MISTAKE OF FACT WITH REGARD TO DEFENCES IN TORT LAW

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I. INTRODUCTION

The purpose of this comment is to evaluate the legal question as to whether mistake of fact respecting an element of defence has any place in the law of intentional tort, and, if this query can be answered affirmatively, to determine specifically what the scope of such a doctrine should be. The discussion shall focus mainly on mistake of fact as it relates to the elements of self-defence and defence of third person. The type of situation which comes to mind immediately in this context, is one where an individual allegedly acts in self-defence, reasonably believing that he is being unlawfully attacked, when in fact no attack is being made; or where an individual intervenes to act in defence of a third person under the mistaken but reasonable belief that such action was necessary and lawful in the circumstances. [1]

In these cases, the conduct in question was intended to cause the effect which resulted, but the error resulted from the belief that such an effect was not tortious, [2] but rather legitimate. Thus, it becomes necessary to distinguish between negligent mistake and non-negligent mistake, since the basis of an individual's belief in this situation is of prime importance. For the purposes of this discussion, only non-negligent mistake will be considered: that mistake which a reasonable man might make in the circumstances. [3] To do otherwise would extend this analysis to a consideration of negligent mistake of fact, which is not a defence in either tort or criminal law.

It has been said by many authors [4] that in the law of intentional tort mistake of fact is not an available defence in a situation concerning title of property or chattels. This submission is valid; since the earliest English cases, [5] common-law courts have held that a mistake of fact in relation to

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[1] For the purpose of this comment, it is assumed in the case of the defence of a third person that the injured party is unable or unwilling to recover his damages against his initial assailant. Thus in this situation, the injured party must seek his remedy from the intervening party who actually inflicted the injury.

[2] This choice of terminology is not to be read so as to assume that a discussion of both mistake of law and mistake of fact will be included in the analysis. This comment will be restricted to an evaluation of mistake of fact, *i.e.*, where an individual mistakenly, but honestly and reasonably believes in a *state of facts* which, if existed, would provide him with a complete justification for his actions.

[3] See Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335, at 339 (1902).

[4] See J. FLEMING, LAW OF TORTS 77-79 (3d ed. 1965) and W. PROSSER, HANDBOOK OF THE LAW OF TORTS 100-01 (3d ed. 1964).

[5] Basely v. Clarkson, 3 Levinz 37, 83 Eng. Rep. 565 (C.P. 1680).

title does not constitute a defence, regardless of how honest or reasonable the belief of the trespasser might be. In most cases, the application of this rule does not result in any injustice, since in the majority of cases regarding trespass to land only nominal damages are awarded. Similarly, in the case of misappropriation of chattels, an unjust enrichment at the expense of the true owner of the chattels is prevented by such a rule.[6] However, as a consequence to the application of this rule, certain courts and legal authorities have been led to conclude that the defence of mistake of fact has no application in the action of trespass to the person, *i.e.*, in the case of mistake of fact as related to certain defences to intentional torts. It is only in the latter area that I feel further investigation is required.

II. A Question of Policy

It is apparent that courts are faced with a problem of policy with regard to the defence of mistake of fact. In the situation that is under examination, prima facie, the courts are confronted by opposing parties in circumstances where neither party is basically at fault in the strict sense of the word. The problem for the courts is to determine on what legal basis they should predicate their decision. On the one hand, if a court were to follow the doctrine of "no liability without fault," the defence of mistake would excuse the defendant in such a case. On the other hand, if a court were to adhere to the principle that an innocent injured party is to be compensated, it could hold that in such a situation a man acts at his own peril, and that the defence of mistake has no application. Thus, it is essential to determine whether the law of tort in such a situation should on policy grounds tend to compensate the victim in the unfortunate situation, or to excuse the defendant on the basis of an honest and reasonable mistake which negates any moral culpability on his part.

A. *The Canadian Position*

In Canada, there is a great disparity of case law in this area; it is thus difficult to articulate any solution to the problem. The consensus of Canadian writers on the subject appears to be that in general the defence of mistake of fact should have only a very limited application, but that in many cases of self-defence and defence of third person it should be recognized.

