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Leon Green
University of Texas

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The Thrust of Tort Law Part I The Influence of Environment*

LEON GREEN**

The common law forms of action, trespass and trespass on the case, gave much of body and spirit to the law of tort. In so far as can be ascertained from the reports prior to the 1800's its development was slow and restricted.¹ Whether this was due to the environmental scarcity of injuries now classed as torts, to the disinclination or inability of injured persons to litigate, or to the tight procedural restrictions of the actions themselves is not known. But we do know that in the late 1700's and the first half of the 1800's when forms of action were falling apart, tort law began a development that is still under way. The theories of liability retarded for so long a time became the cores of what we now know as actions for trespass, negligence, nuisance, conversion, deceit, defamation and other actions, each with a network of defensive doctrines, and capable of caring for a limitless number of cases over the whole field of injuries to person, property and relations resulting from the activities of a massive population.

It is to be noted that this expansion of tort law is the product of the courts with minor assistance of legislatures. It is the achievement of case by case decisions by widely separated courts from

* This article was originally delivered as the first of three lectures of the Edward G. Donley Memorial Lectures of 1961. The two other lectures of the series will appear in subsequent issues of the *Review*. The Edward G. Donley Memorial Lectures of 1961 were delivered on April 17 and 18, 1961 at the West Virginia University College of Law.

** Distinguished Professor of Law, University of Texas.

¹ Wigmore, *Responsibility for Tortious Acts: Its History* (pts. 1-3), 7 HARV. L. REV. 315, 383, 442 (1894); WINFIELD, TORT ch. 2 (1931).

numerous jurisdictions over nearly two centuries in time. It is not too much to say that tort law has been given direction and flexibility by environments constantly kept in flux by the rapid turnover of professional personnel and a constant procession of inventions, discoveries, processes, economic developments and social attitudes which have so abundantly characterized this period. It is indeed remarkable how closely tort law tends to follow and reflect environment, though at times it may be stymied by shortsighted administration.

UNLAWFULNESS

Professor Ferdinand Stone, in one of his most sparkling essays² indicates that *unlawfulness* is the most ancient touchstone of tort liability—this even before tort and crime became the basis of separate actions. This corresponds to the protection needed at that early period by the group, and also the protection needed by the individual for himself and for his possessions, against violent harms. The unlawfulness of a defendant's conduct is one of the basic factors by which the expansion and elaborate doctrinal structure of tort law has been achieved and sustained. Practically all common law crimes are held to be the basis of tort liability.³ This is true in large degree even as to police regulations of state and municipality, as witness the use made by the courts of traffic regulations in actions for negligence. It is not unusual for a court, when dealing with some new problem, to rely on criminal statutes as the expression of public policy adequate for imposing tort liability or interposing a defense, as the case may be.⁴

RECOMPENSE

Antedating unlawfulness, however, is the more basic concept of the common law, and doubtless of all tort law, that one who hurts another should make recompense.⁵ Dean Ames in his well

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

³ Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

⁴ Waynich v. Chicago Last Dept. Store, 269 F.2d 322 (7th Cir. 1959); Bishop v. Liston, 112 Neb. 559, 190 N.W. 825 (1924); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201 (1959).

⁵ Wigmore, *supra* note 1; 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 44-52 (3rd ed. 1923); Jeremiah Smith, *Tort and Absolute Liability—Suggested Changes in Classification* (pts. 1-3), 30 HARV. L. REV. 241, 319, 409 (1917). But see, HOLMES, THE COMMON LAW 88-96 (1881); MORRIS, TORTS 9 (1953).

known essay, "Law and Morals",⁶ thought this concept of recompense "unmoral". Oliver Wendell Holmes Jr. in his classic, *The Common Law* says: "My aim and purpose have been to show that the various forms of liability known to modern law spring from the common ground of vengeance."⁷ He insisted that the "early forms of procedure were grounded in vengeance",⁸ and that "private liability started from the notion of actual intent."⁹ While the records available can be so read, they can also be read, and it is believed more rationally, to require the one who has hurt another, however innocently, to make atonement, expiation or reparation for the hurt. The forms of retribution exacted by our forbears may seem crude and impelled by religious compulsions foreign to our modern notions, but they can also be conceived as the highest expressions of morality. At least as the records become clearer there is no doubt that recompense in damages¹⁰ has been the remedy sought by the victim, and in absence of some strong countervailing factor, has been the remedy given by the court.

Why should it be thought "unmoral" to require one who has hurt another, however innocently or accidentally, to make reparation for the hurt while he who inflicted the hurt goes without responsibility? It may well be that down to this day the strongest bastion of tort law is found in the strong reaction of the human heart that one who hurts his brother should make recompense, and that the escapes from that responsibility found in modern tort law represent a compromise of morals with other considerations. Professor James believes, and I agree, that the "heterogeneous law of torts did not grow up because it was inspired by any one integrating principle",¹¹ but however eroded the principle has become, if any

⁶ 22 HARV. L. REV. 97 (1908). Many other writers have supported the view expressed by Dean Ames. See Wigmore, *supra* note 1, and the long list of writings examined by Jeremiah Smith, *supra* note 5. *But cf.* HOLMES, *THE COMMON LAW*, chs. 1 and 2. And see especially Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918), in *SELECTED ESSAYS ON THE LAW OF TORTS* 235 (1924); Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37 (1926).

⁷ HOLMES, *THE COMMON LAW* 37 (1881).

⁸ *Id.*, at 2.

⁹ *Id.*, at 4.

¹⁰ 2 HOLDSWORTH, *op. cit. supra* note 5 at 44-52, *Lambert v. Bessey*, Sir. T. Raymond, 421, 467, 83 Eng. Rep. 220, 244 (1680); *Basely v. Clarkson*, 3 Lev. 37, 83 Eng. Rep. 565 (1681); See McCORMICK, *DAMAGES* 21-28 (1936).

¹¹ Fleming James, *Tort Law in Midstream: Its Challenge to The Judicial Process*, 8 BUFFALO L. REV. 315 (1959). For an analysis of the opposing views of English writers see the excellent article of Professor Glanville Williams, *The Foundation of Tortious Liability*, 7 C.A.M.B. L.J. 111 (1939); also, Probert, *Speaking of Torts*, 49 KY. L.J. 114 (1960).

one principle can be found running the entire length of tort law, it is the concept of recompense.¹² It would seem that unlawfulness is but an explicit expression of this more basic concept and that the forms of action of trespass and trespass on the case were fashioned to accommodate them both. It will be recalled how strictly liability was imposed by both actions and how slowly even self-defense and accident came to be recognized as defenses.

In *Weaver v. Ward* (1616)¹³ plaintiff and defendant were soldiers in the same company engaged in skirmishing when defendant's musket was discharged and plaintiff wounded. The court held that defendant must show the shooting to have been utterly without his fault, as for example, that plaintiff or someone else struck the musket and caused it to fire. In some jurisdictions this strictness of liability for injuries inflicted by firearms continues,¹⁴ and even in jurisdictions where liability has been transferred to a basis of negligence the modification is slight and any unlawfulness of conduct imposes strict liability.¹⁵

Late in the 1700's, in the celebrated squib case,¹⁶ two of the judges relied heavily on the unlawfulness of the defendant's throwing the squib into the market place as a trespass on the plaintiff, although the squib had been tossed about by several other persons before it exploded in plaintiff's face. Blackstone, on the other hand, insisted that the injury was the indirect result of the defendant's act and therefore the action must lie, if at all, in trespass on the case. A fourth judge agreed with Blackstone that the question before the

¹² See Isaacs, *supra* note 6. Aside from the strict liability imposed under the forms of action, the concept of recompense is strongly reflected in the maxim, "*Sic utere tuo alienum non laedas*" recognized in numerous modern tort cases. See 3 HOLDSWORTH, *op. cit. supra* note 5, at 375-80; 8 *id.* at 462-72. It is also the underlying basis of the "Prima Facie Tort" doctrine first suggested by POLLOCK, *LAW OF TORTS* (1st ed. 1887) and approved by Holmes in *Aikens v. Wisconsin*, 195 U.S. 194 (1904). See Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1957); Green, *Protection of Trade Relations Under Tort Law*, 47 VA. L. REV. 559 (1961).

