

by which to determine the quality of *all* acts which are complained of as injurious. The classification of torts indicated by this consideration is obvious. All breaches of duty are not examples of negligence, the simple reason being that the area covered by the conception expressed by term "negligence" is co-extensive with that defined by acts which the typical citizen will not do in his special character of a man of average prudence, skill, diligence, etc., while the area covered by the conceptions expressed by the words which denominate other kinds of tortious conduct is co-extensive with that defined by acts which such typical citizen would not do in his special character of a man who deals uprightly with his neighbours and abstains from damaging them in person or property.

This form of statement not only enables us to see at a glance the fallacy involved in Mr. Ewart's theory, but also, if we are not much mistaken, indicates the origin of that fallacy. The character of the typical citizen is a composite one. He is prudent, skilful, and diligent, but he is also actuated by motives which induce him to avoid committing such wilful acts as those we have already referred to by way of illustration, as well as from many others. Mr. Ewart, however, draws no distinction between what such a citizen will do, as a man in the exercise of prudence, skill and diligence, and what he will do as a man who will not defame his neighbour, or inflict damage upon his person or his property. Logically such a confusion between the various moral qualities is wholly inexcusable, and the sole grain of truth which underlies it is that the special quality which saves a man from being negligent will be apt to save him from infringing legal rights, for the incidental reason that it is commonly inexpedient to commit such infractions (a). But this fact by no means warrants the conclusion that it is in his character as a careful man that the careful man is honest, just and the like. Such a doctrine

(a) The "authorities" have fully recognized that there is this point of contact between negligence and fraud in the line of cases which hold that gross negligence may be evidence of "*malâ fides*" and involve the same civil consequences—a doctrine also embodied in several aphorisms of the Roman Law. See 11 Beven on Negl., pp. 1624, *et seq.* We wonder, by the way, that Mr. Ewart did not strengthen his position by referring to this theory. It is the only instance, so far as we know, in which the "authorities" can be said, to lend any countenance to his peculiar ideas.