

TORT LAW IN MIDSTREAM: ITS CHALLENGE TO THE JUDICIAL PROCESS*

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THE QUEST FOR AN INTEGRATING PRINCIPLE IN TORTS: A PURSUIT OF FUTILITY

WHEN I was a first year law student I was often asked to explain what was meant by the word "torts," which was of course the name of one of my courses. This drove me to a law dictionary where I found tort defined as breach of a duty not arising out of contract. This is certainly not a very helpful definition. It suggests a simple dichotomy of duties or obligations into those we voluntarily assume by contract or agreement, and those that are thrust upon us by law whether we like it or not. This is a vastly oversimplified picture—neither the division nor the description of the parts into which the whole is divided will bear close analysis.¹ Yet it is not without usefulness, and it may well serve as our starting point so far as the nature of torts is concerned; for by and large—in the gross so to speak—the law of torts has historically dealt with duties and obligations that society imposes on its individual members for one reason or another having little to do with the individual's consent, though they may indeed be imposed as conditions—often unwanted conditions—upon action voluntarily undertaken (like driving a car or running a business).

It is obvious at once that this covers a heterogeneous mass of stuff. There are countless different reasons why society may decide to impose duties on its members under the infinite variety of situations that make up human life. Thus the law of torts is generally thought of as including assault and battery, false imprisonment, malicious prosecution, trespass to realty, the amorphous tort of nuisance, trespass to personalty and conversion, fraud and deceit, libel and slander (whether involving a matter between neighbors or defamation by a giant newspaper chain or broadcasting network), a good deal of what is called unfair competition among business men, and, most prominent of all today, the many facets of accident law. Even this is not a complete listing.

This heterogeneous law of torts did not grow up because it was inspired by any one integrating principle. Under the formulary system of the common law its growth was piecemeal and fragmented. The roots of some torts are lost in antiquity.² Others are relatively modern.³ The result is a hodge-podge.

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1. See Seavey, *Book Review*, 45 HARV. L. REV. 209 (1931); FLEMING, *LAW OF TORTS* 1-3 (1957); cf. WINFIELD, *PROVINCE OF THE LAW OF TORT* (1931).

2. 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* chs. 1, 2, 3 (1906).

3. The outstanding dramatic example is the recognition of the right of privacy. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 635 (2d ed. 1955). See also Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (K.B. 1853); Temperton v. Russell [1893] 1 Q.B. 715; Ratcliffe v. Evans [1892] Q.B. 524, which were pioneer cases in the expanding subject of tortious interference with economic relations. And negligence as a tort is no older than the 18th century. 1 STREET, *op. cit. supra* note 2, 183-187.

Yet ever since the law was liberated from the procedural shackles of the forms of action, there has been a strong school of thought which has sought to find, or to construct, a unifying principle which would give integrity to the whole law of torts.⁴

On the other hand there has been a competing school which has denied the possibility or the utility of such a quest and has kept insisting on the fragmented nature of the subject, which it regards as a group of isolated torts, and often as a closed cycle.⁵ This school more accurately reflects history but this in itself is no reason why its view should be perpetuated.

If one leaves the heterogeneous nature of the situations covered by the law of torts and seeks to find principles of liability applied in them, it is easily possible so to classify these principles as to reduce their number drastically. The usual number is three. According to the prevailing classification⁶ liability may be based on

1. The intent to inflict injury,
2. The negligent infliction of injury or on
3. Mere voluntary action or activity causing injury. That is to say that some acts or activities, although they are perfectly lawful, are engaged in at our own peril so far as liability for injurious consequences is concerned.

It will be seen that one underlying notion does run through all of these principles. A voluntary act is required⁷ and this must be either an affirmative act or activity, or an omission in carrying out an act, activity, or undertaking. Otherwise the failure to confer a benefit has not generally been regarded as a tort.⁸ And simply *being* at the expense of another has never been regarded as a tort.

As the nineteenth century wore on, accident law emerged as the dominant branch of the law of torts, and *fault* (usually the fault of negligence) emerged as the dominant motif in accident law. This meant a relaxation of some of the stricter aspects of older liability. As Leon Green puts it:

"The concern of centuries for the injured party was transferred to the offending party, for whom the common law had theretofore shown slight consideration."⁹

This shift is explainable by the economic changes accompanying the industrial revolution and our common desire to free activity and enterprise from bur-

4. WINEFIELD ON TORTS § 7 (6th ed. 1954 per T.E. Lewis); *cf.* POLLOCK, LAW OF TORTS 16-18 (15th ed. 1951 per P.A. Landon).

5. SALMOND, LAW OF TORTS 9 (6th ed. 1924) (this was the last edition prepared by Salmond); *cf. id.* 17-19 (12th ed. 1957, per R.F.V. Heuston). Compare also POLLOCK, LAW OF TORTS, EXCURSUS A, p. 40 (15th ed. 1951, per P.A. Landon).

6. PROSSER, HANDBOOK OF THE LAW OF TORTS 24 (2d ed. 1955). *Cf.* HARPER, A TREATISE ON THE LAW OF TORTS §§ 4-7 (1933) (listing intent, negligence, and "extrahazardous conduct" as the kinds of conduct required to constitute a basis of tort liability).

7. RESTATEMENT, TORTS §2 (1934).

8. McNiece and Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949); HARPER & JAMES, LAW OF TORTS §18.6 (1956).

9. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE 13 (1958).

dens.¹⁰ It was quite in keeping with the notions of individualism and *laissez faire*, which then became current, to regard fault as the normal basis of liability. It was the job of self-reliant individuals to look out for themselves so far as the ordinary risks of desirable activity were concerned. Only when activity was antisocial or *unreasonably* dangerous should the actor be held.

It was natural then that those who sought a unifying principle in torts should find it in *fault* which included negligence and the intentional infliction of injury.¹¹ Instances of strict liability were viewed as exceptions and generally as exceptions to be disparaged and narrowed. Of the famous decision in *Rylands v. Fletcher*¹² which involved something of an extension of strict liability, Salmond said "No decision in the law of torts has done more to prevent the establishment of a simple, uniform, and intelligible system of civil responsibility."¹³

So fault was dominant. But the concept of legal fault is ambiguous. It may be used to refer to personal blameworthiness—to the choice of a bad alternative by an actor who has two alternatives or more and at least one good one. And that which makes the choice a bad one must be perceivable. "A choice which entails a concealed consequence is, as to that consequence, no choice."¹⁴ In this sense the word fault has meaning both to the layman and in terms of those values which the industrial revolution exalted. It still has meaning when it is used to refer to conduct which is substandard or unreasonably dangerous to the eye of the average reasonable man, even where the particular actor cannot perceive the danger or take the needed precaution, because he is dull or awkward.

But legal fault may be given a much more mechanical meaning. It may mean simply the failure to meet a legal standard, and such failure may often be quite a neutral thing so far as personal blameworthiness is concerned. Thus a man who uses land¹⁵ or a chattel¹⁶ in the honest and reasonable belief that it is his own incurs legal liability if he is mistaken in that belief. He has we say been "guilty" of trespass or conversion. He has committed a legal wrong. The

10. *Id.* ch. 1. According to Dean Green this was not due primarily to any deep sense of morality, nor to a capturing of the judicial process by a dominant economic class, but rather to the stake we all felt we had in the industrial revolution and in the free use of improved highways. "We of that period desired the good things of life that a bounteous new industrial world and the ingenuity and labor of vigorous men and women could afford. We were willing to pay the price, to share the risks, even more to sacrifice the individual in order to achieve our ends." *Id.* at 31.

11. Pound, *The Economic Interpretation of the Law of Torts*, 53 HARV. L. REV. 365, 377-378 (1940).

12. 3 Hurl. & C. 774 (Ex. 1865), L.R. 1 Ex. Cas. 265 (Ex. Ch. 1866), L.R. 3 H.L. 330 (1868).

13. SALMOND, *LAW OF TORTS* 20 (12th ed. 1957 per R.F.V. Heuston).

14. HOLMES, *THE COMMON LAW* 94 (1881).

15. RESTATEMENT, *TORTS* §164 and comments (1934).

16. PROSSER, *The Nature of Conversion*, 42 CORN. L.Q. 168, 175, 176 (1957); RESTATEMENT, *TORTS* §§244-246 (1934).

New York courts, adopting a minority rule, hold that the innocent purchaser from a wrongdoer must first be informed of the defect in his title and given a chance to restore the chattel to the true owner before he becomes a converter, unless, of course, such demand and refusal would be futile. *Gillet v. Roberts*, 57 N.Y. 28 (1874); Prosser, *op. cit. supra* at 176 note 32.

same thing may be said of the motorist whose brakes fail because of some latent undiscoverable defect in the mechanism, if a statute requires brakes that work;¹⁷ or of the retailer who sells impure food in a sealed container of unsuspecting appearance which he got from a reputable supplier.¹⁸ We vary the figure of speech slightly when we "impute" the wrong of a servant to his altogether blameless master.¹⁹ It is clear, I think, that in cases like these liability is strict in the sense that the careful, conscientious man could not avoid it by using the knowledge and perception open to him when he acted. If the language of fault is used to describe such cases, doctrinal unity may perhaps be attained, but it is attained by a play on words.

Even in the heyday of fault, however, the imposition of strict liability was not always concealed by a facile attribution of "legal fault" to the actor, witness *Rylands v. Fletcher*.²⁰

Fault then was not the universal solvent of all tort problems even when its dominance was well-nigh unchallenged; it certainly is not today.

Recently there has been a rather interesting attempt to find common denominators in the elements of the tort cause of action. The common elements, it is said, are damages to the plaintiff, causal relation, duty, and breach of duty by the defendant.²¹ But the attempt yields more of interest than it does of satisfaction. For one thing, resulting damage is not required in all torts,²² and this objection is scarcely met by resurrecting the hoary fiction of presumed damage. A more serious flaw in the usefulness of this analysis concerns the element of duty. If we assume for a moment that duty is indeed a common denominator in all torts, we are not helped very much. In a case of any difficulty or novelty the real question is whether a duty is to be imposed; and this at once reminds us of all the manifold reasons why society should or should not impose non-consensual obligations in the infinitely variable types of situations covered by the law of torts. The lack of a common thread here is not supplied by focussing on the concept of duty instead of the concept of torts.