The recompense concept is clearly the principle underlying the doctrine of "Restitution" now so widely accepted. See York, *Extension of Restitution Remedies in Tort Field*, 4 U.C.L.A.L. REV. 499 (1957).

¹³ *Weaver v. Ward*, Hobart 134, 80 Eng. Rep. 284 (K.B. 1616).

¹⁴ *Norling v. Carr*, 211 F.2d 897 (7th Cir. 1954); *Hawksley v. Peace*, 38 R.I. 544, 95 Atl. 856 (1916); *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898).

¹⁵ *Jensen v. Minard*, 44 Cal. 2d 325, 282 P.2d 7 (1955), citing with approval *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 869; *Summers v. Tice*, 33 Cal. 2d 1, 199 P.2d 1 (1948).

¹⁶ *Scott v. Shepherd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (C. P. 1773).

court was the proper form of action rather than the unlawfulness of defendant's conduct but agreed with the other two judges that the injury was direct and therefore trespass. Under either action there was liability. Throwing squibs had been made a nuisance by statute *after* the plaintiff's injury, but the majority would not look with eagle's eyes at the theory as long as justice had been done. Unlawfulness alone, though buttressed by recompense, proved an insufficient basis for the development of tort law over the long period from the thirteenth to the nineteenth century. Other factors came to require consideration.

INTENTION

Professor Stone¹⁷ indicates how *intention* as an additional touchstone of liability was necessitated by the changing environment from feudal to a broader economic and social order based on industry, goods and trade, together with a fuller recognition of the individual's rights and responsibilities. But as long as trespass and trespass on the case were distinguishable on the basis of direct and consequential harms and between them shared tort liability for injuries resulting from violence, intention was of little importance except in the determination of damages and in the action for deceit and actions for other non-violent harms in process of emerging.¹⁸ Intent was an incident of consensual transactions and did not achieve any great importance in tort law until after the action for negligence had largely superseded the actions for trespass and trespass on the case. It then became highly important in distinguishing intended from negligent and accidental harms. As we now know, intent is a highly ambiguous concept which may mean merely that the *conduct* was intended, or it may mean that the *consequences* of the conduct were intended. If the consequences are not intended, intent may be implied, presumed,¹⁹ constructed,²⁰ or even transferred.²¹ This fictional usage of intent is highly important in cases in which

¹⁷ *Supra* note 2.

¹⁸ See Wigmore, *supra* note 1. Also see opinions of the judges in *Pasley v. Freeman*, 3 Term Rep. 51, 100 Eng. Rep. 450 (K.B. 1789); WINFIELD, TORT 34 (1931).

¹⁹ *Wilkinson v. Downton*, [1897] 2 Q.B.D. 57; *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 (1926).

²⁰ *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N.E. 484 (1902).

²¹ *James v. Campbell*, 5 Car. & P. 372, 172 Eng. Rep. 1015 (C.P. 1832); *Talmage v. Smith*, 101 Mich. 370, 59 N.W. 656 (1894).

the line between intended and negligent harms is blurred, or in fact does not exist.²²

NEGLIGENCE

The introduction of the *negligence* concept is identified by Professor Stone²³ as the third touchstone of tort law. The revolutionary changes in the environment of the eighteenth and nineteenth centuries required a further modification of the base of tort law from that provided by unlawfulness, recompense and intention. For a period extending until late in the 1800's this new action for negligence was frequently called an action on the case for negligence, but quite unlike the action on the case for trespass, liability under the negligence action was modified by numerous limitations, immunities, and defenses.²⁴ Parallel with this development came the modern action of trespass which for personal injuries is normally restricted to some form of intentional invasion of the personality, though in an action of trespass to property intention is usually not required.²⁵ Many vestiges of the trespass form of action are found in the modern trespass action, and many vestiges of the action for trespass on the case are found in the action for negligence.

NEW CLASSIFICATION

The new classification of tort law necessitated by the action for negligence is roughly indicated as (1) intended harms, (2) unintended harms, *i.e.*, negligent and accidental harms and (3) harms for which there is strict liability. The classification is by no means precisional and much confusion is found in appellate court opinions

²² *Deane v. Johnston*, 104 So.2d 3 (Fla. 1958); *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905); *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891).

²³ *Supra* note 2.

²⁴ See Malone, *Ruminations on Group Interests and the Law of Torts*, 13 *RUTGERS L. REV.* 565 (1959); GREEN, *TRAFFIC VICTIMS* 10-13 (1958).

²⁵ *Pfeiffer v. Grossman*, 15 Ill. 53 (1853); *Van Alstyne v. Rochester Tel. Corp.*, 163 Misc. 258, 296 N.Y. Supp. 726 (Rochester City Ct. 1937); *Newsom v. Anderson*, 24 N.C. 42 (1841). The line here indicated is not always respected. Personal injury incidental to trespass on land may be included by way of "aggravation" although there is no intent to hurt the person. *Brackett v. Bellows Falls Hydro-Elec. Corp.*, 87 N.H. 173, 175 Atl. 822 (1934). There may be trespass to land and no liability. *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249 (1954), noted 40 *CORNELL L.Q.* 387 (1954); *RESTATEMENT, TORTS* §§ 166, 380 (1939). See the illuminating study in Keeton & Jones, *Tort Liability and the Oil and Gas Industry* (pt. 2), 39 *TEXAS L. REV.* 253 (1961).

during the period of transition from the earlier bases of liability to those now current.²⁶

For a century before the new classification was definitely formulated, and during its formative period, its influence marked a revolutionary change in tort law.²⁷ As already indicated, the basic philosophy of medieval tort law was that one who suffered physical hurt to his person or property as a result of the conduct of another was entitled to reparation for his hurt. The forms of action supported this philosophy but it was greatly qualified by the concepts of intent and negligence which were equated with the concept of fault. The concept of fault has been widely considered as identifying tort law with morality. "Liability based on fault" has been set over against "liability without fault" which is supposed to be "unmoral." In fact, the so-called "liability based on fault" was a precipitous retreat from the stricter morality of recompense. "Fault" has thus become a schizophrenic concept with a moral connotation in everyday life, but as employed in cases of unintended hurts it usually has no moral content. More of this later. It is enough for the moment to say that for almost the entire nineteenth century the concern of the courts was focussed on the liberation of the defendant from liability and this was accomplished under the cover of "fault".²⁸ Emphasis was shifted from *hurt* to *blame*. Even so able a scholar as Holmes, possibly suffering from the astigmatism produced by the tremendous development of tort law at the time he wrote, declared: "The general principle of our law is that loss from accident must lie where it falls".²⁹ And more lately this has been expanded by another great scholar, Professor Morris, into a basic axiom that "a loss should lie where it happened to fall unless some affirmative public good will result from shifting it."³⁰

This concern for defendants throughout the 1800's was almost an obsession in the area of unintended hurts, but was also quite marked in the area of intended hurts. In cases of intended violent harms, self-defense, the defense of others, or the protection of prop-

²⁶ James, *supra* note 11; Smith, *supra* note 5; Isaacs, *supra* note 6.

²⁷ Harvey v. Dunlop, Hill & D. Supp. 193 (N.Y. 1843); Hartfield v. Roper, 21 Wend. 615 (N.Y. 1839); Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Vincent v. Stinehour, 7 Vt. 62 (1835); Stanley v. Powell, [1891] 1 Q.B.D. 86; Holmes v. Mather, L.R. 10 Ex. 261 (1875).

²⁸ See Probert, *Speaking of Torts*, 49 Ky. L.J. 114 (1960), for analysis indicating the pull of the fault concept.

²⁹ THE COMMON LAW 94 (1881).

³⁰ MORRIS, TORTS 8 (1953).

erty, consent, provocation and mitigation of damages became first line defenses freeing many defendants from liability. In cases of unintended harms the defenses of no duty, no negligence, assumed risk, contributory negligence, proximate cause, accident, fellow servant, independent contractor, imputed negligence, trespasser and licensee, and many refinements of each of these doctrines, made it almost impossible for the traveler, employee, a person entering another's premises, a tenant, a customer, consumer, patient, a bystander, or other person, to maintain an action for damages for personal injury. All these doctrines were based ostensibly on the concept of "fault"—largely upon the fault of the victim, while the fault of the defendant was ignored.