Fleming[7] suggests that there is a strong tendency to reject the defence of mistake of fact. and it is his opinion that only in the situation where there are special reasons of policy or expediency should the courts consider the application of the defence.[8] With respect to the topic of this comment, Fleming states that the view of Prosser may fall under the category of

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[6] For further discussion in this area, see J. Fleming, *supra* note 4, at 79.

[7] *Id.* at 80.

[8] *Id.* at 80, where the author cited for this general rule the authority of Smith, *Tort and Absolute Liability*, 30 Harv. L. Rev. 319, at 327 (1917).

"special reasons of policy or expediency." Thus he paraphrases Prosser's view and proposes "that a mistake is privileged when it appears necessary to act quickly in protection of a right, as to the existence of which the defendant is not mistaken; for example when he believes that he is being attacked and acts in self-defence." [9] Similarly, in regard to defence of third person, Fleming recommends the application of the defence of mistake when "so urgent is the call for instant action that allowance should be made for any reasonable mistake by the intervener in thinking that his action was necessary to ward off an attack and that the force used was reasonably proportioned to the exigency." [10]

Fleming's argument is based on the principle of policy that the law is concerned with the preservation of the individual against the apparent attack of another, and that the courts are willing to excuse such a mistake for the seemingly higher priority in law of self-defence and defence of third person. The application of such a policy, as expressed by Fleming in regard to the urgency of the circumstances, is far too wide, since in most tort cases concerning this type of situation, an adoption of this perspective would excuse the attacker, as the pressure of time in the decision making process to act or not to act in defence is invariably very high. Furthermore, why should the courts' concern for the safety of the individual be only considered with regard to the innocent attacker and not in relation to the innocent victim? As Atrens has asserted, it is quite possible that the law of torts is not equipped to deal satisfactorily with this type of situation. Thus "within the framework of the present law the most one can do is express a personal reaction to the problems. It is suggested that the average person's sympathy would lie with the innocent victim of the mistake. In so far as public opinion is a factor in the formulation of legal rules, this would support the conclusion that the defence of mistake should seldom be allowed." [11]

In support of Fleming's view, it can be argued that not to recognize the defence in the realm of defence of a third person would discourage individuals in our society from intervening in the defence of a fellow citizen. This has been a problem of great concern in our troubled times, [12] and one must be aware that the law has a large role in forming the social values of our society. In considering whether mistake of fact should be recognized as a defence in civil cases, a very significant policy factor to weigh is whether the non-recognition of such a defence would have a detrimental effect on the attitude

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[9] *Id.* at 80.

[10] *Id.* at 87.

[11] Atrens, *Intentional Interference With the Person, in* STUDIES IN CANADIAN TORT LAW 378, at 387 (A. Linden ed. 1968).

[12] There are many examples of the public apathy which prevails in our society. One of the most flagrant illustrations of this fact occurred six years ago in the infamous case of Kitty Genovese, 28, who was stabbed to death in New York City while thirty-eight of her neighbours, roused by her screams, watched or listened and did nothing. *But see* TIME, January 19, 1970, at 54, cols. 1-2 (Can. ed.), for a recent study on this apparent social phenonemon which reveals a more humanitarian approach.

of individuals in situations where they must decide whether to act in the

assistance of a fellow citizen who is apparently being assaulted.

Yet if one were to consider this issue from another standpoint, it could be argued, in the absence of empirical evidence to the contrary, that the recognition or non-recognition of such a defence would have little bearing on this social enigma which presently faces our population, and that sociological and psychological causes are of far greater importance in analysing the basis of this problem of apathy in our society today. Furthermore, even if one were to accept the fact that the law in this area of mistake of fact had some sort of relation to the actions of individuals placed in these situations, it is just as plausible to argue that not to recognize the defence of mistake would possibly have the desirable side-effect of discouraging an individual from acting on the basis of a non-negligent mistake of fact. [13]

