture.[38] The justification or excuse element in torts properly falls for discussion under privilege—no-right relations, and the question of privilege or duty, herein involved, is frequently a close one. The determining factor, one way or the other, is ever ultimately a question of policy.[39]

The holder of a right often can consent to its extinguishment and thereby create a privilege in another who formerly had a duty, and create a no-right in himself. Thus, A, the owner of a piece of land, has a right that B shall not trespass. But A can grant B the privilege of entering the land. B's duty not to enter is thereby extinguished and a privilege is substituted. Again, A has a right that he shall not be assaulted by B, but if A and B are arrayed on opposite sides in a football game, A has assumed the ordinary risks of the game, and B's conduct is to that extent privileged. But if A and B by consent stage a mutual affray the conduct of neither is privileged. Policy here becomes an obvious factor. Because of it A and B cannot extinguish the existing right-duty relation between them and either has, as a result of the assault and battery, a secondary right to damages from the other.[40]

---

[38] E. g. in *Tuberville v. Savage* (1669, K. B.) 1 Mod. 3, a man put his hand on his sword and said: "If it were not assize-time, I would not take this language from you." The state of mind indicated by the words was absence of intention to assault, and the court held that it was not an assault. In *Stephens v. Myers* (1830, K.B.) 4 C. & P. 349, the defendant advanced with his fists clenched toward the plaintiff. This was held to be an assault.

[39] Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1, 3.

[40] *Bell v. Hansley* (1855, N. C.) 3 Jones, 131. But see *contra Lykins v. Hamrick* (1911) 144 Ky. 80, 137 S. W. 852.

Numerous cases arise where society refuses its aid to the person harmed because of his own blameworthy conduct. A has a right to damages from B because of injuries received from B's wild animals. But where B held in captivity some zebras, which were tied in a barn, and A walked into this barn and began stroking one of the zebras and was as a result severely injured, the court held that A could not recover damages, because he had contributed in bringing the injury upon himself.[41] A's conduct here had the effect of depriving him of a right and the resulting legal relation between A and B was a privilege—no-right one. Similarly A has a right not to be beaten by B, but if A strikes B first, the latter, under circumstances of self defense, has the privilege of striking back, and society will refuse its aid to A should he sue B for an assault and battery.[42]

The same principles are basic in contributory negligence. A person who, by his own conduct, has contributed in bringing harm on himself cannot recover damages. A defendant is under a duty not to injure negligently a plaintiff, but if the plaintiff's conduct, combined with that of the defendant, has brought on the harm, a rule of policy lays the weight of its emphasis on the plaintiff's fault, denies him the right, and holds the defendant's conduct privileged.[43] But in such a case the plaintiff and the defendant must each be judged by the same standard of foresight. For instance, where the probability of harm resulting from the defendant's conduct is so great that the harm following is said to have been intentional and the probability of harm resulting from the plaintiff's conduct is not so great, so that his acts are said to have been merely negligent, the defendant cannot rely upon the plaintiff's negligence as a defense. Thus, where A sued B for an assault and battery, and B answered that A's negligence provoked it, the court held that this was not a defense.[44]

So also, the rule does not apply where there has not been an equal opportunity to avert the harm. The so-called doctrine of "last clear chance" is here involved. An inquiry into this rule is beset with difficulties. A solution, it is often said, lies in a distinction between "proximate" and "remote" cause, or between "concurrent" and "suc-

---

[41] *Marlor v. Ball* (1900, C. A.) 16 T. L. R. 239.

[42] *State v. Sherman* (1889) 16 R. I. 631, 18 Atl. 1040.

[43] It is submitted that the doctrine in admiralty of equal division of damages offers the more logical solution. See *The Max Morris* (1890) 137 U. S. 1, 11 Sup. Ct. 29.

The German Civil Code, sec. 254, has this provision: "If the injured party has contributed to the cause of the injury, the obligation for indemnity as well as the extent of the indemnity to be rendered depends upon the question, whether the injury has been caused mainly by one party or by the other."

See also U. S Comp. St. 1913, sec. 8659, relating to actions by employees against common carriers.

[44] *Steinmetz v. Kelly* (1880) 72 Ind. 442.

cessive" negligence.[45] It is obvious that these are qualifying terms which merely hamper thought. The problem is to fix responsibility.