It was the middle of the 1800's before an action for death could be maintained and even then it was subject to all the defenses available in a personal injury action and many more.³¹ In most jurisdictions it was much later before a personal injury action survived the death either of the victim or tortfeasor. Only in cases involving passengers and goods transported by carrier did claimant have a relatively firm basis for recovery.³² In these cases liability was thought to be determined by contract rather than tort, though later it was shifted to the tort basis with considerable expansion in defenses. In the area of trade, actions for deceit,³³ slander, and libel,³⁴ were likewise limited by phalanxies of defenses almost impenetrable. The protection of the family against sexual pirates, kidnappers of children, and slanders was limited by numerous defenses.³⁵ Most of the injuries resulting from the negligent conduct of municipalities, charitable hospitals, builders and contractors, manufacturers and suppliers of goods were outside the protection of law. People could not live and do business on the high level of

³¹ Lord Campbell's Act, 1846 9 & 10 Vict. ch. 93. Massachusetts had previously enacted a very limited death statute. See, *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848).

³² *Stokes v. Saltonstall*, 38 U.S. (13 Pet.) 181 (1839); *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319 (1839); *McElroy v. Nashua & L. R.R.*, 58 Mass. (4 Cush.) 401 (1849); *Ware v. Gay*, 38 Mass. (11 Pick.) 106 (1831).

³³ *Sherwood v. Salmon*, 2 Day 128 (Conn. 1805): "Whatever morality may require, it is too much for commerce to require that the vendor should see for the purchaser."

³⁴ *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L.R. 9 Ex. 218 (1873); *Smith, Disparagement of Property*, 13 COLUM. L. REV. 121 (1913).

³⁵ *Pickle v. Page*, 252 N.Y. 474, 169 N.E. 650, 72 A.L.R. 842 (1930); *Lynch v. Knight*, 9 H.L. Cases 577, 11 Eng. Rep. 854 (1861); *Winsmore v. Greenbank*, Willes. 577, 125 Eng. Rep. 1330 (C.P. 1745).

morality required by the concept of recompense, or so it was thought.³⁶ The environment demanded much new law to reduce the severity of the orthodox common law, and the courts responded. They developed the defensive doctrines of tort law as naturally as the weeds and flowers come to the landscape in response to spring-time, and from as many different seeds—a splotch here and a splotch there, but eventually in great profusion. But why so much law created so favorably for defendants and so little for their victims? Why was the historic principle of recompense so widely abandoned? There were many factors involved. Let us consider some of the more important ones.

RESTRICTIONS ON LIABILITY

The late 1700's and the 1800's in England and America were periods of expanding frontiers in all directions—territory, population, mobility, trade, commerce, finance, speculation, construction, invention—innumerable activities of many types devoted primarily to the acquisition of wealth. In America it was a period of enterprise and mobility in which the whole population was engaged and upon which its welfare depended. It was a mass movement with all the characteristics of a glacier in which the individual was merged for better or for worse. His fortune was tied up with that of the group and it was the group's interest in a world of wealth and jobs that dominated the environment.

COURT ORGANIZATION AND PROCEDURES

Tort law, as was true of other law, was caught up in this movement. Legislatures were as busy making laws as the farmers were in growing crops and cattle and the factories in making goods. But tort law was left almost untouched by legislation for the courts to continue their historic function and responsibility in its creation case by case. In large degree in this country and not much less so in England each trial court had great independence; an organized system of courts came later in the century. While appellate courts generally conceived their functions to be the detection of errors in the trial process, and if errors were found to remand for a new

³⁶ *Losee v. Buchanan*, 51 N.Y. 576 (1873); *Ryan v. New York Central R.R.*, 53 N.Y. 210 (1866); *Russell v. Men of Devon County*, 16 East 305, 100 Eng. Rep. 359 (K.B. 1788); *Southcote v. Stanley*, 1 H. & N. 247, 156 Eng. Rep. 1195 (Ex. 1856); *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842); *Priestly v. Fowler*, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837).

trial, yet they wrote seriously in developing a body of law by judicial decision.³⁷ It was well after the middle of the century, however, before a body of tort law came into existence and the authoritative power of appellate decision became reinforced by a doctrine of *stare decisis*, which though often discussed played little part in restricting a court's power to reach the decision considered desirable.³⁸ The ever increasing volume of new problems were frequently dealt with through analogies rather than precedent and thus the courts were constantly making new precedents, and as a court was free to accept the reasoning of courts of another jurisdiction this process accelerated the growth of decisional law very greatly. In fact the development of tort law during most of the 1800's was in practical respects one of free decision, but free decision employed by the courts to impose doctrinal restrictions upon themselves—restrictions which the courts of the 1900's have spent much of their time rejecting.

The tort law of the 1800's was thus greatly influenced by the substantive procedures of litigation. Aside from the straight jackets of pleading under the forms of action, retained in some jurisdictions at least in name until this century,³⁹ the forms of action greatly impaired the development of the doctrinal substantive procedures. For example, the action of negligence required a wide spread of doctrine. There had to be some limit beyond which causal relation between a defendant's conduct and a resulting consequence would not be recognized. Some method had to be provided for the determination of duties and the risks which fell within their scope in all the limitless activities involving dangers to which people were subjected. There had to be reliable formulas for determining the affirmative and defensive issues of negligence at common law and for statutory violations. The sufficiency of evidence on fact issues for submission to a jury in so many different types of cases presented innumerable difficulties and still does not submit to any patented solution. Measures for the determination of damages have from the beginning suffered from uncertainty and instability. With

³⁷ See POUND, *THE FORMATIVE ERA OF AMERICAN LAW*, chs. 1, 3 (1938); POUND, *THE SPIRIT OF THE COMMON LAW*, chs. 2, 5 (1921); POUND, *The Place of Judge Story in the Making of American Law*, 48 AM. LAW REV. 676 (1914); GRAY, *NATURE AND SOURCES OF LAW* 244 (2d ed. 1921); Green, *The Development of the Doctrine of Stare Decisis*, 40 ILL. L. REV. 303 (1946).

³⁸ *Ibid.*

³⁹ Silverstein, *A Basic Introduction to the New West Virginia Rules of Civil Procedure*, 62 W. VA. L. REV. 117, (1960); see, excellent opinion of Smith, J., in *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960).

the constant increase of new dangers and the severity of old dangers, the whole doctrinal structure of negligence law was constantly under pressures it could not withstand and was constantly in disrepair. What was true of negligence was also true of nuisance and deceit. The readjustments required in the judicial process and its substantive doctrines throughout the 1800's in order to meet the problems of a revolutionary century account for many of the opinions and decisions which now seem so remote from good sense. Thus was tort law influenced by the inner structure of the processes through which it was created.

LITIGATION IMBALANCE

During most of the 1800's the injured person was at a great disadvantage in obtaining competent advocates and in financing a long, drawn-out lawsuit. Personal injury suits were not held in favor by the legal profession until this century, and by some of its members not even at present, though by all moral standards it should be at the ethical top of all civil litigation. On the whole, claimants were pitted against the more substantial citizens of a community, and their lawyers were pitted against the best defensive talent that money could buy. However meritorious the claimant's case and however persuasive his lawyer before trial judge and jury, they faced a relatively more powerful defendant and an advocate who was skilled in the pitfalls of trial and the preservation of a record full of errors for review by an appellate court. In the appellate court a claimant was usually outgunned. Strong advocates who pressed the newly spun defenses with their metaphysical logic played heavily in a defendant's favor. The result was that the imbalance of wealth of the parties and the talents of advocates accounts for much of the imbalanced tort law of the 1800's.

ATTITUDE OF JUDGES

Another influence which tilted tort law defensively was the attitude and outlook of the judges. Judges were good citizens, sensitive for most part to the functions of judges as generally conceived at that time. As were other people, they were part and parcel of their environment. They were perfectly ready to declare the law but with rare exceptions they did not look upon themselves as obligated to fashion the law and keep it in adjustment with the ever-changing environment. Most of them rejected the function of law-making while at the same time making law with every decision.