B. *The American Position*

Most Canadian authors who have commented on this complex problem have chosen to rely on American authority and case law as a guide to determine how the Canadian courts should deal with this area of law. [14] In his leading work on mistake of fact, Whittier [15] suggests that non-negligent mistake should constitute a valid defence in tort law but that the preponderance of authority appears to be in opposition to this view. However, he points out that the judicial position on mistake of fact is by no means unanimous and he cites specific situations where this defence has been recognized. Whittier states that the defence of mistake excuses "where the defendant wrongly supposes that the plaintiff is the aggressor in an affray, or that the plaintiff is assaulting him when in fact no attack is being made, or another is the assailant, when the defendant commits a battery on the plaintiff in defence of another person mistakenly thinking that his interference was necessary to repel the plaintiff's assault on such person; . . . ." [16] Jeremiah Smith [17] feels a more pragmatic approach is required and proposes a solution which differs in a degree from that of Whittier. He states: "We do not think that there is any general rule as to whether non-negligent mistake does, or does not, exonerate from civil liability. Each particular set of cases seems to us to be decided upon the special reasons of policy or expediency bearing upon that particular set of facts." [18]

It could be argued that to hold an individual liable for his non-negligent mistake in certain instances would be restricting freedom of action to an unjustifiable extent, as it would compel an individual to restrain himself from acting except in the most infrequent cases where no mistake of fact was possible. On the other hand, we must look to the basis of tort liability

[13] *Supra* note 11, at 387.
[14] *Supra* note 6, at 80; *supra* note 11, at 386.
[15] Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335 (1902).
[16] *Id.* at 340-41.
[17] Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 319 (1917).
[18] *Id.* at 327 (footnote omitted).

in this class of cases and determine a general policy guideline on which the courts may in future base their decisions. I submit that much of the academic discussion concerning mistake of fact and the support of its recognition in certain areas tends to over-emphasize the non-culpability of the defendant in such cases and ignores the relative position of the innocent victim who would be forced to bear the loss.

In the American case law, the dichotomy of views [19] previously noted above is most definitely evident. On the one hand, in a recent American case, [20] the Court of Appeals of New York held that "[t]he weight of authority holds . . . that one who goes to the aid of a third person does so at his own peril . . . ." [21] The court, however, recognized that a minority rule did exist in other states, that is, "that one who intervenes in a struggle between strangers under the mistaken but reasonable belief that he is protecting another who he assumes is being unlawfully beaten is thereby exonerated from criminal liability . . . ." [22] However, despite the fact that this point was presented and argued in the case, the court held in most emphatic terms that "[w]e agree with the settled policy of law in most jurisdictions that the right of a person to defend another ordinarily should not be greater than such person's right to defend himself." [23] This so-called majority view was further set out in the case of *Robinson v. Decatur* [24] which involved the question of a father's attempted justification of his defence of his daughter. In this instance, the court held that "[t]he general rule is that a third person who intervenes in defence of another steps into that person's shoes, and only those defenses that could be set up by the assaulted party are available to the intervenor." [25] These two cases, clearly illustrate that the majority of the judicial opinion in the United States does not favour the recognition of the defence of mistake.

The minority view which arrives at the opposite conclusion is worthy of examination. *Pearson v. Taylor* [26] outlines this position quite well. In this case, the Court of Appeal of Louisiana held that "[f]or the privilege of

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[19] W. PROSSER, *supra* note 4, at 115, gives a clear expression of this dichotomy in regard to the defence of others:

> As to the effect of a mistaken but reasonable belief that intervention is necessary, or that the force used is called for, the courts have not agreed. The majority of them have said that the intermeddler takes the risk that the man he is defending would not be privileged to defend himself in the same manner. But if an honest mistake is to relieve the defendant of liability when he thinks that he must defend himself, his meritorious defence of another should receive the same consideration. The minority view to this effect seems greatly to be preferred.

(Footnotes omitted).

[20] New York v. Young, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962).

[21] 183 N.E.2d 319 (N.Y. 1962).

[22] *Id.* at 319.