A moment ago we assumed that duty is a common element in all torts. This is often said—indeed I spoke that way myself at the beginning of this lecture. But let us look more closely at this assumption.

When we speak of duty or obligation as non-lawyers we ordinarily mean a command or a prohibition imposed by law, morals, or religion.²³ Duty is related to *oughtness* according to some recognized standard. We have a duty to do that which we ought to do or should do. And the assumption also is that performance of duty lies within the realm of the possible. Breach of duty has

17. See, e.g., *Madison v. Morovitz*, 122 Conn. 208, 188 Atl. 665 (1936).

18. *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

19. See *Bellefontaine & I.R.R. v. Snyder*, 24 Oh. St. 670, 676 (1874); 2 HARPER & JAMES, LAW OF TORTS §26.3 (1956).

20. Note 12, *supra*.

21. Ward, *The Tort Cause of Action*, 42 CORN. L.Q. 28 (1956).

22. RESTATEMENT, TORTS §907 (1939).

23. But cf. OLIVECRONA, LAW AS FACT (1939).

aptly been described in the Episcopal prayer book: "We have left undone those things which we ought to have done, and we have done those things which we ought not to have done."²⁴ In the law of torts also this is the usual notion of duty—though of course the law is concerned only with legal duties and not all those which may derive from morals or religion. When these duties concern conduct outside the processes of civil litigation (or the presentation and settlement of legal claims) they may be called for convenience primary duties. Thus I am under a primary duty not to assault my neighbor. I owe my fellow high-way traveler the primary duty to use care in driving my automobile. And so on. If I violate one of my primary duties and injure someone I may then come under a new and different type of duty, a duty to pay damages, which may be enforced by the process of civil litigation or the threat of it. Let us call this kind of duty "secondary."²⁵

It is perfectly clear, I suppose, that whenever you have liability in tort you have a secondary duty. It is true, but it is also tautologous. It helps us no more than it does to know that in all successful tort actions there has been a tort. A more important question is whether you always have a primary duty. Let us look for example at a case like *Rylands v. Fletcher*²⁶ or the case of the careful employer. In *Rylands* the defendant built a reservoir on land he had under lease. So far as he was concerned he used all due care.²⁷ Unknown to him, however, there were shafts of an old mine under his reservoir and these led to plaintiff's mine. After defendant had impounded water in his reservoir the old shafts gave way and plaintiff's mine was flooded and rendered unworkable. In spite of defendant's admitted freedom from fault of every kind, the courts imposed liability upon him. Where is the primary duty in a case like that? One can readily be formulated as it was by Blackburn, J., in the Exchequer Chamber: "[T]he 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."²⁸ At another place he calls this "an absolute duty to keep it in at his peril."²⁹ But given the water on the land and the other circumstances of the case, this duty was impossible of fulfillment by one excusably ignorant of the danger against which omniscience might have taken further precautions. Of course defendant could have avoided the injury by not creating the reservoir.

24. From the General Confession.

25. Cf. HOEFFELD, FUNDAMENTAL LEGAL CONCEPTIONS 101 (1923).

26. Note 12, *supra*.

27. It appears from the report of the case that the independent contractor who constructed the reservoir observed the shafts and, although they were filled up with soil like that surrounding them, he was probably negligent in failing to realize the danger and take further precautions. Today most courts would hold defendant liable for this negligence of his independent contractor; but at the time of the decision the courts had not yet developed an appropriate exception to the owner's immunity from liability for his independent contractor's acts. So most of the judges assumed that liability of defendant could not be based on the negligence of the independent contractor. See Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. OF P. L. REV. 298, 299 (1911).

28. L.R. 1 Ex. Cas. at 279.

29. *Ibid.*

But that was a lawful activity and he was conducting it carefully. There was nothing then that defendant could and should have done that he failed to do; nothing he did that he should not have done.

The same thing is true of the careful employer who is held liable for the casual negligence of his employee. Even if he has adopted all the training devices and safety measures known to man and used the utmost human care in selecting his employee, he will be held vicariously liable for injury caused by the employee's momentary oversight so long as the employee is acting within the scope of his employment. Again there is nothing that the employer could and should do that he has left undone; nothing he did that he should not have done.

It is apparent then that the law of torts will sometimes impose the secondary duty to pay damages without insisting on the breach of a primary duty. In other words the law sometimes says to a man: "You may engage in a certain activity if you do it carefully. In fact it is in the social interest that you do so. Yet if you do so, however carefully, you must pay for all injuries which that activity causes to other people." The principles of liability which will justify such a result may well be quite different from those which justify imposing liability on a man who has violated a primary duty and caused an injury by his wrong. Duty then is seen to be an ambiguous term, just as fault is. It will serve no better, as a meaningful integrating principle of tort liability.

The truth is there is no single integrating principle of tort liability save one so broad that it answers nothing, though it may suggest fruitful inquiries.

And is not this inevitable?

Remember what torts are: those various heterogeneous instances where the law has sought to impose liability on people for real or supposed reasons of policy, without much regard to their consent. These instances cover the spectrum of human affairs. They touch matters of individual privacy, things that happen within a family; uses of neighboring land that interfere with each other; the incidents of public and private transportation; fights, affrays, and brawls; competition among business; police activities; the content of newspapers and broadcasts; industrial and other work accidents, and so on. Why should we not expect the agencies of the law—courts and legislatures—to have many different reasons for imposing liability under so many different circumstances, stressing deterrence here, compensation there; expediency here, morals there; concern for the individual here, subordinating it there? All with only this one common denominator: in each case the court or legislature must try to weigh the considerations of social welfare which favor or oppose liability and strike a balance according to its best judgment.

The lack of a unifying principle in torts does not mean, however, that we must fragment the field in the same way that the common law forms of action did; surely it does not mean that the law of torts represents a closed cycle to

which nothing new may be added. Nor does it mean that we should abandon the quest for the fundamental common concepts of liability.

Earlier we saw that it is the modern fashion to find three fundamental bases of tort liability: intent, negligence, and strict liability. This is a perfectly defensible form of statement but I find it unsatisfactory for one reason. It seems to me that the category of "strict liability" covers two distinct strains which have different origins and serve quite different ends. One is a very old strain. When the central government in England was in the making, the law of torts consisted in simple, very specific commands and prohibitions, with few if any exceptions or defenses.³⁰ A primary purpose of these rules was to control behavior and keep peace. The touchstone of tort liability was breach of a rule—unlawfulness in that sense, but an unlawfulness which might be quite devoid of fault as we are using that term. While this mechanical kind of unlawfulness is one of the oldest touchstones of liability, it has not been abandoned and still has vitality as one source of strict liability today.

But modern strict liability stems in part from an entirely different source whose older strains are emanations from notions of unjust enrichment³¹ and eminent domain (though this connection is often unperceived), which have more recently become mixed with what may loosely be called the principle of insurance, by which I mean the principle which recognizes that broad distribution of a loss diminishes its disutility or human hardship, although of course it cannot diminish the loss.³²

This ground of liability does not involve fault or even mechanical unlawfulness in any sense. It requires no breach of primary duty. Rather it involves a recognition of two things: (1) that the actor in a perfectly lawful and socially desirable but dangerous activity may fairly be asked to compensate the victims of the danger inevitably accompanying his activity, and (2) that such an actor is usually able today to distribute these losses widely among the beneficiaries of the activity and that the social disutility of the loss is thereby diminished.

I propose, then, to classify the principles of tort liability as:

1. Unlawfulness resulting in injury.
2. Intentional infliction of injury.
3. Negligent infliction of injury.
4. Strict liability imposed in spite of the absence of unlawfulness or fault, for reasons of policy.

This last is perhaps not so much a principle of liability in its traditional sense (which for centuries has been individualized) as it is a principle of allocating losses in the social interest. But the modern law of torts is becoming increasingly influenced by this principle (though often this does not appear on

30. Stone, *Touchstones of Tort Liability*, 2 STAN. L. REV. 259, 260 (1950).

31. See Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 410 (1959).

32. See 2 HARPER & JAMES, LAW OF TORTS ch. 13 (1956).

the surface) and it would be fatuous to consider that law without taking the principle into account.

Having set forth the basic principles of tort liability, let us next see something of the way each one is applied in the situations covered by tort law. In doing so, we need not inquire whether any one of these principles will account for all the cases in which tort liability is imposed. Obviously it will not. We should, however, ask whether these principles are uniformly applied—whether they mean the same things and carry the same consequences whenever they are invoked.

Unlawfulness. This we have seen involves disobedience to a specific command or prohibition. It is found in many of the familiar common law torts: the law of trespass forbade a man to enter his neighbor's close, to meddle with his chattels, to bring force directly to bear on his person, or to detain him by force or threat of force. The law of libel forbade the publication of a statement defamatory in its effect. Liability in some of these cases persists. In addition many police regulations like traffic laws have been enacted by legislatures and some new specific commands and prohibitions devised by courts.

The disobedience which constitutes unlawfulness may involve intent to hurt or negligence, and so it often overlaps these bases of liability and serves in an auxiliary capacity (as by prescribing a standard of conduct which a jury might otherwise be free to reject).³³ But, as we have seen, unlawfulness may serve as an independent basis of liability when there is no personal blameworthiness. You will recall the examples of the reasonably mistaken trespasser on land and of the motorist with a brake defect he could not know about. In other words society may regard some of its commands as so important that it makes them peremptory and unqualified. The question remains whether the faultless violation of such a command (or prohibition) will uniformly subject the violator to tort liability. The legislature may provide that it shall,³⁴ and if it does the provision will be given effect. If it does not—that is, if the statute merely provides for a fine or other criminal penalty—then American courts differ on the question. Some do hold the faultless violator subject to civil liability,³⁵ others do not,³⁶ still others will allow the violator to avoid liability if he can show one of certain excuses for violation³⁷ (even though the excuse would not remove the unlawfulness). A majority of our courts embrace one of the two last described solutions.³⁸

33. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1913); Lowndes, *Civil Liability by Criminal Legislation*, 16 MINN. L. REV. 361 (1931); Morris, *Criminal Statutes and Tort Liability*, 46 HARV. L. REV. 453 (1932); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949).