They accepted the newly fashioned negligence law with all its defensive limitations as it had been developed by the late 1800's and were in accord with its philosophy. This attitude resulted in what Dean Pound characterized as a sterile mechanical jurisprudence.⁴⁰ The feeling was that enterprise should not be burdened by heavy verdicts. Everyone had a stake in its solvency and prosperity. Damage suits for personal injury or death were often referred to as efforts to obtain "blood money." When juries reacted favorably to the injured victim their verdicts were frequently rendered futile by the legal doctrines administered by the courts. Only a few reported cases⁴¹ heralded the reaction to come in the current century and they were under violent attack by the profession for many years.

FAULT-MORALITY

The equating of negligence with fault, and fault with morality, has been mentioned as an influential factor in tort liability. This gave deep satisfaction to the professional conscience of the 1800's and still does so in many quarters. The victim whose careless conduct contributed to his own hurt cut himself off from the court's protection. This was a risk the courts would not impose upon the defendant. Nor would the courts compare faults even though the defendant's fault might be greater than that of the victim. Why did the courts penalize the victim so severely and let the defendant go free? This severity cannot be justified on any basis of morality. Even in cases of intended hurt the much stronger defense of *consent* is frequently allowed in mitigation of damages and is sometimes rejected altogether.⁴² Why did not the courts allow the victim's *carelessness* in mitigation? That would have seemed the moral way.

⁴⁰ Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 802, 808 (1923).

⁴¹ Among the notable cases of this period favorable to plaintiffs are: *Grand Trunk Ry. of Canada v. Ives*, 144 U.S. 408 (1892); *Milwaukee & St. P. Ry. v. Kellogg*, 94 U.S. 469 (1887); *Sioux City & P. R. v. Stout*, 84 U.S. (17 Wall.) 657 (1873); *Montgomery & E. Ry. v. Mallette*, 92 Ala. 209, 9 So. 363 (1891); *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890); *Rylands v. Fletcher*, L.R. 3, H.L. 330 (1868).

See, Smith, *Liability of Landowners to Children Entering Without Permission* (pts. 1-2), 11 HARV. L. REV. 349, 434 (1898) for strictures on the Stout doctrine. The rejection of *Rylands v. Fletcher* was at first almost universal by American courts though today, as with Stout, it, or its equivalent, is generally accepted. *Bedell v. Goulter*, 199 Ore. 344, 261 P.2d 842 (1953); *Donley, Some Aspects of Tort Liability in the Mining of Coal*, 61 W. VA. L. REV. 243 (1959).

⁴² *Christopherson v. Bare*, 11 Q.B. 473, 116 Eng. Rep. 554 (1848); *WINFIELD, TORT* 87 (1931). See also, *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953); *Morris v. Miller*, 83 Neb. 218, 119 N.W. 458 (1909); *Royer v. Belcher*, 100 W. Va. 694, 131 S.E. 556, 47 A.L.R. 1089 (1926).

How explain this wide departure from the concept of recompense and how explain this use of "fault" to shift the loss from defendant to his victim? Fault in a moral sense would be relevant only if there were intent or wilfulness to inflict the harm and thus be a basis for increasing the damages by way of punishment. But here "fault" is nothing more than the failure to exercise the care of an ordinarily prudent person under the circumstances; at most the violation of a legal standard of conduct determined by court and jury after the conduct has done its hurt. In that sense any conduct in violation of a legal standard in any area of law is fault, and so it is. But if the conduct is intended, fault is not needed for intention is enough. If the conduct is only in violation of the standard of care, fault is not needed for negligence is enough. Once intention and negligence are substituted for recompense the concept of fault is no longer valid as a moral basis for determining liability.⁴³ It no longer serves a useful classificatory function.

It is believed that the concept of negligence and the whole defensive array of assumed risk, contributory negligence, proximate cause, imputed negligence, accident, and their kindred, ostensibly based on fault, represent a flight from morality and are based upon the demands of a revolutionary environment which captured the minds of judges and the people they served. The break with the morality of the orthodox common law was so great that the judges could not accept it until they had convinced themselves they were inaugurating a more refined and rational morality as a basis of liability. They were judging something new to them—the risks of enterprise⁴⁴—the economic good of the community—but they continued to talk the law's language of sin.

⁴³ Professor Isaacs in his valuable essay, *Fault and Liability*, 31 HARV. L. REV. 954 (1918) quotes a passage from HOLMES, *THE COMMON LAW*, as follows: "The law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feelings of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests of morals. But as the law has grown even when its standards have continued to model themselves upon those of morality, they have necessarily become external because they have considered not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril." Professor Isaacs adds: "The law begins with liability based on fault, and tends, as it grows, to formulate external standards which may subject an individual member of society to liability though there is no fault in him."

⁴⁴ See Ehrensweig, *Loss Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case*, 8 UNIV. CHI. L. REV. 729 (1941). Also, see Malone's penetrating article, *Ruminations on Group Interests and the Law of Torts*, 13 RUTGERS L. REV. 565 (1959).

It is believed to be significant that assumed risk—mother concept of all negligence defensive doctrines—was translated into contributory negligence, proximate cause, and accident in three otherwise unimportant landowner-traveller cases. In *Butterfield v. Forrester*⁴⁵ a landowner had partially blocked a highway by a barrier with which the plaintiff's horse collided and the plaintiff hurt. At that time the landowner was under no liability for injury to a trespasser except for intended hurt. A trespasser assumed all other risks. The landowner was permitted great freedom in the use of the highway adjacent to his premises even to the extent of stacking wood in the road,⁴⁶ and staking out his animals to graze beside the highway.⁴⁷ The court required the rider whose horse collided with the barrier to show himself without fault, and did the same in holding the traveller liable for permitting his team to collide with the highly publicized hobbled ass.⁴⁸ In *Flower v. Adam*,⁴⁹ the defendant had piled rubbish in the street. The dust whirling from the pile frightened plaintiff's horse. Plaintiff in the attempt to control his bolting horse pulled heavily on the reins. The wheel of the chaise in which plaintiff was riding struck another pile of rubbish. The horse was further frightened and the chaise upset with serious injury to plaintiff. Mansfield, C.J., instructed the jury "that if the mishap was occasioned either by pure accident or owing to the plaintiff not being a very skillful charioteer, the plaintiff was not entitled to recover." After verdict for defendant, on motion for new trial, Mansfield opined: "I rather think it is either accident or inability in the driver." Lawrence, J., added: "The immediate and proximate cause is the unskillfulness of the driver."

Today these cases would be decided against the landowner,⁵⁰ but their doctrines transplanted in other soils persist in many jurisdictions with slight modifications. In the meantime the highway traveller as against the landowner has come to be one of the most protected persons known to the law of torts.⁵¹ How these defenses

⁴⁵ 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

⁴⁶ *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824).

⁴⁷ *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

⁴⁸ *Ibid.*

⁴⁹ 2 Taunton's Rep. 314, 127 Eng. Rep. 1098 (C.P. 1810).

⁵⁰ See judgment of Denning, L.J. in *Davies v. Swan Motor Co.*, [1949] 2 K.B. 291; *Deane v. Johnston*, 104 So. 2d 3 (Fla. 1958).

⁵¹ *Hagy v. Allied Chemical & Dye Corp.*, 122 Cal. App. 2d 361, 265 P.2d 86 (Dist. Ct. App. 1954); *Drew v. Gross*, 112 Ohio St. 485, 147 N.E. 757 (1925); *Byrne v. Boadle*, 2 H. & C. 72 (Exch. 1863); *Malone*, *supra* note 44.

and those kindred to them which place the risks of injury entirely upon the victim and allow the initial wrongdoer to go free is one of the anomalies of twentieth century tort law. It is true that the courts are finding ways to avoid their severity in some cases and legislatures in some jurisdictions have enacted comparative negligence statutes,⁵² but by and large the efforts of the courts to attune these doctrines to the modern environment have been clumsy and unreliable. In case after case the courts still interpose the assumed risk—contributory negligence—proximate cause group of defensive doctrines as a matter of law to relieve negligent defendants of liability. Throughout the period when negligence doctrines were being developed in such profusion the courts talked endlessly about fault, but what they were doing was freeing enterprise from liability for the common welfare at the expense of its victims and attempting to justify their harshness towards the victims and their wide departure from early common law by cloaking their doctrines in terms of morality. The judges were not hypocrites. They were merely the mouthpiece of the environment—an environment dedicated to the acquisition of wealth and the building of a strong economic social order. Nor are the judges who continue to speak these doctrines hypocrites. They are merely the captives of a day gone by. It is all very confusing to everyone—litigant, advocate, judge, teacher, and student. The environment of today struggles to break through the doctrinal overcast of yesterday. It succeeds more and more frequently. When it fails, failure is usually due to judges who either do not comprehend the obligations imposed by the power vested in them, or else are too fearful to make use of it.