This doctrine, as a limitation on the theory of contributory negligence, had its origin with the celebrated donkey case[46] decided in England in 1842. The facts of that case were briefly as follows: The plaintiff had fettered the fore feet of an ass and turned it out to graze on the highway. The defendant, driving three horses hitched to a wagon, coming down a slight descent at a brisk speed, ran against the ass and injured it. A direction to the jury, that whatever they thought of the plaintiff's conduct, he still was entitled to his remedy if the accident might have been avoided by the exercise of ordinary care on the part of the driver, was held proper. The rule of this case, though severely criticized, has been followed in England and generally in the United States.[47] The following is proposed as a statement of the principle involved: (1) Where the negligence of both plaintiff and defendant has contributed to the harm but the plaintiff has deprived himself of the ability to avert it, or, having been able to extricate himself, was unconscious of his peril, and the probability of harm had become obvious to the defendant in time to avert it, and he did not do so; or (2) where the plaintiff has negligently deprived himself of the ability to avert the harm, and the defendant, whose negligence contributed, reasonably should have become aware of the plaintiff's peril in time to prevent the harm, but he did not, the defendant in either (1) or (2) is answerable to the plaintiff for the result.[48]

Reasons of policy furnish the excuse or justification for harm under various other circumstances. A rule of policy prescribes that a man may perpetrate an assault and battery in defense of family or property, or in matters of discipline. Policy is the underlying factor establishing the privilege element in connection with acts for which a person would otherwise be answerable in an action for defamation. Thus, A is under a duty not to slander B, but if A makes statements in court as judge, counsel, or witness, these statements are privileged, provided they were pertinent and material to the case.[49]

---

[45] 1 Street, *Foundations of Legal Liability* (1906) 136.

[46] *Davies v. Mann* (1842, Exch.) 10 M. & W. 546. The principle was actually recognized in an earlier case, *Butterfield v. Forrester* (1809, K. B.) 11 East, 60. See discussion, Schofield, *Davies v. Mann: Theory of Contributory Negligence* (1890) 3 HARV. L. REV. 363.

[47] *Radley v. L. & N. W. Ry.*, (1876) L. R. 1 A. C. 754; *Fuller v. Illinois Central Ry.* (1911) 100 Miss. 705, 56 So. 783.

[48] See an able comment by Professor Thurston (1920) 29 YALE LAW JOURNAL, 896.

[49] "It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties,

A merchant has the privilege of offering his goods for sale at a low price even though his purpose and the result of his action is to injure a competitor.[50] In an Ohio case[51] the defendant built a high wall on his property close to the plaintiff's house shutting off light and air from the plaintiff's windows. The court held that the plaintiff had no remedy, and that it was of no consequence what the defendant's motives were. So where the plaintiff was a lower riparian owner and the defendant an upper one and the latter cut the timber on his land which shaded the stream, as a result of which the water in the stream evaporated, the plaintiff was denied an injunction irrespective of the defendant's intention.[52]

It is believed, however, that there is a tendency to qualify the rule above stated, and to lay emphasis on the question whether or not the person causing the harm had, in some degree, a beneficial object in view. Thus, in a Michigan case,[53] where the defendant erected a fence on his land for the purpose of shutting out the light and air from the plaintiff's windows in a building on land adjoining, the court ordered the fence removed. In a later Michigan case[54] the bad motives of the defendant appear to have been uppermost, yet, since the court found the obstruction served also a useful purpose, it refused its aid to the plaintiff. In another familiar case where the plaintiff was a barber in a small town and the defendant, a banker, had set up a rival shop for the purpose of destroying the plaintiff's trade, the plaintiff was permitted to recover.[55]

Our inquiry here leads us, perforce, into a study of certain leading cases involving an interference with the relations between the plaintiff and third persons. The celebrated case of *Lumley v. Gye*[56] is of first significance. In that case the plaintff had entered into a contract with

---

counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case." *McLaughlin v. Cowley* (1879) 127 Mass. 316, 319.

[50] *Passaic Print Works v. Ely & Walker Co.* (1900, C. C. A. 8th) 105 Fed. 163. But see the dissenting opinion in this case by Sanborn, J., at p. 167, where he contends that the defendant's conduct is privileged only where his acts are in the furtherance of a legitimate trade purpose. And see article by Ames, *How Far an Act May be a Tort Because of the Wrongful Motive of the Actor* (1905) 18 HARV. L. REV. 411.

[51] *Letts v. Kessler* (1896) 54 Oh. St. 73, 42 N. E. 765.

[52] *Fisher v. Feige* (1902) 137 Calif. 39, 69 Pac. 618.

[53] *Flaherty v. Moran* (1890) 81 Mich. 52, 45 N. W. 381. In many states statutes have been passed declaring a "spite fence" to be a nuisance.