34. 2 HARPER & JAMES, LAW OF TORTS §17.5 (1956).

35. See, e.g., *Andrew v. White Line Bus Corp.*, 115 Conn. 464, 161 Atl. 799 (1932).

36. *Hanlon v. Southern Boston R.R.*, 129 Mass. 310 (1879); *Landry v. Hubert*, 101 Vt. 111, 141 Atl. 593 (1928). Cf. *Combs v. Los Angeles Ry.*, 29 Cal.2d 606, 177 P.2d 293 (1947).

37. See, e.g., *Taber v. Smith*, 26 S.W.2d 722 (Tex. Civ. App. 1930); *Bissell v. Seattle Vancouver Motor Freight*, 25 Wash. 2d 68, 168 P.2d 390 (1946).

38. Sources cited note 33, *supra*; 2 HARPER & JAMES, LAW OF TORTS §17.6 (1956).

It is also true that an unlawful act does not create liability for harm of a kind different from that which makes the act unlawful,³⁹ but this would not impair the general application of the principle if carefully stated.

Where a court sets up a specific command or prohibition⁴⁰ it has of course the power to visit liability mechanically upon the violator, but the trend has in fact been away from this kind of rigidity either through engrafting exceptions and qualifications on the rule of command, or by letting it become merged in the broad requirement of reasonable conduct which is applied by the jury.⁴¹

We cannot say then: whoever acts unlawfully and thereby injures another is subject to liability for that injury. We find here no principle of general or uniform application either as a rule of inclusion or one of exclusion. What we have is simply a concept, or a principle, or a device for imposing liability which sometimes is used and sometimes is not.

Intent. Like so many words we have used thus far "intent" is an ambiguous one. When we say that A intentionally cut B's trees we may mean that A did so knowing the trees belonged to B and therefore contemplated the injury to B as the desired or at least inevitable result of what he did. Or we may mean simply that he intended the cutting—a meaning which would be perfectly consistent with excusable ignorance of any injury to B. In many of the familiar torts which are commonly classed as intentional, intent in the latter sense is all that is required. Thus for trespass to real or personal property, for conversion, for libel, no intent to bring about injury or even to interfere with plaintiff's property⁴² or reputation⁴³ is needed. It is enough that defendant intended the act that constituted the interference. Now the books are full of situations where intent to do the very act which in fact results in injury does not make the actor liable.⁴⁴ Such intent could surely not be erected into a general principle of liability. Indeed I suggest that the real basis of liability in most of the so-called intentional torts is unlawfulness rather than intent.

A different and a harder question is posed when we come to an intent to inflict the injury. Yet it is perfectly clear that injuries may sometimes be in-

39. *Gorris v. Scott*, L.R. 9 Ex. Cas. 125 (1874). Cf. *Klein v. Herlim Realty Co.*, 184 Misc. 852, 54 N.Y.S.2d 144 (Sup.Ct. Bronx Co. 1945).

40. As in *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927); *Benner v. Philadelphia & R.Ry.*, 262 Pa. 307, 105 A.2d 283 (1918).

41. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PR. 476 (1936).

42. RESTATEMENT, TORTS §164 comment a (1934).

43. *Hulton & Co. v. Jones* [1909] 2 K.B. 44, *aff'd*, [1910] A.C. 20. See Holdsworth, *A Chapter of Accidents in the Law of Libel*, 57 L.Q. REV. 74 (1941).

American cases looking in the same direction are *Washington Post Co. v. Kennedy*, 3 F.2d 207 (D.C.Cir. 1925); *Switzer v. Anthony*, 71 Colo. 291, 206 Pac. 391 (1922); *Whitcomb v. Hearst Corp.*, 329 Mass. 193, 107 N.E.2d 295 (1952); *Laudati v. Stea*, 44 R.I. 303, 117 Atl. 422 (1922) ("The question is not who was aimed at, but who was hit.").

44. Examples would be cases where a man driving carefully turns his car to avoid a child darting out and runs into a parked car before he can stop; cases where a man creates precisely the condition of the premises which in fact causes an injury although the condition is not unreasonably dangerous, and so on. See also *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N.E. 531 (1888); *Poplar v. Bourjois, Inc.*, 272 App. Div. 74, 69 N.Y.S.2d 252 (1st Dept. 1947); *Bennett v. Pilot Prod. Co.*, 120 Utah 474, 235 P.2d 525 (1951).

tionally inflicted without fear of liability. In the first place there are some interests which the law does not protect. No action may be maintained for a cruel social snub. And even where the injurious invasion is to an interest which receives legal protection, there may be no liability. Our attitude towards business competition and possible conflict between labor and management, for example, is such that we permit many competitive methods⁴⁵ and strikes under many circumstances⁴⁶ although the conduct is intended to inflict economic harm.

If then the intent to injure a legally protected interest is to be erected into a generally applicable principle of liability it must include the qualification that the intent to injure is without legal justification. Some commentators⁴⁷ and some courts⁴⁸ do indeed embrace this as a principle of general application; others however reject it as an independent basis of liability altogether,⁴⁹ while still others accept it with qualifications.⁵⁰

Negligence. The term negligence, too, involves ambiguity although perhaps less than some other terms we have noted. It is often defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm;⁵¹ conduct, that is, which would be seen by the reasonably prudent actor to threaten unreasonable risk of harm to another. As we have already noted,⁵² courts do not agree upon whether a standard prescribed by a criminal statute is "established by law"—at least conclusively—for the purpose of tort law. There is an ambiguity here. There may be others. But the definition of negligence is itself so vague and covers so much ground that the problems it involves—and they are many—seldom turn on the same kind of definitional ambiguity. More often they are concerned with the weighing of facts and their evaluation in terms of legal consequences within the latitude allowed and invited by the language used.

The next question is whether negligence is a principle of general application. It is surely the dominant concept in modern tort law. But can we say that wherever a man's conduct has caused foreseeable and unreasonable harm he is subject to liability for it? A casual examination of the subject shows that we can not. For example:

If an able-bodied man makes no attempt to rescue a child from drowning

45. *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B. Div. 598 (1889), *aff'd*, [1892] A.C. 25.

46. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 742 (2d ed. 1955); Forkosch, *The Doctrine of Just Cause as Applied to Labor Cases*, 23 *TEMPLE L.Q.* 178 (1950).

47. POLLOCK, *LAW OF TORTS* 17, 18 (15th ed. 1951 per P.A. Landon); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 *CORN. L.Q.* 465 (1957).

48. See *Skinner & Co. v. Shew & Co.* [1893] 1 Ch. 413, 422 (per Bowen, L.J.); *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) (per Holmes, J.); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946).

49. See Professor Landon's Excursus A in POLLOCK, *LAW OF TORTS* 40-46 (15th ed. 1951); *Mayor of Bradford v. Pickles* [1895] A.C. 537.

50. Various qualifications are described in Forkosch, *op. cit. supra* note 47.

51. *RESTATEMENT, TORTS* §282 (1954).

52. *Supra* at notes 35-38.

in what the man knows to be a pool of shallow water, there is probably no liability.⁵³

If a water company negligently fails to keep up the pressure in its system many courts will not hold it liable for fire damage which could have been prevented by proper pressure. Such is the law of New York.⁵⁴

If an accountant makes a negligent audit of his client's accounts he is not liable to a creditor who lends the client money on the faith of the financial statement which because of the accountant's negligence pictures an insolvent business as one worthy of credit.⁵⁵

If a man makes a careless statement which disparages another's product he is not liable for the harm that ensues.⁵⁶

If the possessor of premises negligently allows them to become ruinous he is generally not liable to trespassers and often not even to licensees, injured by the ruinous condition.⁵⁷

If I lend another my automobile I owe the borrower no duty of care in inspecting or putting it in repair.⁵⁸

If I sell or lease premises I am not liable to the lessee or vendee for injuries caused by negligent disrepair, unless I actually knew of the defect and its danger, had reason to think the tenant or buyer would not observe it, and concealed it from him.⁵⁹

The list could be extended, but these instances will serve to illustrate the point. By no stretch of the imagination can we regard negligence as a principle of universal application.

Strict Liability. No one would contend that either courts or legislatures uniformly apply principles of strict liability based on notions of unjust enrichment or the insurance principle.

We have then no integrating principle in torts. We have, to be sure, principles or bases of liability; but some of these are ambiguous and none of them, with one possible and quite narrow exception, is a principle of general application. The possible exception is the intentional infliction of injury without justification, and this has often been hedged about with qualifications. Moreover as a practical matter it affects only a small segment of tort law.

A MORE FRUITFUL QUEST: SOCIAL PROBLEMS AND THEIR LONG RANGE SOLUTIONS

If, now, the quest among the concepts is disappointing this may suggest inquiry into the *facts* of the social problems with which the law of torts seeks

53. *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928).

54. *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928); *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945).

55. *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931).

56. *Dale System v. General Teleradio*, 105 F.Supp. 745 (S.D.N.Y. 1952).

57. PROSSER, *HANDBOOK OF THE LAW OF TORTS* ch. 15 (2d ed. 1955); 2 HARPER & JAMES, *LAW OF TORTS* ch. 27 (1956).

58. *Johnson v. H.M. Bullard Co.*, 95 Conn. 251, 111 Atl. 70 (1920).