LEGAL FAULT

Professor Stone identifies a fourth touchstone of tort liability presently emerging which he terms “*legal fault*.”⁵³ The term is given a breadth of meaning capable of including unlawfulness, intent, negligence, strict liability, and perhaps more, but he thinks it too early to indicate its bounds more definitely. Professor Robert Keeton in a highly provocative and significant article has suggested “*condi-*

⁵² Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960). Most of the voluminous literature on the subject is cited in these articles.

⁵³ *Touchstones of Tort Liability*, 2 STAN. L. REV. 259, 277 (1950).

tional fault” as at least a partial coverage of the same area.⁵⁴ Either term seems inadequate. “Fault” can only be used in this connection to indicate failure to live up to some standard imposed by law. In this sense it is question-begging, confusing, and not needed. If it is used to give a moral flavor to liability the result is a resurrection of the early concept of recompense or reparation. In other words, in view of the great danger to the victim involved in the defendant’s conduct liability will be imposed without more. The term “strict liability” is generally employed to indicate this type of case but is not a happy one inasmuch as the term is little more than a tab after liability has been held to be strict.⁵⁵ “Enterprise liability,” given general usage by Professor Ehrenzweig, more nearly hits the mark.⁵⁶ Whether a more descriptive term can be found is problematical. Let us notice what has happened in the environment to require the revision of tort law sought to be reflected by these terms.

NEW ENVIRONMENT

The period under consideration has its beginning in the latter half of the 1800’s but its significance was not fully recognized until the 1900’s were well under way. The tort law of the 1800’s remained dominant well into the twentieth century though it had given way on several fronts and was under pressures on other fronts somewhat earlier. By 1960 the face of tort law bore slight resemblance to its face in 1860.⁵⁷ As the 1800’s wore on, the injuries due to the cumulative mechanization and the steady multiplication of industrial activities produced more and greater dangers for everyone and his property. Employees, traders, customers, travellers, land occupiers, professional men, and men, women, and children of every walk of life were frequently the victims of these dangers. Moreover, the injuries suffered grew in severity on victim, family, and community. People were maimed or killed in increasing numbers, their fortunes were frequently caught up in fraudulent schemes and their substance lost. Traders were put out of business by the piracies of other traders. Business institutions grew financially strong, sometimes through exploitation of workers and customers. Railroads

⁵⁴ Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); see Probert, *Speaking of Torts*, 49 KY. L.J. 114 (1960) for comments on “conditional fault concept.”

⁵⁵ See PROSSER, TORTS 315 (2d ed. 1955).

⁵⁶ EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

⁵⁷ Bohlem, *Fifty Years of Tort Law*, 50 HARV. L. REV. 725, 1225 (1937); Green, *The Law of Torts*, in 3 LAW: A CENTURY OF PROGRESS (N. Y. University Press, 1936).

were projected into every region, canals dug, rivers dredged, and highways multiplied. Great construction of every sort followed in the wake of these projects for the mobility of persons and goods. The acquisition and selling of land, the developments of trading centers, towns, and cities, the establishment of banks, mills, mines, and factories; enterprise activities of every sort absorbed the interest and energies of the ever-increasing population. Fortunes were made and lost, but the urge to do and to get could not be restrained. In the midst of this explosion of population, energy and efforts of people engaged in making a new society; the private corporation with its controls in the hands of the few came on the scene to play a dominant part in every phase of peoples' lives. Many corporate enterprises grew in power; many people grew rich; most of them improved their economic status; enterprise prospered.

THE CORPORATE DEFENDANT

Among all these factors the appearance of the corporate defendant did more, perhaps, than any other to influence the development of tort law in the nineteenth century and this influence is still strong. This was especially true in the case of the railroad in the area of personal injury and property damage. It influenced legislatures to enact wrongful death statutes,⁵⁸ fencing statutes,⁵⁹ precautions against fire hazards,⁶⁰ and collisions at railway crossings.⁶¹ The dangers encountered on railway premises influenced the courts to impose liability on landowners generally on behalf of trespassing young children who were hurt on dangerous premises,⁶² to give greater protection to victims of crossing accidents,⁶³ and to increase

⁵⁸ See 87 PARL. DEB. (3rd Ser.) House of Lords, May 7, 1847, House of Commons, July 22, 1846, and House of Lords, August 21, 1846; Mass. Acts, ch. 80 (1840); CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1894 (Record, Vol. II, Nos. 37, 57 pp. 593, 595, 852, 954, 961; July 31, Aug. 16).

⁵⁹ *Bischof v. Illinois So. Ry.*, 232 Ill. 446, 83 N.E. 948 (1908); *Di Caprio v. New York Cent. R.*, 231 N.Y. 94, 131 N.E. 746, 16 A.L.R. 940 (1921).

⁶⁰ *St. Louis & S.F. Ry. v. Matthews*, 165 U.S. 1 (1896).

⁶¹ See Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); also, Malone's article, *Ruminations on Group Interests and the Law of Torts*, *supra* note 44.

⁶² *Sioux City & P. R.R. v. Stout*, *supra* note 41; Green, *Landowner's Responsibility to Children*, 27 TEXAS L. REV. 1 (1948).

⁶³ *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934); *Grand Trunk Ry. Co. of Canada v. Ives*, *supra* note 41; *Belcher v. Norfolk & W. Ry.*, 140 W. Va. 848, 87 S.E.2d 616 (1955).

protection of persons and animals on right of ways.⁶⁴ The defenses of contributory negligence and proximate cause were considerably modified in railway cases through extension of the last clear chance doctrine,⁶⁵ and the adoption of comparative negligence statutes.⁶⁶ Negligence law developed in the horse and buggy cases gave way slowly and in varying degrees in nearly all jurisdictions during the late 1800's. Most of its liberalization can be traced to the railroad cases. The financial strength of the corporate defendant of every class brought to the fore the ability of the defendant to absorb, or at least to distribute the loss as an incident of the business in which it might be engaged. The development has been long and often retarded, and is still being fought out in pockets all over the American scene.

It has often been said there is but one law for the weak and the strong, the poor and the rich, and that justice is blind as to the parties seeking her aid. This is only true as to the formal side of the judicial process. It is not true and never has been true in the administration of tort law. During most of the 1800's tort law favored the strong and the rich, the group as against the individual, those aggressively seeking power and status as against their victims. In the late 1800's there came a reaction, which has grown stronger with the years, to favor the weak, the poor and the individual as against the corporate defendant. The concept of tort law as something impersonal, unchanging, with the consistency of a precious stone weighed in delicate scales of a blind lady is a myth—perhaps a salutary myth but without substance. Tort law has swung far and wide, and at times crazily, since the early 1800's. It is everyday law with all the earthiness of the earthy; no better and no worse than the people involved in its administration. A composite of their image is reflected very accurately in the results of every litigated case.

ADVOCATE-JUDGE-DOCTRINE

In the meantime, the profession has increased in number, and as tort law developed many lawyers became highly skilled in the

⁶⁴ *Kunkumian v. City of New York*, 306 N.Y. 167, 111 N.E.2d 865 (1953); *Jenkins v. Southern Ry.*, 196 N.C. 466, 146 S.E. 83 (1929); *Cincinnati & Z. R.R. v. Smith*, 22 Ohio St. 227, (1871); *Dent v. Bellows Falls & S. R. St. Ry.*, 95 Vt. 523, 116 Atl. 83 (1922); *British Columbia Elec. Ry. v. Loach*, [1916] 1 App. Cas. 719 (P.C.).