[54] *Kuzniak v. Kosminski* (1895) 107 Mich. 444, 65 N. W. 275.

[55] *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946. The German Civil Code, sec. 226, provides: "The exercise of a right is not permissible if it can have no other purpose than to damage another."

[56] (1853, Q. B.) 2 El. & Bl. 216. And see article by Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV. 195.

Miss Wagner, a singer, under the terms of which she agreed to sing for the plaintiff in his theater, and nowhere else. The defendant, a business rival of the plaintiff, with knowledge of the agreement between the plaintiff and Miss Wagner, enticed her to leave the plaintiff's employment. The court held that the defendant had violated a legal right and gave the plaintiff his remedy in tort.[57] The crux of the problem is in conflicting factors. Is it policy to forbid or permit such conduct? The court correctly decided in this case that the defendant was under a legal duty not to interfere with the plaintiff's contractual relations. But had the defendant merely dissuaded Miss Wagner, with the honest purpose of benefiting her, and not himself, the privilege element might have governed.[58] The principle announced in *Lumley v. Gye* is generally accepted as law in the United States.[59]

It should be observed however, that the harm, for which a legal remedy was given in that case, resulted from an interference with contractual relations, and that the plaintiff had a further remedy in contract against the party in privity of contract with him. Closely connected with the doctrine of that case a further problem evolves. What are the resulting legal relations where harm is caused, not from dissuading a person from a contractual duty, but rather in influencing one who owes no legal duty to the plaintiff, but with whom the plaintiff has merely certain advantageous connections—in existence or in expectancy—so to act that harm results to the plaintiff?

No general solution of this vexed question is contemplated and only a few deductions are offered. It is believed that reasons of policy generally favor a privilege—no-right relation. An early case[60] exemplifies this principle. Two masters in a grammar school in a certain locality sought damages from another master who had set up a rival school in the same town. The new master evidently lowered the tuition fees, for it is alleged "that whereas the plaintiffs had formerly received 40d. or two shillings a quarter from each child, now they got only 12d."

---

[57] In *Quinn v. Leatham* [1901] A. C. 495, Lord MacNaghten, in referring to the case of *Lumley v. Gye,* said, at p. 570: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intent—that was not, I think the gist of the action—but on the ground that a violation of a right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognized by law, if there is no sufficient justification for the interference.

[58] "That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had been enticed into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not." Sterling, L. J., in *Glamorgan Co. v. South Wales Miners' Federation* [1903] 2 K. B. 545, 577.

[59] *Walker v. Cronin* (1871) 107 Mass. 555.

[60] *Anonymous* (1411) Y. B. 11 Hen. IV, 47, pl. 21.

It was held that the plaintiffs had no actionable cause. *Mogul Steamship Co. v. McGregor*[61] is a leading case in this field. The facts in that case were that the plaintiff and the defendants were engaged in carrying tea from China to England. The defendant offered special discounts to exporters who employed them alone; they sent their ships to China authorizing their agents to underbid the plaintiff even to accepting freight at unprofitable rates, and their agents were forbidden to act as agents for the plaintiff The court held that the plaintiff had no cause of action.[62]

So in the field of labor disputes certain labor unions had combined for the purpose of obtaining a monopoly of employment for the members of their local unions in the several occupations in which they were engaged. In furtherance of these purposes they had boycotted the plaintiff and all persons for whom he had furnished labor or material, and persons by whom he had been employed, and had instituted strikes in all cases where their demands were not complied with. The court held that individuals may work for whom they please, and quit work when they please, as long as they do not violate their contracts of employment; that they may refuse to work with non-union labor where their object is to strengthen the union, and where it is for their own interests, and the means used are not prohibited nor contrary to policy.[63]

Granting then that acts of persuasion are generally privileged, even though the persuader influences the conduct of a person to the harm of another who has some advantageous connection with the first, there are yet to be mentioned certain qualifying elements which, when present, render the conduct of the persuader unjustifiable, and result in a right-duty relation between the persuader and the person injured. The whole question, after all, is one of policy. If a man's methods are

[61] [1892] A. C. 25.

[62] In the United States this field has been largely covered by federal and state laws relating to unfair competition. For a recent discussion of the question see Haines, *Efforts to Define Unfair Competition* (1919) 29 YALE LAW JOURNAL, 1.

[63] *Cohn & Roth Electric Co. v. Bricklayers' Union* (1917) 92 Conn. 161, 101 Atl. 659. But see *contra Folsom v. Lewis* (1911) 208 Mass. 336, 94 N. E. 316.