59. *Kilmer v. White*, 254 N.Y. 64, 171 N.E. 908 (1950).

to deal. I believe that it does, and that more help at the present juncture can be had from classification and study of these problems in terms of their socially significant facts, than can be had from conceptual classification and analysis. This will not, of course, yield any integrating principle. Nor will it yield any automatic solution of problems. Indeed when the factual analysis is done, the work of laborers in the field of torts will be just begun. But it will, I suggest, be more fruitful work, at least in those areas (and they are important ones) where classification reflects an identifiable social problem.

There has been very little of this kind of factual sociological study made in fields covered by the law of torts; none that I know of in most areas. There have been significant studies in the fields of automobile accidents⁶⁰ and of industrial accidents,⁶¹ and that is about all.

Because I believe so strongly that studies like these are the greatest contributions that can now be made to tort law I should like to indicate something of the lines along which I suggest fruitful inquiry may be made.

The first thing any investigator will have to do is identify the area of study. This should be indicated by the dimensions of a significant social problem, but there may well be competing notions about these dimensions. This may be partly a matter of statistics—are there enough situations having significant common features to warrant studying them together? The question of what is significant will necessarily turn in part on the investigator's hypothesis as to solution. I have spoken of the studies of automobile accidents. Such an area would be carved out for study on the hypothesis that automobile accidents may properly be singled out for special treatment by the law, or possibly that they will shed light on a broader area.

Scope once determined, the inquiry should concern itself with the following:

What kind of injury is suffered by those who will seek redress; what is the value of the interest invaded; what is the frequency of the injury; what kinds of people are injured; what are the consequences, economic, psychological, social, of injury?

What kinds of redress are possible, appropriate, or preferable from the point of view of best protecting the interest?

What are the kinds of behavior that lead to injury? Is that behavior part of an activity or enterprise, or is it in each case simply an isolated instance?

Is the behavior which produces injury socially useful behavior; is it part of a socially useful activity or enterprise?

Can such behavior be controlled? If so can it be controlled without inhibiting useful enterprise or activity?

How will the remedies which are effective to redress the injury work as controls of the behavior which brings those injuries about?

60. Notes 62, 64 *infra*.

61. Note 63, *infra*; Report of the Wainwright Commission, N.Y. SENATE DOCUMENTS vol. xxv, No. 38 (1910).

To what extent will a remedy tend to minimize the social disutility or hardship of losses that occur? If a remedy will have a desirable trend in this direction, will the benefit of this be offset by unwanted side-effects in discouraging behavior and activity which we wish to encourage?

Such a study would obviously presuppose an examination of values whereby one may rate conduct and results as desirable or undesirable; or else an assumption of such values. In many situations, however, this would not be a major stumbling block since there is fairly wide common acceptance of enough of the values so that we would all be looking for many of the same things. Moreover there would not have to be agreement as to the relative weight to be given different values before a study is justified. Competing claims among values can be more intelligently discussed if we know as a matter of fact just how seriously an existing or proposed legal rule will affect them. Most of us would agree, for instance, that monetary compensation to a man who has been injured and has suffered financial loss as a result, is a desirable thing. Most of us would also agree that it is an undesirable thing to impose liability for damages where such imposition will tend to discourage lawful and useful activity. Now however much or little weight one would give these considerations on balance, the weigher would be helped by knowing the extent of harm done to the victim and to others by his loss if it should not be compensated; the extent to which that harm is effectively minimized by compensation; the extent to which liability would in fact discourage the activities of those on whom it may be imposed, and so on.

The optimum legal rule for any given type of situation is one which will best conserve and promote the values involved, with a proper balance between competing ones. My thesis here is simply this: This is fundamentally a human, economic, or social problem, not a legal one. The legal rules and techniques are only means or tools for conserving or promoting the values selected as important in any given type of situation. The situations presented and the kinds of problems they pose are infinitely varied. They call for different types of solution and the use of different techniques; and this may be so even within the confines of what has traditionally been thought of as a single tort.

There is another point I think is important. We have seen that there are relatively few basic principles of liability in torts. Naturally then the same ones will reappear in many different contexts. Negligence, for instance, may be found an appropriate basis for liability in accident law, and also in the field of misrepresentation of facts where commercial or business interests are at stake. It does not follow, I submit, that the concept of negligence in the two different contexts should be identical. The fact that we reject degrees of negligence in one situation, for example, should not mean that we must necessarily reject them in the other. Or, the willingness to accept contributory negligence as a defense in one of these fields should not lead us blindly to accept it in the other. We should not, in other words, be led astray by the pursuit of conceptual sym-

metry. We should not only select but also adjust our tools to the particular job in hand, and that is to be measured in terms of human needs and values and not of legal concepts.

So much for general considerations.

Let us turn now to some of the studies which have actually been made and see the lessons they teach. As I said before, the only studies I know of have been in the field of accidental personal injury. The greatest of these are, The Columbia Study,⁶² made in the early Thirties, of the economic consequences of personal injuries suffered in automobile accidents, and a study made by the Railroad Retirement Board⁶³ of the consequences of work injuries in the railroad industry for the years 1938-1940. There have also been some minor later studies to test whether the conditions shown by the Columbia Study continued to exist in the post-war period.⁶⁴ There has also been a significant study into the comparative costs of administering workmen's compensation statutes and the modified common law system which covers railroad workers under the Federal Employers' Liability Act.⁶⁵ Finally there have been several studies by industrial psychologists and others into the kinds of human behavior which cause accidents.⁶⁶

From these studies facts of outstanding significance emerge. I shall take up first those which concern the consequences of injury under the present system, for the injured party.

1. There is an overall inadequacy of payments as measured by the economic loss actually suffered. This inadequacy is striking where defendants are

62. COLUMBIA UNIVERSITY, COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932) (hereafter called the COLUMBIA STUDY).

63. U.S. RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY 1938-40 (1947) (hereafter called the RAILROAD STUDY). See Pollak, *Workmen's Compensation for Railroad Work Injuries*, 36 CORN. L.Q. 236 (1951), for a summary of many of the findings in this study.

64. James and Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70 (1952); *Economic-Financial Consequences of Personal Injuries Sustained in 1953 Philadelphia Auto Accidents*, 7 ECONOMICS & BUS. BULL. No. 3 (March 1955) (by the Temple University Bureau of Economic and Business Research; hereafter called the TEMPLE STUDY).

Both these studies are briefly described in Marx, "Motorism," Not "Pedestrianism": *Compensation for Automobile Victims*, 42 A.B.A.J. 421 (1956).

See also Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300 (1950).

65. Conard and Mehr, COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS (1952); Conard, *Workmen's Compensation: Is It More Efficient than Employer's Liability?* 38 A.B.A.J. 1011 (1952).

This study found that the administration of the federal act "costs less per dollar of benefit conferred" than workmen's compensation.

66. Many of these studies are collected in James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950); 2 HARPER & JAMES, LAW OF TORTS §11.4 (1956).

See also SCHULZINGER, THE ACCIDENT SYNDROME, THE GENESIS OF ACCIDENTAL INJURY (1956) (casting doubt on the hypothesis of accident proneness, but offering no more comfort to those who seek moral fault as basis for accident responsibility. "[I]n the final analysis, accidents are a medical problem and further major improvements in accident prevention must be in terms of clinical medicine with special emphasis on the adjustment of the individual to himself and to his environment." p. 218).

uninsured individuals.⁶⁷ Even where there is insurance or financial responsibility, however, average payments fall far short of the actual economic loss, especially in the case of serious injuries and death. Thus the Columbia Study concluded: "In the small loss groups the losses in the insured cases are more than covered by the payment received, while in the large loss groups the losses are not covered."⁶⁸ Where losses exceeded \$2500, payments covered only a third to a half of these losses. And this conclusion is based on wage loss and medical expenses up to the time of investigation only, while the serious cases involved continuing future losses which were not counted.⁶⁹ If they had been, the inadequacy in such cases would have been even more pronounced. The Railroad Study showed that the average net recovery for railroad work injuries was less than half of the wage loss even after the estimated future losses had been reduced to present worth.⁷⁰

Later studies indicate that this overall inadequacy still persists in spite of occasional spectacularly high verdicts and settlements.⁷¹

2. There is a tremendous inequality of payments made to those with similar economic losses. Thus the Railroad Study showed that payments in permanent total disability cases ranged all the way from zero to \$50,000.⁷² Today, of course, the top figure would be substantially higher⁷³ and the range consequently even wider.

3. The payment of a lump sum of money to an injured man gives very inadequate assurance that his future losses will be properly taken care of.⁷⁴ Accident victims as a class are not well equipped to conserve and invest with skill large capital sums.

4. Accident victims as a class come from the lower income groups and contain a very high proportion of wage earners.⁷⁵ These facts hold true not only for industrial accidents but also for motor accidents. They mean that the loss inflicted by personal injury creates great hardships not only for the victim, but also for his family, his doctor, his landlord, his grocer, and other creditors—often ultimately for society.⁷⁶

5. Many of these losses may be guarded against—*theoretically*—by insurance of one kind or another which the injured man himself has taken out. Accident insurance, blue cross, and medical insurance are available for this pur-

67. COLUMBIA STUDY 203-205, Appendices Nos. 5-10, 12-16; James and Law, *op. cit. supra* note 64 at 74-76.

68. COLUMBIA STUDY 266.

69. *Ibid.* See also Corstvet, *The Uncompensated Accident and its Consequences*, 3 LAW & CONTEMP. PR. 466 (1936).

70. RAILROAD STUDY 6. The total estimated wage loss was \$30,500,000. This was adjusted to \$24,000,000 when reduced to present worth. The total amount paid to claimants was about \$12,000,000. The cost of acquiring this amount was about \$1,000,000.

71. Sources cited note 64, *supra*.

72. Pollak, *op. cit. supra* note 63 at 247-248; RAILROAD STUDY 13, 101, 107, 115, 119, 129, 133; COLUMBIA STUDY, Appendices Nos. 10, 11.