⁶⁵ *Supra* note 58. *Ford v. Panhandle & S. F. Ry.*, 151 Tex. 538, 252 S.W.2d 561 (1952); *Smith v. Gould*, 110 W. Va. 579, 159 S.E. 53 (1931).

⁶⁶ *Bond v. Missouri P. R.R.*, 342 S.W.2d 473 (Ark. 1961); *Maloney, supra* note 52, at 154.

trial of tort cases. Plaintiffs have been relieved of the burdens of financing their litigation in most jurisdictions through the legalization of contingent fee arrangements and in some cases may be sustained by the advancement of money by their lawyers. Damage suit litigation became attractive to talented lawyers, and many who earlier had found their way to the courthouse forum through prosecution or defense of criminal cases now turned to personal injury and other tort litigation. In recent years they have identified themselves as claimant lawyers on the one hand, or defense lawyers on the other, and each has a powerful and active organization promoting the interests of its members.

ADVANCES ON WIDE FRONT

Under the influence of these lawyers, judges have been made aware of the social and economic implications of the factual data in tort litigation as well as of the implications of legal doctrines. The balance of power between the respective advocates has been more nearly restored, and the doctrines so excessively overweighted in defendant's favor during the 1800's in most instances are being more fairly stated and employed.⁶⁷ Contributory negligence has become an affirmative defense in most jurisdictions with the burden on the defendant to maintain it, and is less likely to be treated as assumed risk asserted by the court as a matter of law.⁶⁸ Last clear chance has been broadened in its scope;⁶⁹ proximate cause is not infrequently used in a victim's behalf;⁷⁰ trespassers may become licensees, or even invitees; in extreme cases⁷¹ *res ipsa loquitur*, first available to the traveller⁷² as against dangerous premises or activities prejudicing the highway, has become available in almost every type of tort case for unintended hurts⁷³ to ease or even carry the plaintiff's

⁶⁷ The National Association of Claimants' Counsel of America (NACCA) has tremendously broadened the understanding of the profession, including the judges, of the significance of tort litigation and has advanced the proficiency of advocacy immeasurably. Its efforts have been widely supported and advanced by numerous institutes sponsored by bar associations and law schools.

⁶⁸ See, PROSSER, TORTS ch. 10 (2d ed. 1955).

⁶⁹ *Supra* notes 64, 65.

⁷⁰ *Socony-Vacuum Oil Co. v. Marshall*, 222 F.2d 604 (1st Cir. 1955); *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.2d 915 (1932); *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74 (1953); *Dent v. Bellows Falls & S. R. St. Ry.*, *supra* note 64.

⁷¹ *Gaylord Container Corp. v. Miley*, 230 F.2d 117 (5th Cir. 1956); *Phipps v. Oregon R. & Nav. Co.* 161 Fed. 376 (C.C.E.D. Wash. 1908); *Kallum v. Wheeler*, 129 Tex. 74, 101 S.W.2d 225 (1937).

⁷² *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863); PROSSER, TORTS 199 (2d ed. 1955).

⁷³ PROSSER, TORTS 211 (2d ed. 1955).

burden of proof on the issue of negligence;⁷⁴ duties have been broadened to include risks undreamed of by nineteenth century courts;⁷⁵ immunities of hospitals and other charitable institutions,⁷⁶ municipalities,⁷⁷ manufacturers,⁷⁸ dealers,⁷⁹ builders and contractors,⁸⁰ have been rejected or greatly modified in an increasing number of jurisdictions; and the constant hammering of the advocates of plaintiffs will cause even more extensive modifications to come.

Liability of landowners and operators engaged in activities dangerous to the occupants of neighboring premises has become

⁷⁴ *Ibid.* *Dement v. Olin-Mathieson Chemical Corp.*, 282 F.2d 74 (5th Cir. 1960); *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P.2d 104 (1954); *Weiss v. Axler*, 137 Colo. 544, 328 P.2d 88 (1958); *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. App. 1953).

⁷⁵ *Tate v. Canonica*, 180 Cal. App. 2d 898, 5 Cal. Rep. 28 (Dist. Ct. App. 1960); *Railway Express Agency v. Brabham*, 62 So. 2d 713 (Fla. 1953); *Dini v. Naiditch*, 20 Ill. 2d 406, 17 N.E.2d 881 (1960); *Natason v. Kline*, 187 Kan. 186, 350 P.2d 1093, 354 P.2d 670 (1960); *Poliquin v. McDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Ferrera v. Galluchio*, 5 N.Y. 2d 16, 152 N.E.2d 249 (1958); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 (1958); *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), noted, 63 W. VA. L. REV. 83 (1960); *Sundquist v. Madison Ry.*, 197 Wis. 83, 221 N.W. 392 (1928); *Hambrook v. Stokes*, [1925] 1 K.B. 141.

⁷⁶ *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957); *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W.2d 131 (1960).

⁷⁷ *Muskopf v. Corning Hospital District*, 359 P.2d 457 (Cal. 1961); *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Williams v. City of Detroit*, 111 N.W.2d 1 (Mich.) 1961; *McLeod v. Grant County School Dist.*, 42 Wash. 2d 316, 255 P.2d 360 (1953).

⁷⁸ *Carlson v. Chisholm-Moore Hoist Corp.*, 281 F.2d 766 (2d Cir. 1960); *Orthopedic Equipment Co. v. Entsler*, 276 F.2d 455 (4th Cir. 1960); *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575 (1960); *Spence v. Three Rivers Builders & Masonry Supply Co.*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1957); see, *Prosser, The Assault Upon the Citadel*, 69 YALE L.J. 1100 (1960).

⁷⁹ *Supra* note 71; *Waynich v. Chicago Last Dept. Store*, 269 F.2d 322 (7th Cir. 1959); *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 124 N.E.2d 836 (1955); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W.2d 835 (1942); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N.W. 855 (1928).

⁸⁰ *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3rd Cir. 1948); *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1 (1948); Comment, *Liability for Personal Injuries from Defective Housing*, 20 U. CHI. L. REV. 273 (1953).

especially severe.⁶¹ The risks in operations having great potential danger against which neither the operator nor the neighbor can provide protection are more and more imposed on the operator as a risk of enterprise though there are some surprisingly doctrinaire decisions still being made.⁶² Similar expansions of liability are found in cases involving assault,⁶³ privacy,⁶⁴ false imprisonment,⁶⁵ protection against high pressure collection tactics,⁶⁶ frauds of all types,⁶⁷ services rendered in high level commercial transactions,⁶⁸ protection

⁶¹ *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P.2d 952, 60 A.L.R. 475 (1928); *Loe v. Lenhardt*, 362 P.2d 312 (Ore. 1961); *Martin v. Reynolds Metal Co.*, 221 Ore. 786, 342 P.2d 790 (1959); *Bedell v. Goulter*, 199 Ore. 344, 261 P.2d 842 (1953); *Wallace v. A. H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960); *Whitney v. Ralph Myers Contracting Co.*, 118 S.E.2d (W. Va. 1961); *Baker, An Eclipse of Fault Liability*, 40 VA. L. REV. 273 (1954); *Gregory, Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); *Morris, Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952); *Green, Hazardous Oil and Gas Operations; Tort Liability*, 33 TEXAS L. REV. 574 (1955).

⁶² *Reynolds v. W. H. Hinman Co.*, 145 Me. 343, 75 A.2d 802, 20 A.L.R.2d 1360 (1950); *Rose v. Socony-Vacuum Corp.*, 54 R.I. 411, 173 Atl. 627 (1934); *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (1936).

⁶³ *Tate v. Canonica*, *supra* note 75, noted 60 COLUM. L. REV. 1047 (1960); 15 RUTGERS L. REV. 134 (1960); *Johns v. Sampson*, 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 (1926); *Mitron v. Williamson*, 21 Misc. 2d 106, 197 N.Y.S.2d 689 (Sup. Ct. 1960); *Buchanan v. Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159, 18 A.L.R. 1414 (1920); *Geissler v. Geissler*, 66 Wash. 150, 164 Pac. 746, 4 A.L.R. 804 (1917).