And see recent legislation in Kansas establishing a so-called "Court" of Industrial Relations, having supervision and control over all disputes in Kansas between employer and employee arising in connection with public utilities, and in connection with employments and industries dealing in the manufacture of clothing, the mining and preparation of fuel, and in the transportation of food, fuel, and clothing. Strikes, conspiracies to induce others to quit work, picketing, boycotts, unjust discharge of employees, and lockouts are forbidden. Violations of the act are penalized. Three judges, appointed by the governor, constitute the "Court." An appeal from the order of the "Court" may be carried to the Supreme Court of the state. In case of an appeal the Supreme Court considers the evidence adduced before the "Court" of Industrial Relations, but in the interests of justice the Supreme Court may admit additional testimony. Laws of Kansas, Special Session (1920) ch. 29.

peaceful and his advice or persuasion tends merely to create a voluntary desire on the part of another to act, the means used are said to be justifiable and lawful. But if the means used result in the act on the part of the other without his unhampered wish they are said to be unjustifiable and unlawful.

The plaintiff was the owner of a boat which carried on a trade with the natives of Africa. A canoe with natives on board came out to establish a trade with the plaintiff's boat. The defendant, a rival trader, whose boat was lying near, fired a cannon at the canoe, killing one of the natives and frightening the rest, so that the plaintiff's trade was interrupted. The court permitted the plaintiff to recover damages.[64] The same principle is pertinent in labor controversies. If the means employed are coercive,[65] either by resorting to violence or threats of violence,[66] or where abusive language is used,[67] or where conduct is compelled by heavy fine,[68] generally the privilege is denied and a legal remedy is granted.

Privilege—no-right relations frequently arise in connection with so-called accidental injuries. It should be noted that in these cases the element of foresight is a necessary ingredient. When unintended harm results from a man's conduct, and the average prudent man could not have foreseen some kind of harm, no cause of action arises. The harm not having been apparent, it is called an accident. The leading case of *Brown v. Kendall*[69] illustrates this point. There it appeared that the plaintiff's and defendant's dogs were fighting, and that the defendant while seeking to separate them had raised a stick over his shoulder in order to strike the dogs, and in so doing had accidentally hit the plaintiff, injuring him. The court held that this act of the defendant "was a lawful and proper act which he might do by proper and safe means"; and that if "in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie."

In connection with privilege—no-right relations, a distinction should be observed between legal duties and so-called "moral" duties. What is considered a moral duty is often also a legal one, but in many in-

---

[64] *Tarleton v. McGawley* (1804, K. B.) Peake N. P. 205.

[65] *Martell v. White* (1904) 185 Mass. 255, 69 N. E. 1085.

[66] *Iron Moulders' Union v. Allis-Chambers Co.* (1908, C. C. A. 7th) 166 Fed. 45.

[67] *Kolley v. Robinson* (1911, C. C. A. 8th) 187 Fed. 415.

[68] *Martell v. White* (1904) *supra* note 65. Cf. language by Taft, C. J., in *Thomas v. Cincinnati, N. O. & T. P. Ry.* (1894, C. C. S. D. Ohio) 62 Fed. 803, 817. See generally on this subject 1 Street, *Foundations of Legal Liability* (1906) 342-373, and 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) ch. 28.

[69] (1850, Mass.) 6 Cush. 292.

stances conduct which is morally wrong is legally privileged. A, while walking along a water-front, sees B drowning. A rope is at hand which A can easily toss to B, yet A stands by and permits B to drown. Morally A's conduct is most reprehensible, but legally it is privileged. No legal duty arises no matter how small a risk or inconvenience is involved.[70] It is submitted that here are instanced facts where policy is at fault. Some progressive legislation is called for.[71] A Bentham is needed.[72]

---

[70] "With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failing to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of man, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure." *Union Pacific Ry. v. Cappier* (1903) 66 Kan. 649, 653, 72 Pac. 281, 282. But cf. *Depue v. Flatau* (1907) 100 Minn. 299, 111 N. W. 1.

[71] See the Dutch Penal Code, art. 450: "One who, witnessing the danger of death with which another is suddenly threatened, neglects to give or furnish him with such assistance as he can give or procure without reasonable fear of danger to himself or to others, is to be punished, if the death of the person in distress follows, by a detention of three months at most and an amende of three hundred florins at most."

The German Civil Code, sec. 826 provides: "One, who designedly injures another in the manner violating good morals, is bound to indemnify the other for the injury."

[72] See 1 Jeremy Bentham's *Works* (Browning's ed. 1843) 148: "The limits of the law on this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto. In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it upon himself?"