[23] *Id.* at 319-20. *See also* Commonwealth v. Hounchell, 280 Ky. 217, 132 S.W.2d 921 (Ky. Ct. App. 1939) for further discussion of the majority rule.

[24] 29 So.2d 429 (Ala. Ct. App. 1947).

[25] *Id.* at 431.

[26] 116 So.2d 833 (La. Ct. App. 1959).

self-defense to exist, it is not necessary that the danger actually exist. It is only necessary that the actor have grounds which would lead an ordinary reasonable man to believe it exists, and that he so believe." [27] The court went on to state that "[t]he rule that one who reasonably believes the other party intends to assault him is privileged to defend himself although he is in fact in no danger whatever appears to follow the similar rule in the criminal law where it is beyond doubt a sound rule." [28]

C. *The Relationship to the Criminal Law*

The minority view of the United States' courts is grounded to a degree on the fact that, since the defence of mistake of fact is indeed a valid defence in the area of criminal law, [29] an underlying philosophy of law compels them to recognize such a defence in the field of tort. This philosophy is expressed in the concept that if a defence can be recognized in one area of our legal system, it should excuse an individual in another field of the same system. [30] The minority view, therefore, relies on the reasoning that, since mistake in criminal law negates legal responsibility, similarly in tort law an honest party acting without malice and quite reasonably in the circumstances should not be held liable. [31]

This argument reveals a definite lack of insight into the basic problem which is facing the courts in this area. In the field of criminal law, the mental element required for guilt in a particular offence is of utmost importance. Society generally would not condone punishment of an individual for an honest and reasonable mistake which precipitated an act of self-defence or defence of a third person. Perkins in his leading article on mistake in criminal law observes: "[I]t may be stated as a general rule . . . that mistake of fact will disprove a criminal charge if the mistaken belief is (a) honestly entertained, (b) based upon reasonable grounds and (c) of such a nature that the conduct would have been lawful had the facts been as they were reasonably supposed to be." [32] Obviously the recognition of this defence in the field of criminal law is reasonable and well founded since no objective or purpose of the criminal law would be served by punishing such an individual in this

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[27] *Id.* at 835.

[28] *Id.* at 836.

[29] For a clear expression of the American view, see Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939-40). In Canada, the following cases are illustrations that mistake of fact is a valid defence in Canadian criminal law: Regina v. Cadwallader, [1966] 1 Can. Crim. Cas. Ann. (n.s.) 380 (Sask. Q.B. 1965); and Rex v. Dunham, [1950] 1 D.L.R. 498 (N.B. Sup. Ct. 1949).

[30] *Supra* note 11, at 385. Atrens appears to employ this type of reasoning in discussing whether mistake of fact would be recognized in Canada.

[31] *See* Paxton v. Boyer, 67 Ill. 132 (1873); *and also* Crabtree v. Dawson, 119 Ky. 148, 83 S.W. 557 (Ky. Ct. App. 1904). In the latter case, it was stated that "[a] person will not be held responsible civilly or criminally if he acts in self-defence from a real and honest conviction induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger . . . ." (*Id.* at 160, 83 S.W. at 561).

[32] *Supra* note 29, at 54-55 (footnote omitted). *See also* The Queen v. Tolson, 23 Q.B.D. 168 (1889) and Regina v. Chisam, 47 Crim. App. 130 (Ct. Crim. App. 1963).

situation. [33]

In tort law, however, another important consideration must also be taken into account: the innocent victim of such an assault would be forced to carry the resultant financial burden, unless the courts were to deem his innocent assailant liable in spite of the honest and reasonable mistake of fact. Whether one concludes that such a result is desirable or not, a court of law cannot exclusively base such a decision on the ground that a similar defence of mistake is recognized in criminal law; to do so without considering the consequences to the innocent victim would completely ignore the policy distinction that is inherent in tort and criminal law.