⁶⁴ *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958); see generally Note, 44 VA. L. REV. 1303 (1958).

⁶⁵ *Great At. & Pac. Tea Co. v. Lethcoe*, 279 F.2d 948 (4th Cir. 1960), noted, 63 W. VA. L. REV. 196 (1961); *Collyer v. S. H. Kress & Co.*, 5 Cal. 2d 175, 54 P.2d 20 (1936); *Ashland Dry Goods Co. v. Wages*, 302 Ky. 577, 199 S.W.2d 312 (1946).

⁶⁶ *Bowdein v. Spiegel*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); *Biederman's, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956); *Green, Mental Suffering Inflicted by Loan Sharks No Wrong*, 31 TEXAS L. REV. 471 (1953).

⁶⁷ *Morgan v. Graham*, 228 F.2d 625 (10th Cir. 1956); *Elk Ref. Co. v. Daniel*, 199 F.2d 479 (4th Cir. 1952); *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458, 71 P.2d 154 (1937); *Tone v. Halsey, Stuart & Co.*, 286 Ill. App. 169, 3 N.E.2d 142 (1936); *Kabatchnick v. Hanover Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E.2d 692 (1951); *Cauverien v. De Metz*, 20 Misc. 2d 144, 188 N.Y.S.2d 627 (Sup. Ct. 1959); noted 62 W. VA. L. REV. 101 (1959).

⁶⁸ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (1931), noted 26 ILL. L. REV. 49 (1931); see, commentary, *Liability of Persons Supplying Information for Trade Purposes*, in GREEN, MALONE, PEDRICK & RAHL, CASES ON INJURIES TO RELATIONS 91 (1958).

of family relations,⁸⁹ and protection against abuse of governmental power and violation of political rights.⁹⁰

INDUSTRIAL EMPLOYEE

In some areas tort law was unable to respond to the changing environment and legislatures have had to take over. During the 1800's the scales had been so heavily weighted against the industrial employee that the courts were unable to rescue him from the doctrinal involvements of master-servant litigation. However sympathetic trial judge or jury might be, they could not successfully avoid the crystallized rules that denied him damages for his injury and in the overwhelming number of cases he went uncompensated. The industrial employer, although successful in litigation, suffered losses in litigation expenses, time consumed in trials, morale of his employees and the respect of the industrial community. The courts had no solution for the situation and by the end of the century public reaction was so strong that over a relatively short period legislatures enacted workmen's compensation acts which relieved the courts of the largest segment of personal injury and death cases.⁹¹ However short this legislation falls in doing full justice to the injured employee or his family, everyone would agree that the compensation system is far superior to court administration through negligence law.

Significantly, the employees of railroads had sufficient political power to obtain congressional legislation modifying contributory neg-

⁸⁹ *Hitaffer v. Argonne Co.*, 183 F.2d 811, 23 A.L.R.2d 1366 (D.C. Cir. 1950); *Dini v. Naiditch*, *supra* note 75; *cf.*, *Deshotel v. Atchison, T. & S. F. Ry.*, 50 Cal. 2d 664, 328 P.2d 449 (1958); *Green, Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237 (1958); see *Latham v. Karger*, 267 Ala. 433, 103 So. 2d 336 (1958), noted 11 ALA. L. REV. 187 (1959); *Webber v. Gray*, 228 Ark. 289, 307 S.W.2d 80 (1957); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Brown v. Gosser*, 262 S.W.2d 48 (Ky. App. 1953); *Montgomery v. Stephen*, 359 Mich. 33, 101 N.W.2d 227 (1960); *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949); *Pickle v. Page*, 252 N.Y. 474, 169 N.E. 650, 72 A.L.R. 842 (1930); *Becker v. Reich*, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct.), *aff'd*, 13 App. Div. 2d 611, 214 N.Y.S.2d 632 (1959), noted 62 W. VA. L. REV. 206 (1960); *Brownlee v. Pratt*, 77 Ohio App. 533, 68 N.E.2d 798 (1946); *Johnson v. Peoples First Nat'l Bank & Trust Co.*, 394 Pa. 116, 145 A.2d 716 (1958); *Hoekstra v. Helgeland*, 98 N.W.2d 669 (S.D. 1959); *Lough v. Ward* [1945] 2 All. E.R. 338 (K.B.); Note, *Damages for Loss of Consortium*, 46 VA. L. REV. 184 (1960).

⁹⁰ *Barrows v. Jackson*, 246 U.S. 248 (1953); *Geach v. Moynahan*, 207 F.2d 714 (7th Cir. 1953); *Hardy v. Vial*, 49 Cal. 2d 577, 311 P.2d 494 (1957); *Burden v. Hoover*, 9 Ill. 2d 114, 137 N.E.2d 59 (1958); *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 241 (1946); *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1958).

⁹¹ See, MALONE, LOUISIANA COMPENSATION LAW AND PRACTICE 37-39 (1951). By 1930 all the states except four had compensation acts.

ligence as a defense in personal injury and death cases arising out of interstate commerce. Later by amendment the defense of assumption of risk was also removed. Similar statutes are found in some of the states with respect to injuries arising in intra-state commerce. At first, the reactions of practically all courts to this legislation were restrictive. Common law defenses forbidden under one doctrine were bootlegged in under the name of some other doctrine. More recently, under the strict supervision of a slender majority of the Supreme Court, the employee is given as full protection as could be expected.⁹² A considerable segment of the profession disapproves the decisions of the court in marginal cases.⁹³ The mechanical application of nineteenth century negligence defense doctrines still finds strong support by many lawyers and by some courts.

CIVIL RIGHTS

One of the great areas of tort law which has laid dormant for a long period and which is now demanding and receiving attention is that of political and civil rights of the individual. Here the courts and tort law have largely defaulted. There is no other phase of our social well being that has been so completely and closely controlled by local environment. This is shown not only by the affirmative investigations and prosecutions conducted by legislative and executive officials in their attempts to reach "subversives," but equally so by the absence of protection of the citizen's right to vote, or to share on a basis of equality community services such as education, transportation, amusements, and playgrounds, the choice of residence and other rights of citizenship. It would seem that in a government such as ours neither constitution nor statute should have been required to protect these rights of citizenship. But we have had constitutional provisions and statutes in support of them for a long time and still our progress has moved at less than deliberate speed. We know how our first national civil rights statutes were rendered ineffective by the federal courts,⁹⁴ and how the courts of most of the states in which there were local statutes reduced them

⁹² Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 488 (1956); see, *McMillan v. Western Pac. R.R.*, 54 Cal. 2d 841, 357 P.2d 449 (1960).

⁹³ See, *Harris v. Pennsylvania R.R.*, 361 U.S. 15 (1959) and appendix to opinion by Douglas, J., for list of cases and dissents; MILLER, *SELECTED ESSAYS ON TORTS* 127 (1960).

⁹⁴ Gressman, *The Unhappy History of Civil Rights Litigation*, 50 MICH. L. REV. 323 (1952). See, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883).

to a practical nullity;⁹⁵ how only recently have some states given their statutes full effect;⁹⁶ and we are now witnessing at this late date how impossible it is in some jurisdictions to secure for Negro citizens the right to send their children to desegregated public schools even though their rights have the support of the courts as the law of the land. Theoretically, nothing more than a tort suit for damages against those who obstruct the enjoyment of such rights, plus the equitable remedy of injunction, would be required. But when citizens en masse, local judges and juries refuse recognition of the rights, tort law, statute law, and the Constitution seem equally helpless to provide protection. Whether the national environment with all its available instrumentalities can prevail over the intractable local environment is still an open question.⁹⁷ This much may be ventured. The rights of citizenship can never receive full protection until local environments respond favorably.

In other areas losses have been registered. Libel and slander actions in the political area have suffered a great decline as the freedom of speech and press have gained more and more protection.⁹⁸ We are not yet sure whether on balance this is gain or loss. Some legislatures under the influence of pressure groups have withdrawn protection to the family in what are called "heart balm" cases.⁹⁹ While some consider this a gain,¹⁰⁰ others feel that it is one of the rare instances in which legislatures and courts have been imposed upon by a shrewdly conducted campaign behind a facade of feigned moral indignation. The limited protection of the family built up by the courts over a long period was piously ripped away by some legislatures and courts with the result that sexual pirates have open

⁹⁵ *Fletcher v. Coney Island*, 165 Ohio St. 150, 134 N.E.2d 371 (1956), noted 26 U. CINC. L. REV. 116 (1957), 105 U. PA. L. REV. 115 (1956); see note, *Private Remedies under State Equal Rights Statutes*, 44 ILL. L. REV. 363 (1949).