73. See 22 NACCA L.J. 388 et seq. (1958).

74. Pollak, *op. cit. supra* note 63 at 250; RAILROAD STUDY 15, 16, 166-176.

75. Corstvet, *op. cit. supra* note 69; COLUMBIA STUDY 55, 66, 219; TEMPLE STUDY 27.

76. Corstvet, *op. cit. supra* note 75.

pose. But the studies show that very few accident victims are in fact protected in any material degree against such losses.⁷⁷ Moreover the poorer the victim is the less likely he is to be insured. To put it another way: the greater the need the less likely it is to be met by this type of insurance. All this is still true today, despite the growth of social insurance, blue cross plans, and fringe benefits in labor contracts.⁷⁸ Under the present system, then, accident victims depend heavily on tort recoveries or settlements to meet their economic losses.

6. Much of the loss resulting from accidental injury is economic loss which can be provided for by money recovery.

If we turn from a consideration of the injured party to look at the other side of the coin—the defendant's side, we find from the studies facts which are equally significant.

1. Only insurance companies and large corporate self-insurers pay anything to speak of in the way of tort damages or settlements. Uninsured motorists, although they cause more than their share of accidents,⁷⁹ seldom in fact pay anything significant. Employee-participants in an accident—people like the bus driver or the train crew—are practically never called on to pay anything. Those individuals in management who make the decisions for a business which turn out to cause injury and to be found negligent, seldom pay the damages for that injury. In short the *individuals whose personal fault constitutes the legal basis of liability do not pay for the accidents they negligently cause.*

2. There is great disparity between the bargaining position of insurers and large self-insurers on the one hand, and that of injured persons, on the other, who come by and large from the lower income brackets. To make matters worse, the greater the injury, the loss, and the need, the weaker the victim's bargaining position becomes and the less able he is to wait for the outcome of the tedious process of litigation.

3. Studies of the kinds of human behavior which produce accidents show that the conscious free choice of the participants plays far less of a role than is commonly supposed. A disproportionate number of accidents is caused by a relatively small group of accident prone persons.⁸⁰ Accident proneness may stem from defects in vision, from the relationship between speed of perception and reaction time; from personality traits (sometimes of a compulsive nature); from cycles of depression found even in normal persons; or from youth or inexperience. These findings greatly reduce, though they do not eliminate, the importance of ethical fault in accident producing behavior. They also indicate the futility of putting the pressure of tort liability directly on individual participants in order to promote safety. Individuals are often blissfully ignorant of their own accident proneness or of the factors which make them so. Nor are they aware of the tests and the training methods which might help the situation.

77. Sources cited note 75, *supra*.

78. James and Law *op. cit.* *supra* note 64, at 74; TEMPLE STUDY 30, 86, 90.

79. TEMPLE STUDY 32, 33.

80. Sources cited note 66, *supra*.

It is from large units like employer groups and insurance companies that these studies have come, and it is large units which have made successful use of these findings to reduce accidents.

4. Experience has now shown that the presence of insurance against liability for accidents does not lead to any increase in accidents caused by insured persons.⁸¹ This shows again, in a negative way, that the threat of personal civil liability is a negligible factor in accident prevention.

5. The stricter liability imposed by Workmen's Compensation on employers not only led in part to the studies of accident proneness but it was also followed by a substantial reduction of the industrial accident rate⁸² during a period marked by a tremendous growth of productive efficiency.

These are the studies. Let us next see what light they shed on the way we are now trying to solve the accident problem through the medium of tort law.

So far as the accident victim's compensation goes, the present system is a miserable failure, marked by stark overall inadequacy punctuated by occasional fantastically high awards. The condition is one of feast and famine. And even the high awards do not in many cases meet future needs because they are squandered or unwisely invested. The only class that profits systematically from the present system is the lawyers—and I do not say this to disparage, for I think many of them are doing a conscientious job, given present circumstances, but I do say it to note an important fact in the situation.

If our present system fails to give adequate and equitably distributed compensation to accident victims, does it nevertheless operate efficiently to control the behavior that might produce accidents?

Our first conclusion here must be that we do not now have liability based on fault in a sense which is significant in terms of individual morality. For one thing, the conduct of an accident prone person will often amount to negligence in law when it involves no ethical shortcoming. But beyond that, liability today is seldom visited, in accident cases, on the individual who is to blame even where there is genuine blameworthiness. Those who pay in fact are innocent absentees.

Our next conclusion will be that the pressure of civil liability yields little if anything in terms of accident prevention if exerted directly against individuals. It will yield more if exerted in the first instance against employers and, probably, insurance companies.

It is also clear that strict liability for accidental injury will not reduce (and will probably increase) the pressure towards accident prevention.

Finally it will be concluded that strict liability, at least if coupled with reasonable limitation on amounts, will not discourage desirable activity and enterprise.

Another conclusion of a more general nature emerges. Under our present

81. 2 HARPER & JAMES, LAW OF TORTS §13.5 (1956).

82. *Ibid.*

system techniques have been developed for the broad distribution of losses, and the imposition of liability in fact tends to bring about such distribution.

The upshot of all this to me seems clear. Motor accidents should be handled on a broad compensation basis under which liability is dependent on the fact and extent of injury and not on fault. But compensation should be limited in amount. All injured persons should receive a minimum portion of their actual economic losses to be paid periodically as such losses occur. Insurance—whether in the form of liability or loss insurance—should be compulsory and its cost borne by the owners of vehicles—the direct beneficiaries of motoring.

I believe, and I think we may safely assume at this point, that any such program as this calls for legislation and cannot be brought about in anything like the requisite completeness by the courts. This naturally brings us to the question of what the courts should do in the meantime. But before we get to this let us interrupt the continuity of our argument to take a quick look at another field wherein some of the factors are similar at least superficially yet where, I believe, quite a different pattern of legal solution is appropriate, though there is need for further study before coming to a firm conclusion on the matter. I refer to defamatory statements made by our media of mass communications—newspaper, radio and television. Here, as in much of the accident field, we have enterprises carrying on business for profit and individuals injured as a by-product of the activities of that business. Here, too, we have available liability insurance to aid in distributing the loss. Here, too, there is often the same lack of real fault as is so often found in accidental injury. The analogy has been tempting to some. And indeed the traditional basis of liability here is strict—a species of what we have called unlawfulness.

Here, however, there are questions calling for study which may well point to different solutions. In the first place the injury done often entails no pecuniary loss so that compensation may not be made so aptly by money award. Perhaps other forms of relief, which would be only a mockery in case of personal injury, may come closer to satisfying the legitimate grievance of one defamed.⁸³ We should find if we can some way to measure the gravity of this intangible injury and the effectiveness of the possible means of redressing it.⁸⁴

On defendant's side the deterrent effect of a money judgment may be fraught with untoward consequences. Certainly where the defamation occurs in the course of news or comment on matters of real public concern—and I mean

83. See, e.g., Chafee, *New Remedies for Errors in the Press*, 60 HARV. L. REV. 1 (1946); Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); Morris, *Inadvertent Libel and Retraction*, 32 ILL. L. REV. 36 (1937).

Cf. *Werner v. Southern California Assoc. Newspapers*, 35 Cal.2d 121, 216 P.2d 825 (1950), noted 38 CALIF. L. REV. 951 (1950); 64 HARV. L. REV. 678 (1951); 99 U.P.L. REV. 107 (1950).

84. Sociologists have already made some studies which suggest that techniques could be devised to make the kinds of studies needed to yield such data. See, e.g., KLAPPER, *THE EFFECTS OF MASS MEDIA* (Bureau of Applied Social Research, Columbia University) (1950); HOVLAND, JANIS AND KELLEY, *COMMUNICATION AND PERSUASION* (1953); KATZ & LAZARSELD, *PERSONAL INFLUENCE* (1955).

concern beyond the interest we all have in news of private misfortune or scandal—it is of the greatest public importance to have brought home to the public the manifold points of view and comments of men with variant ideas. It is one of the first articles in our belief in democracy that ideas be free to compete for our acceptance. The media themselves are no longer so likely to do this as they were in the early days of the republic. Existing studies show us that newspaper publishing is big business.⁸⁵ Some broadcasting stations are small but they depend materially on the large networks. These businesses by and large are engaged in to make money rather than to disseminate points of view—especially unpopular points of view. One of our big problems is to keep these channels free as vehicles for other points of view than their own—voices that will not be heard if the media of communication are closed to them. If the businesses that run these media are to be strictly liable for statements by persons who use their facilities for comment on public issues, whenever these statements turn out to be defamatory, then certainly there is danger that these businesses will be reluctant to let their facilities be used for this purpose in which the public has so great an interest.⁸⁶ We should find out if we can just how great this danger is.

Already the law has recognized this interest by creating a privilege to comment about facts of public interest. But the privilege does not (in New York for instance) cover honest mistakes about those facts.⁸⁷ And there is conflict among decisions upon the question whether a broadcaster is liable without fault for spontaneous, ad-libbed statements made by non-employees over its facilities.⁸⁸

I cite these matters as areas for further study and as illustrating areas where studies may well indicate a retreat from strict liability for money damages.

THE ROLE OF THE COURTS IN THE MEANTIME

Let us return now to the motor accident field. It is clear, as we have seen, that the program proposed would require legislation. It is also perfectly clear that we may have to wait a long time for it.

When I was practicing tort law for the New Haven Railroad back in the days of Hoover's presidency, there were hard headed practitioners who thought a compensation scheme for auto accidents was, like prosperity, just around the

85. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 37, 50 (1947); ICKES, AMERICA'S HOUSE OF LORDS 10-13 (1939).

86. See Murphy, J., in *Dale System v. General Teleradio*, 105 F.Supp. 745, 751-752 (S.D.N.Y. 1952).

87. *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947); Noel, *Defamation of Public Officers and Candidates*, 49 COL. L. REV. 875 (1949). *Contra*: *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955). See Hall, *Preserving the Liberty of the Press by the Defence of Privilege in Libel Actions*, 26 CAL. L. REV. 226 (1938).