D. *The Basis of Liability*

The trend of present day tort law to limit the doctrine of "no liability without fault" and to advocate instead a type of strict liability approach yields a plausible reasoning for not recognizing the defence of mistake of fact. One could thus conclude that since this concept of fault has become quite diluted, an individual's mistake in the situation I have discussed should not predominate over the compensation of damage that arises from such a situation. However, one must read into this reasoning the historical basis for this modern day approach to civil law. It has been suggested [34] that since the advent of the Industrial Revolution and the age of the machine and big business, that the causal relation of human conduct and harm has been obscured and hence the legal doctrine of liability based on fault has come under criticism. The problems arose mainly in relation to the difficulty in proof of fault in many of these situations brought about by our complex social structures. Thus, the traditional concept of "no liability without fault" gradually began to lose ground as the protection of general social values began to be emphasized instead of concerning the law with various requirements of proof in these areas.

Although the tendency of tort law has been toward absolute liability, in this area of human relations where mistake in matters of defences may arise, the causal relation of conduct and harm is not obscured by our industrial age. The conduct and harm are in fact still in the immediate position and their causal relation remain clearly definable and unencumbered by the intervention of industrial devices. Thus, in matters of self-defence and defence of third person, personal and physical confrontation between the parties is not obscured, difficulties of proof seldom, if ever, emerge and the fact-situation is often easy to establish in court. Therefore, one could argue that fault liability should still prevail and that mistake of fact should not be precluded from being a valid defence on this basis.

In my view, these two opposing arguments are equally valid and that the real basis of liability is to be found elsewhere.

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[33] Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORD. L. REV. 1, at 38 (1964).

[34] *Id.* at 27.

III. CONCLUSION

As expressed earlier, it is my submission that if the law is faced with a case of self-defence or defence of third person, where the one individual has made an honest and reasonable mistake of fact, and where the other individual is the "innocent" victim of such a mistaken assault, legal policy in nearly all circumstances should favour compensation of the "innocent" victim. As Takayanagi [35] states "[t]he basis of liability does not consist so much in being allowed to carry on a perilous undertaking for his own benefit as in not sufficiently examining whether his conduct complies with predetermined conditions. Just as in enterprise liability, this form of liability aims at the prevention of damage by inducing the actor to use the utmost care in the examination of the conditions." [36]

It is my opinion, however, that there should be one exception to this general rule: mistake of fact in relation to self-defence and defence of third person should be recognized as a defence in circumstances where the victim has induced the mistake by his own conduct. [37] This type of conduct on the part of the victim should be a consideration, as this conduct, whether it be a threat of word or motion, would distinguish such a person from the so-called "innocent" victim discussed above. [38] It would be unjust for the law to allow such a plaintiff to complain of a mistake for which he is himself responsible. This exception, however, should be applied only in situations where it can be proven to a court that there exists a definite causal link between the eventual victim's conduct and the ensuing mistake of fact. Although it is very difficult to define the limits of this exception, I submit that the courts should give this exception a narrow scope of application so as not tc reduce the utility of the general rule. Thus, in order for the defence of mistake of fact to be recognized, the court must be convinced that this conduct on the part of the victim would induce even an individual using the "utmost care" to make such a mistake in examining the conditions.

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[35] Takayanagi, *Liability Without Fault In The Modern Civil and Common Law*, 17 ILL. L. REV. 187, at 189 (1922-23).

[36] *Id.* at 189 (footnote omitted). The author clearly outlines these predetermined conditions: "[T]he permission to do an act is given only conditionally, i.e. that the act which involves a danger to another's interest is not objectively illegal, and whether that condition is fulfilled or not depends on the judicial determination of the court after the occurrence of the alleged harm. If that condition is fulfilled, the actor is not liable at all; if not, he is liable irrespective of fault."

[37] See W. PROSSER, *supra* note 4, at 102, and the cases cited in that section.

[38] In relation to self-defence, an illustration of this conduct might be an earlier threat made by the eventual victim to the defendant which was the direct cause of the latter's mistake of fact. Similarly, with regard to the defence of third person, such a threat may have been in the knowledge of the intervening party which led him to his mistake of fact at a later point in time.