⁹⁶ *District of Columbia v. John R. Thompson Co.*, 348 U.S. 100 (1953); *Everett v. Harron*, *supra* note 90; note, *Civil Rights Acts; Scope and Equitable Enforcement*, 35 CALIF. L. REV. 571 (1947).

⁹⁷ But see *Monroe v. Pape*, 81 S. Ct. 473 (1961); *Progress Dev. Corp. v. Mitchell*, 286 F.2d 222 (7th Cir. 1961); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961).

⁹⁸ *Green, The Right to Communicate*, 35 N.Y.U. L. REV. 903 (1960).

⁹⁹ *Siegal v. Soloman*, 19 Ill. 2d 145, 166 N.E.2d 5 (1960); *Smith v. Hill*, 12 Ill. 2d 588, 147 N.E.2d 321 (1959); *Heck v. Schull*, 384 Ill. 296, 68 N.E.2d 464 (1946) noted 42 ILL. L. REV. 233 (1946); *Pennington v. Stewart*, 211 Ind. 653, 10 N.E.2d 619 (1937); *Magierowski v. Buckley*, 39 N.J. Super. 534, 121 A.2d 749 (1956).

¹⁰⁰ *Bohlen, Fifty Years of Tort Law*, 50 HARV. L. REV. 1225, 1246-48 (1937).

season on seducable spouses and especially the “maidens from the other side of the tracks,” leaving the family unprotected at its most vulnerable point.

THE AUTOMOBILE AND LIABILITY INSURANCE

Of all the factors which have stimulated the development of tort law in the twentieth century none equals the influence of the motor vehicle with its ghastly slaughter and maiming of those who use the highways. As the motor vehicle has become the chief catalyst of our economy, likewise it is the chief support directly and indirectly of tort law and those connected with its administration.¹⁰¹ A great insurance enterprise sprang up almost overnight to take over the defense of those who feared the liabilities imposed by tort law in behalf of the victim of the motor vehicle. A movement is gaining momentum to require every motorist to provide liability insurance so that behind every defendant motorist will be found a solvent insurance company. And, if prudent for the motorist, why not prudent for other prospective tort-feasors; the shopkeeper, the home owner, the contractor, manufacturer, hospital, doctor, municipality, operator of any type? And so the idea grows. With insurance, tort law took on new dimensions; tort cases now consume a large part of the time of the important trial courts of the country and the number of courts and judges are increased at nearly every term of most legislatures. Supreme courts in many states must have intermediate appellate courts to carry the load of litigation and the writing of opinions. New procedures are required; discovery, pre-trial hearings, use of scientific evidence given by expensive expert witnesses, special sections in the bar associations, how-to-do-it institutes, publications devoted to the interests of the litigants, more and more books on the law of torts and on some of its important sub-divisions. Nor does the influence of insurance stop here. Courts are opening their dockets to inter-family suits of spouse against spouse,¹⁰² or the estate of the offending spouse;¹⁰³ minor child against minor child;¹⁰⁴ child

¹⁰¹ GREEN, *TRAFFIC VICTIMS* (1958).

¹⁰² *Silverman v. Silverman*, 145 Conn. 663, 145 A.2d 826 (1958); *Brown v. Gosser*, *supra* note 89; *contra*, *Campbell v. Campbell*, 114 S.E.2d 406 (W. Va. 1960).

¹⁰³ *Johnson v. Peoples First Nat'l Bank & Trust Co.*, *supra* note 89.

¹⁰⁴ *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) noted 42 VA. L. REV. 687 (1956); *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960).

against parent and parent against child.¹⁰⁵ Verdicts given by juries and affirmed by appellate courts grow larger and in turn insurance coverage and rates are increased correspondingly.

While the doctrines with their refinements are still great handicaps for plaintiffs and correspondingly protective of defendants and their insurers, in some jurisdictions they are used primarily by appellate courts to maintain drastic control over trial courts and juries. Doctrines do not seem too important to juries as long as they understand their effect upon the ultimate judgment, and thus the great efforts by defense lawyers, with less and less aid from the courts, is to keep the jury in ignorance of the existence and the amount of insurance available.¹⁰⁶ And thus, also, there is preference for the special issue method of submission as a substitute for the general verdict,¹⁰⁷ and for separate trials on the issues of liability and damages.¹⁰⁸

The layman's evaluation of insurance is different from that of the lawyer. "Why," he asks, "if the motorist pays for insurance to protect him if he hurts someone, should not the insurance company pay the loss as it does in case of fire or theft? Why all the trouble and expense of a lawsuit? Why should a purchaser of insurance buy a lawsuit in which he has no voice as to the settlement or the defense of the claim? Why not protection for the injury done at least within the limits provided by the policy?" The layman's point of view is slowly sinking in on the lawyer, the judge, and the legislator. It cannot be long before they concede the point and take open steps to accommodate it to the law. In the meantime, the existence of insurance is known both by judge and jury and it is more and more difficult to mix negligence law and insurance in the same case. The universality of liability insurance overloads the law and the courts. Its influence penetrates all other cases of negligence law, and even as retooled by 1960 patterns the load of litigation is more than the courts can handle with trial by jury and appellate review. In this impasse litigants must either settle their cases at considerable

¹⁰⁵ *Supra* note 89; *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1960); *Talbert v. Talbert*, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. 1960); *Decker v. Decker*, 20 Misc. 2d 438, 193 N.Y.S.2d 431 (Sup. Ct. 1959); *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Parker v. Parker*, 230 S.C. 28, 94 S.E.2d 12, 60 A.L.R.2d 1280 (1956).

¹⁰⁶ *Green, Blindfolding the Jury* (pts. 1-2), 33 TEXAS L. REV. 157, 273 (1954), 34 *Id.* 382 (1956); see, *Flanagan v. Mott*, 114 S.E.2d 331 (W. Va. 1960).

¹⁰⁷ *Green, Special Issues*, 14 TEXAS B.J. 521 (1951).

¹⁰⁸ *Hosie v. Chicago & N.W. Ry.*, 282 F.2d 639 (7th Cir. 1960).

discount or run the risk of losing their cases by the erosion of time—the disappearance or unavailability of witnesses, the fading of memories, absorption of their lawyers' interest by other litigation, and the feeling of futility on the part of the victim himself or his loss of courage to litigate. Lapse of time between injury and final judgment has become so great as largely to defeat the protection law provides for the victim.

CONCLUSION

By whatever standards tort law is measured, it will be found to impose increasingly stricter and heavier liabilities upon defendants in behalf of their victims. The imposition upon the defendant of the risks created by his activities; his capacity to bear and/or distribute the losses as a part and incident of the costs of doing business or through insurance; the feeling that any dangerous activity should make provision for the losses it may inflict; the acceptance of these notions by people in general; and the recognition by a large segment of the profession that a law suit is more than a contest governed by procedures, rules, and arguments are largely responsible for this front-line advance of tort law. How far the advance will be pushed depends upon many factors later to be discussed, but the overtopping factor that has characterized the advance to this date would seem to be the faith of the courts and of advocates who appear before them that the heart of tort law is the litigation process; that doctrines, theories, rules, and formulas are merely the means of making the process operational; and that the process, manned as it is by both laymen and legal experts, is designed to respond and must necessarily respond, to the environment of the period.¹⁰⁹

This faith has been greatly shaken by failure of the litigation process to meet the ever-increasing needs of the victims of the highways. The question now arises, can it meet the needs of an environment dominated by the machines of air traffic and the even more dangerous machines and processes for the production and uses of our newly found source of energy in the atom?

(Part II of this article will appear in the February issue.)

¹⁰⁹ See Green, *The Influence of Environment on the Litigation Process*, 20 LA. L. REV. 548 (1960).