88. *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1952); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933) impose strict liability. On the other hand negligence was required for liability in *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A.2d 143 (1948); *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. N.Y. Co. 1942); *Summit Hotel Co. v. National B. Co.*, 336 Pa. 182, 8 A.2d 302 (1959).

corner. In the next few years the New Deal sired, out of the Depression, social insurance schemes that went far beyond anything most of us had even dreamed of. But not this one.

Why? It may be that the public does not yet want social insurance here; but if that is so, the general will is schizophrenic. Surely there is a strong popular urge towards strict liability here, wherever it can be seen that defendant can absorb and distribute the loss—wherever, that is, there is insurance in the case. There may be pulls in the opposite direction. We still often think of liability as theoretically an individual matter—a sort of penalty that should not be visited on the innocent. And especially in these days of astronomical verdicts we are still lured on by the hope of hitting a jack pot.

But I suspect that the main reason why we haven't compensation here is the fact that there are strong pressure groups against it and this includes the ranks of our own profession who—we must face it—are the chief beneficiaries of our horse and buggy system, and the insurance companies who regard compensation here as too socialistic, just as their predecessors regarded workmen's compensation. On the other hand there is no pressure group to take up the cudgels for accident compensation although a growing number of disinterested students of the problem are coming to regard it as the only sensible long run solution.

If we are right about the solution and if it is to be postponed as long as I fear, the question arises what the courts should do in the meantime.

There are several possibilities.

One thing courts might do is to stand still, declaring that all further change is for the legislature to make.

A second thing courts might do is to unmake changes that have already been made.

Still a third possibility is to make further changes in the direction of more complete compensation and distribution of the loss.

There are no doubt other possibilities but these are the principal contenders on the modern scene.

I suggest with diffidence that courts should follow the third of these courses of action, and I believe they are already doing so and are very likely to continue to do so.

The specific changes which I should like to see the courts bring about through the process of common law change are these (and it should be noted that some courts have already made many of them):

First, in meeting a problem of accident litigation, courts should, I submit, consciously and expressly deal with the factual and policy questions really involved in the problem, and these would include the effect of the decision in terms of compensation and loss distribution. The results of sociological studies suggested before, would greatly help the courts to do this. Courts do write opinions like this on occasion, but too often they talk in fictional terms which only conceal the real problems. Consider the way many courts have treated a

minor child's suit against his parent for injuries caused by negligent automobile driving. Recovery is generally denied because suit would threaten parental discipline and the family peace, and give the injured child too big a share of the family pocketbook.⁸⁹ Such talk is nonsense. The only time a suit like this is brought is when there is insurance. The real dangers are too much—not too little—family harmony, and a threat to the pocketbooks of the insurance company and its other policyholders—not to the family pocketbook. A commendable example of careful and realistic analysis in a situation of this kind is to be found in a New Hampshire decision.⁹⁰ There are a good many examples in other situations.⁹¹

Second, I should like to see the courts extend the law of negligence so as to eliminate pockets of immunity under existing law. I am happy to say that the New York court has been a pioneer along this line. Some of these pockets of immunity from liability for negligence are:

- (1) Intra-family suits⁹² (like those between parent and minor child).
- (2) Pre-natal injuries. Not long ago most states denied recovery for injury negligently caused to a child before birth.⁹³ In the last ten years several states, including New York,⁹⁴ have repudiated this immunity.
- (3) Not long ago a majority of American courts denied recovery for injury caused through emotional distress without impact.⁹⁵ A defendant would be liable for negligently scratching a man's hand, but not for negligently scaring him to death. Many courts have now repudiated this limitation.⁹⁶ New York decisions are equivocal.⁹⁷
- (4) A century ago the maker of an article for sale owed no duty to make it safe for anyone beyond the immediate purchaser even though the purchaser might be a dealer and the only persons likely to be hurt by the defect might be remote purchasers and users.⁹⁸ New York courts were among the first to break with this limitation⁹⁹ which is now widely

89. See, e.g., *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940).

90. *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

91. See, e.g., *President & Directors of Georgetown Hospital v. Hughes*, 130 F.2d 810 (D.C.Cir. 1942); *Escola v. Coca Cola B. Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion of Traynor, J.); *Jacobsen v. Dailey*, 228 Minn. 201, 36 N.W.2d 711 (1949); *Kohlman v. Hyland*, 54 N.D. 710, 210 N.W. 643 (1926); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

92. *McCurdy, Torts Between People in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

93. Note, 50 MICH. L. REV. 166 (1951).

94. *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

95. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) was a typical decision.

96. See *Smith, Relation of Emotions to Injury and Disease*, 30 VA. L. REV. 198 (1944); *Symposium on the Urban Case*, 27 CONN. B.J. (1953).

97. *McNiece, Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949).

98. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842); *Bohlen, Liability of Manufacturers to Persons Other than their Immediate Vendees*, 45 L.Q. REV. 343 (1929).

99. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), is the culmination of a long line of cases.

repudiated.¹⁰⁰ Its ghost lingers on, however, in a rule which denies recovery against a contractor for injuries caused by his negligence to third persons after his work has been accepted by the party with whom the contract was made.¹⁰¹ A recent opinion of the Court of Appeals has said this is no longer New York law.¹⁰²

- (5) Until the second World War most American states denied the liability of charitable institutions for the negligence of their employees.¹⁰³ Two years ago New York swept away the last vestiges of this immunity.¹⁰⁴
- (6) The occupier of land still enjoys a wide immunity from liability for negligence towards those who enter upon his land. He owes little or no duty of care to trespassers no matter how likely they are to trespass.¹⁰⁵ He owes only a very limited duty of care to those who come on his land for their own purposes but with his permission.¹⁰⁶ Even to his business visitors or invitees, the occupier owes only the duty to disclose dangerous defects and need not repair them.¹⁰⁷ Courts in many states have made substantial inroads on these immunities but here New York courts have been more reluctant than most.¹⁰⁸ It would be my proposal that courts withdraw these immunities altogether and substitute the tests of negligence generally applied in accident cases.

Third. I should like to see courts continue to make changes within the field of negligence itself along lines already well charted by rules which relax the burden of proof (like *res ipsa loquitur*) in situations where this burden is overlikely to defeat meritorious claims; and by rules which would enlarge the jury's role on the issues of liability. Examples of this would be progressive abandonment of fixed standards of conduct¹⁰⁹ and the progressive extension of last clear chance¹¹⁰ and other notions which would cut down the defense of contributory negligence.

100. *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946); RESTATEMENT, TORTS §§395-398 (1934).

101. *Benton Harbor Malleable Industries, Inc. v. Pearson Constr. Co.*, 348 Mich. 471, 83 N.W.2d 429 (1957).

102. See *Inman v. Binghamton Housing Authority*, 3 N.Y.2d 137, 143-144, 143 N.E.2d 895, 898-899 (1957).

103. See opinion of Rutledge, J., in *President & Directors of Georgetown Hospital v. Hughes*, note 91 *supra*, exhaustively considering development of the rule; Annotation, 25 A.L.R.2d 29 (1952).

104. *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

105. *Carbone v. Mackchil Realty Co.*, 296 N.Y. 154, 71 N.E.2d 447 (1947).

106. *Laube v. Stevenson*, 137 Conn. 469, 78 A.2d 693 (1951); *Wilder v. Ayres*, 3 N.Y.2d 725, 143 N.E.2d 514 (1957).

107. RESTATEMENT, TORTS §343(c) (iii) (1934).

108. *Carbone v. Mackchil Realty Co.*, *supra* note 105. *But see* *Mayer v. Temple Properties*, 307 N.Y. 867, 122 N.E.2d 750 (1954); *Runkel v. Homelsky*, 286 App. Div. 1101, 145 N.Y.S.2d 729 (2d Dept. 1955), *aff'd*, 3 N.Y.2d 857, 145 N.E.2d 23 (1957).

109. See *McKinney v. Yelavich*, 352 Mich. 687, 90 N.W.2d 883 (1958); *Nixon, op. cit. supra* note 41; 2 HARPER & JAMES, LAW OF TORTS §§17.1, 17.2 (1956).

110. New York has been more reluctant than most states to extend the last clear chance doctrine. *Contrast* *Woloszynowski v. New York Central R.R.*, 254 N.Y. 206, 172 N.E. 471 (1930) with RESTATEMENT, TORTS §§479, 480 (1934). *But see* *Kumkumian v. City of New York*, 305 N.Y. 167, 111 N.E.2d 865 (1953).

Fourth. I should like to see courts maintain and extend existing areas of strict liability. The principal ones which courts have worked out are these:

Liability on a warranty of fitness, or of merchantability, of an article sold by defendant to plaintiff.¹¹¹ The New York courts, aided by the codifying Sales Act, pioneered in the fashioning of this liability.¹¹² More recently other courts have extended it by abandoning at least partly the limitation of privity and allowing recovery by an injured consumer directly against the maker even though the purchase was not direct.¹¹³

Ultrahazardous activities, like blasting or the shooting of oil wells, are often regarded as involving strict liability.¹¹⁴ It is my belief that this is a sound notion and that courts should be increasingly liberal in characterizing dangerous activities as "ultrahazardous."¹¹⁵

The New York courts have historically given wide scope to the ancient action of trespass. This has led lower courts to hold airplane operations strictly liable for ground damage they cause.¹¹⁶ The Court of Appeals has not yet spoken. It is to be hoped that Court will not disturb the rule—its reasoning may reflect antiquity, but its substance has the shape of the future.

Finally, I should like to see the courts make certain changes in the field of damages. The present law is based on the notions of full compensation for all items of loss including many non-pecuniary items. This may well be justified where damages are paid by a wrongdoer to his innocent victim. But the requirements of fault and innocence are progressively, and I think properly, being diluted in response to a growing feeling that compensation for a cripple or a dead man's dependents should not turn on whether somebody forgot to look, or inadvertently gave the wrong signal, on this occasion. And once we recognize that human failings like these are an inevitable part of our system and that human injuries are simply a part of its cost, then the moral claim to such full compensation loses some of its force. This has been pointed out by one of the former deans of this School.¹¹⁷

The foregoing, I believe, should be reflected by the courts in two ways:

First they should continue to supervise overall amounts of verdicts.

111. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943); PROSSER, *HANDBOOK OF THE LAW OF TORTS* 506 *et seq.* (2d ed. 1955); HARPER & JAMES, *LAW OF TORTS* §§28.15 *et seq.* (1956).

112. *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931).

113. See, e.g., *Mannsz v. MacWhyte Co.*, 155 F.2d 445 (30 Cir. 1946); *McAfee v. Cargill*, 121 F.Supp. 5 (S.D. Cal. 1954), noted 8 VAND. L. REV. 149 (1954); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); Symposium, *Strict Liability of Manufacturers*, 24 TENN. L. REV. 923—1018 (1957).

114. RESTATEMENT, TORTS §519 (1934).

115. Recent decisions which I should call "liberal" include *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

116. *Rochester Gas & Elec. Co. v. Dunlap*, 148 Misc. 849, 266 N.Y. Supp. 469 (Monroe Co. Ct., 1933); *Halm v. U.S. Airlines*, 127 F.Supp. 951 (E.D.N.Y. 1954); *Margosian v. U.S. Airlines*, 127 F.Supp. 464 (E.D.N.Y. 1954).

117. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PR. 219 (1953).

Secondly they should reverse much of the judge-made "collateral source" rule. This is a rule that lets plaintiff recover in a tort suit for items of loss which have already been met by someone other than the defendant. Thus if a plaintiff has already had his wages paid¹¹⁸ (for the time he lost because of his injury) or his medical and hospital bills completely taken care of—perhaps at public expense¹¹⁹—he may still recover in full for those items from the tort defendant under the prevailing American rule. And many courts allow him to recover damages—which are not subject to income tax—computed on the loss of income before taxes.¹²⁰ Such rulings in effect provide double recovery. In most situations they cannot be reconciled even with the notion of full compensation. They should have no place at all in a system under which damages are more and more often being paid by persons who are not at fault.

So much for a statement of what I should like to see courts do in the near future, pending the comprehensive legislative change which I believe is the better long range solution.

This interim program has been attacked and certainly will be attacked again. As I see it the attackers fall into two main groups. There are those who raise substantive objections, who basically disagree with the whole philosophy underlying both the long range solution and proposals for the interim, who want no part of any scheme of social insurance and prefer the individualism which they believe underlies the present law of negligence.¹²¹ There are also those who would accept a comprehensive scheme for compensation without fault but who shrink from my proposals from what the courts should do in the meantime.¹²²

118. *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927); McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 310 (1935).

This is not the rule in New York. *Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880).

119. *Denver & G.R. Co. v. Lorentzen*, 79 Fed. 291 (8th Cir. 1897); *Hudson v. Lazarus*, 217 F.2d 344 (D.C. Cir. 1954); *Plank v. Summers*, 203 Md. 552, 102 A.2d 262 (1954). See notes 42 GEO. L.J. 556 (1954), 43 *id.* 515 (1955); 68 HARV. L. REV. 366 (1954); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952).

120. *Stokes v. United States*, 144 F.2d 82 (2d Cir. 1944); *Chicago & N.W. Ry. v. Civil*, 178 F.2d 497 (8th Cir. 1949); *Hall v. Chicago, St. P., M. & O. Ry.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955). *But see Floyd v. Fruit Industries*, 144 Conn. 659, 136 A.2d 918 (1957).

See Harnett, *Torts and Taxes*, 27 N.Y.U.L. REV. 614 (1952); Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L. REV. 212 (1958); 2 HARPER & JAMES, LAW OF TORTS §25.12 (1956).

121. See, e.g., HOLMES, THE COMMON LAW 96 (1881); Sherman, *Grounds for Opposing the Automobile Compensation Plan*, 3 LAW & CONTEMP. PR. 598 (1936); McVay, *Reply to "The Case for Compulsory Automobile Compensation"*, 15 OH. ST. L. REV. 162 (1954); Ryan and Greene, "Pedestrianism": A Strange Philosophy, 42 A.B.A.J. 117 (1956); *cf.* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

There are also those who would accept most of my proposals for the near future but reject my long-run proposal. See, e.g., Richter and Forer, *The Railroad Industry and Work-Incurred Disabilities*, 36 CORN. L.Q. 203 (1951); de Parcq, *The Supreme Court and the Federal Employers' Liability Act, 1956-57 Term*, 36 TEX. L. REV. 145 (1957). This in general is the position of the National Association of Claimants' Compensation Attorneys (NACCA). See Lambert, *Editorial*, 17 NACCA L.J. 23 (1956); 19 *id.* 25 (1957).

122. See Cooperrider, *A Comment on The Law of Torts*, 56 MICH. L. REV. 1291 (1958). Professor Cooperrider apparently accepts with reluctance the need for a compensation scheme for motor accidents. At least he is "... not inclined to argue ..." that

Theoretically, these two classes are mutually exclusive. Actually I suspect they are not, and that the reason for this lies in the fundamental weakness of the first position. In fact, we could not if we would in this day and age recapture the conditions that made early accident litigation a matter between neighbor and neighbor—for one sufficient reason among many because we cannot abolish liability insurance. The notions of individualism that underlay the development of negligence law during the last century do not in fact underlie accident law today, and no philosophy and no amount of wishing will make it so. Most people realize this more or less consciously and therefore few will be found to embrace the all out position that we should try to restore what has gone out of our system. But many people are unhappy about this and their nostalgia, which cannot be satisfied, leads them to espouse the status quo as though it still contained the substance of which it is only the shadow; or to grant the logic of compensation, with melancholy reluctance, but at the same time to resist any specific step that takes us nearer that goal as an inadequate half-way measure.

There is however much more substance than this to many objections levelled against the interim position. Let us examine them. One set of objections is addressed to the system which the proposed judicial changes would produce. This, it is charged, would be "incomplete, both internally and externally."¹²³ It would leave many accident losses uncompensated as well as many other losses "of equal significance to society."¹²⁴ It would be uneven in its incidence both among plaintiffs and among defendants. Moreover, "the 'loss distribution' aspect of the system is a naked assumption"¹²⁵ of doubtful validity. There is also another aspect to the argument from incompleteness. Half-way measures are said to relieve the pressure for more complete reform.¹²⁶

Another set of objections takes a different tack. Even if the changes I would urge upon the courts—or some of them—are good ones, they should not be made by the courts without legislation. It would do violence to the integrity of the common law system for the courts to make these changes. Moreover to the extent that they call for an extension of the jury's sphere it is said that they involve a "shocking abdication of judicial responsibility."¹²⁷ All the foregoing would call into "grave question the continuing validity of the common law system itself."¹²⁸

To the incompleteness and inequities of the interim system I must plead confession and avoidance. I do not claim and I do not believe that a satisfactory

such accidents ". . . should not be . . ." treated in accordance with that theory. *Id.* at 1302.

123. *Id.* at 1306.

124. *Ibid.*

125. *Id.* at 1306.

126. See Frankfurter, J. (concurring in part), in *Urie v. Thompson*, 337 U.S. 163, 197 (1949); cf. Peairs, *The God in the Machine*, 29 B.U.L. Rev. 37, 77 (1949); James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 187 note 27 (1951); note 130 *infra*.

127. Cooperrider, *op. cit. supra* note 122 at 1311.

128. *Id.* at 1312.

system for handling accident losses can be worked out through the judicial process. Any system we have, short of a comprehensive legislative compensation scheme, will be full of hardship, unevenness, compromise and inconsistency. These are the hallmarks of the present system. All I should expect from interim judicial changes is relief from a few of the worst injustices (as I view them) of the present dispensation. It is against these the comparison must be drawn, not against the provisions of any more ideal legislative program.

The loss distribution aspect of any contemplated change should not, I agree, be nakedly assumed. Factual studies should be directed to this matter and the courts should always find out all they can about it and draw reasonable conclusions from their experience and common knowledge, when nothing more specific is at hand. Not every possible judicial extension of liability would lead to better loss distribution.¹²⁹ Enough is already known, however, to suggest pretty clearly when decisions on many questions will have that effect and when they will not. The studies we reviewed earlier in these talks are replete with lessons on the subject, for those who really wish to learn.

There is one more phase of the argument from incompleteness. There are those who fear small reforms as "the worst enemies of great reforms."¹³⁰ The logical conclusion of this argument is that judges who believe in a compensation scheme should make their decisions under the present system so impalatable that an aroused public will clamor for change. There are I think at least two answers to this. For one thing it rests on a very doubtful assumption about the practical operations of political science. Great changes are often ushered in by a gradual erosion of the old order; "by resort to juries, to fictions, to compromises with logic,"¹³¹ that presage the new order. But more than that, this reasoning would call on judges to render decisions which they believe to be unjust ones in the cases before them, in the hope that this would make the legislature do what the court thought best for society. This would cast the courts in a role somewhere between that of God and Machiavelli in our body politic.¹³² I think we need not stop to ask whether this would be desirable, for surely it would be a psychological impossibility for most judges deliberately to render wrong decisions so as to make the system they administer an abomination.

The remaining objections cluster around the notion that the interim proposals for judge-made change would do "violence—to the integrity of the common law system."¹³³ The objectors recognize, of course, the common law's

129. MORRIS, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1958); 2 HARPER & JAMES, *LAW OF TORTS* 1053, 1276, 1343-1360, 1403-4 (1956). Cf. James, *Contribution Among Joint Tort Feasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

130. MORLEY, *ON COMPROMISE* 185 (rev. ed. 1877), quoted in Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1286 (1952).

131. Wyzanski, *op. cit. supra* note 130 at 1286, 1287.

132. I am indebted to mimeographed teaching materials prepared by Professor Mishkin of the University of Pennsylvania Law School, for suggestions that led to some of the thoughts expressed here.

133. Cooperrider, *op. cit. supra* note 122 at 1306.

capacity for growth. But in the past this is thought to have been interstitial and to have been checked by a more wholesome regard for *stare decisis* than is abroad in the land today. The changes proposed here on the other hand "involve judicial assumption of legislative power considerably more grandiose than those"¹³⁴ in the past.

I doubt whether such an objection is compatible with historical perspective. Some of the greatest edifices in our law were originally wrought by courts without the aid of—sometimes in the very teeth of—legislation. The most casual look will show how true this has been throughout the course of Anglo-American legal history.

The law of trusts was a creature of the early courts of equity¹³⁵ and has been a judicial device to this very day for attaining justice where it would be thwarted by more inflexible rules of judge-made or statutory law.

The rule against perpetuities was a child of the judicial process.¹³⁶

The modern law of contract and the doctrine of consideration were wrought by the common law courts.¹³⁷

The statute of frauds has been greatly tempered and modified by judicial doctrines like part performance.¹³⁸

Courts, not legislatures, invented the concepts of restitution and quasi-contract.¹³⁹

Coming closer in time and subject matter to our present concern, we see tremendous changes in the law of torts brought about by nineteenth century courts. The whole law of negligence as a principle to govern accidents is scarcely older than that,¹⁴⁰ and it supplanted an earlier, stricter liability in trespass, which in turn was itself fashioned by the judicial process.

The defense of contributory negligence was a later development than negligence; this year marks its one hundred fiftieth anniversary.¹⁴¹

Indeed many of the very doctrines which I should like to see today's courts overrule were invented by other courts within the last century. The parent's immunity from suit by his minor child was first announced by a Mississippi court in 1891.¹⁴² Recovery for prenatal injury was first denied in 1884, by a Massachusetts court.¹⁴³ The American version of immunity for charitable institutions stems from decisions in Massachusetts¹⁴⁴ and Maryland¹⁴⁵ in the 70s

134. *Id.* at 1307. Quite a different view from Professor Cooperrider's may be found in SEAVEY, *COGITATIONS ON TORTS* (1954).

135. PLUCKNETT, *A CONCISE HISTORY OF THE ENGLISH LAW* 566-569 (4th ed. 1948).

136. *Id.* at 563-568.

137. *Id.* at 592-618; Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888).

138. 2 CORBIN ON CONTRACTS ch. 18 (1950).

139. *Moses v. Macferlan*, 2 Burrows 1005, 97 Eng. Rep. 676 (1760); DURFEE AND PALMER, *CASES ON RESTITUTIONS* 1-5 (1958).

140. See note 3 *supra*.

141. *Batterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

142. *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891).

143. *Dietrich v. Northampton*, 138 Mass. 14 (1884).

144. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876).

145. *Perry v. House of Refuge*, 63 Md. 20 (1885).

and 80s and these decisions were based on English cases which were but a few decades older and had already been overruled in England ten years before they were resurrected on this side of the Atlantic.¹⁴⁶ The discrimination against injuries resulting from emotional disturbance caused by negligence,¹⁴⁷ and the limitation on the maker's liability for a defective product¹⁴⁸ emerged during the nineteenth century as the tort of negligence was itself coming to flower.

Those who feel that my proposals would take the courts beyond their traditional role stress the vitality which *stare decisis* used to have, and its former hold on the courts.¹⁴⁹ This it is thought curbed judicial legislation and kept it in its proper place. Courts changed the law only in a circumscribed and interstitial way. But when one looks back over the long course of the common law one wonders whether these objectors may not be misled by the way courts talked into overlooking what they did. The principle of *stare decisis* has always had and still has vitality in our common law development. Yet it has not from the very beginning prevented very great changes, made without benefit of statute. Some of these changes were more radical and thorough-going than any proposals made here. This suggests that what some people think of as greater respect for *stare decisis* in the olden days may have been nothing more than greater lip service so that judges formerly took greater pains to conceal their changes by fiction or to use language which would give them the *appearance* of being merely interstitial. But time and again as the older structure of the law crumbled these interstitial secretions emerged to constitute a new and altogether different structure. I suggest that the newer judicial attitude toward *stare decisis* is not a disparagement of its real worth but rather a more realistic attempt to chart the line where stability ends and the common law's dynamic side—its capacity for growth and adaptation, also of ancient lineage—begins.

A part of the objection that these proposals do violence to the fabric of our common law system is the charge that they call on the courts "to abdicate completely to the jury the function of applying . . . policy to the case at hand."¹⁵⁰ The word abdicate of course is an emotive word suggesting something improper. But let us leave polemics and look at the thing objectively.

Throughout the history of the jury system it has been recognized that the jury does not always stick to its theoretical function and apply the law in the judge's charge to the facts as they find them. Juries sometimes take the law into their own hands and decide a case according to popular prejudice which often embodies popular notions of what the law ought to be. It has also been recognized that this fact is not always a weakness but sometimes a great strength

146. The development of the doctrine is traced in the opinion of Rutledge, J., in *President and Directors of Georgetown Hospital v. Hughes*, 130 F.2d 810 (D.C.Cir. 1942); James, *Inroads on Old Tort Concepts*, 15 NACCA L.J. 281, 294 (1955).

147. Leading cases in establishing this rule were *Victorian Railways Comm. v. Coultas*, 13 A.C. 222 (P.C. 1888); *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

148. *Winterbottom v. Wright*, 10 M. & W. 109 (Ex. 1842).

149. *Cooperrider, op. cit. supra* note 122, at 1308.

150. *Id.* at 1312.

of the jury system. Lord Coke is reported to have said "the jurors are Chancellors."¹⁵¹ Holmes said "one reason why I believe in our practice of leaving questions of negligence to them is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community."¹⁵² Pound concluded that "Jury lawlessness is the great corrective of law in its actual administration."¹⁵³ One of our ablest trial judges of today has noted that "traditionally juries are the device by which the rigor of the law is modified pending the enactment of new statutes."¹⁵⁴ Justice Traynor of the California Supreme Court believes that "we would lose more than we would gain by a reform of fact-finding that would only compel righteous adherence [by juries] to wrong rules. . . ." Until the rules themselves are changed we are better off "with that quiet distortion that presently adapts them to the needs of rough justice."¹⁵⁵

It is not, I submit, an improper abdication of responsibility to the jury to call on its dispensing power—its equitable function—when the occasion is appropriate. Is it not rather an exercise of the best there is in judicial power and responsibility to determine wisely what occasions are appropriate for the delegation of this function to the jury, and the limits of the delegation? A reasoned determination that a broad delegation is needed today on the issue of accident liability may well reflect judicial statesmanship rather than an evasion of judicial responsibility. I think it does, for the very reasons we have been developing in these talks. Negligence law and its administrations give an unsatisfactory answer to the accident problem. We feel, pretty generally, that this is so. As Holmes said more than sixty years ago "the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal." Today this inclination has reached the field of motor accidents. But it has not crystallized enough to lead to political action which would establish a scheme of social insurance to cover the field. Perhaps it never will. There are as we have seen, cross currents of opinion. We have not yet made up our mind where to go. We agree only in our discontent with what we have. In such a situation it is doubtful whether the courts would be warranted in trying to give us the comprehensive scheme which in my opinion is needed to fill the bill—even if they could work out the host of administrative details which such a scheme would entail. At any rate it is clear that most courts are not now ready to take such a step. Here then is one of the very cases where there is need of the flexibility¹⁵⁶ which the jury trial affords and has traditionally afforded in

151. Quoted from POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 133 (1922).

152. HOLMES, *COLLECTED LEGAL PAPERS* 237-238 (1921).

153. Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12, 18 (1910).

154. Wyzanski, *op. cit. supra* note 130 at 1286.

155. Traynor, *Fact Skepticism and the Judicial Process*, 106 *U.P.L. REV.* 635, 639, 640 (1958).

156. While the jury imparts flexibility to the system, its verdicts are probably not as

our system at least until such time as we are surer of the ultimate solution we want.

Three more things should be said:

(1) The fact that wide latitude should be given to juries on the issue of liability in accident cases does not mean that the same latitude should be given them in fixing the damages. As I have already suggested, it may well be that the times demand greater control on this question both by the exercise of discretionary curbs over the overall amount and by the fashioning of rules of law which are better adapted to a system in which wrongdoing or fault of the defendant is becoming less and less important.

(2) The fact that wide latitude should be given to juries in accident cases today does not mean that such latitude should be given to them in other contexts today, or in accident cases tomorrow. In commercial, patent, or anti-trust cases, for example, it is probably desirable to try to make juries do what they are theoretically supposed to do—follow the court's charge and apply it faithfully to the facts as they actually find them. And the same thing may again be true in accident law if there is a place for juries in it after it has been comprehensively overhauled.

(3) There is a great difference between a reasoned determination to enlarge the jury's sphere in a certain context after finding it to be appropriate, and a leaving of issues to a jury merely because that is the easiest thing to do. The latter is indeed an abdication of judicial responsibility which could scarcely be charged against such judges as Holmes, Traynor, and Wyzanski. Before such a charge may properly be leveled against any judge it must be remembered that reasoning is not always expressed, and indeed a wise decision may be taught by experience though the grounds for it are never clearly articulated even to the judge himself. That fact, I think, should not free him from the duty of trying to think through and to state his grounds, but it may in spite of that free him from the charge of irresponsibility in his actions.

capricious as its detractors would have us suppose. Judge Wyzanski has noted that in the Massachusetts District Court officers and attendants can predict verdicts with substantial accuracy, so great is their uniformity. He adds: "Indeed, their prediction of jury action is much closer to the ultimate result than their prediction of judicial actions." *Supra*, note 130 at 1287, note 29. See also Kalven, *The Jury, The Law, and The Personal Injury Damage Award*, 19 OH. ST. L.J. 158 (1958).