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THE EXPLOSION IN THE LAW
With an Analysis of the Book, the Law Revolt, by Melvin Belli
by
JUSTICE MICHAEL A. MUSMANNO*

I have just finished reading an absorbing work, *The Law Revolt*, by Melvin Belli.[1] In it Mr. Belli tells of the monumentally drastic changes which have occurred in our substantive and procedural law during the last half century or so. Any other author would probably have named a similar work, *Development in the Law*, or *The Evolution of Law*, but Melvin Belli, with an ever-youthful enthusiasm for all things appertaining to his dedicated profession, would never attach so staid a label to any handiwork of his. And yet, this internationally famous lawyer, with all the vividness of his personality, was really conservative in his naming of what has recently happened in the legal universe.

There has been, during the last several decades, such an upheaval in the law that one could, without hyperbole, call it an explosion. Indeed, one who would contrast the law of 50 years ago, with that of today, not in the meantime having marched with the pack of stare decisis on his back, could believe that he was looking at the legal systems of two different civilizations and not of two eras separated only by a few years.

There have been legal doctrines so firmly imbedded in the granitic mountain range of jurisprudence that even the Pyramids might seem rolling pebbles in comparison. Yet, today, those doctrines are pulverized sand on the shores of an ever-increasing appreciation of law as the handmaiden of justice and the companion of Humanity.

Let me offer an illustration. In 1910 the Supreme Court of Pennsylvania declared that: "It is a doctrine too well established to be shaken, and as unequivocally declared in our own state as in any other, that a public charity cannot be made liable for the tort of its servants."[2] In that case a nurse, employed by a hospital known as a charitable institution, placed on either side of a paying patient, still unconscious from an administered anesthetic, hot water bottles which she had failed properly to cork. The escaping scalding water inflicted on the patient injuries more serious than those she had entered the hospital to have mended. She brought suit against the hospital organization and recovered a verdict. The Pennsylvania Supreme Court, as above indicated, reversed the verdict, stating that the charitable immunity doctrine could not be shaken.

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1. M. BELLI, THE LAW REVOLT, (1968). Published by Trial Lawyers Service Co., Belleville, Ill., 2 volumes, 1126 pp. $25.

2. Gable v. Sisters of St. Francis, 227 Pa. 254, 258, 75 A.1087 (1910).

In 1958, another paying patient, who was injured through negligence in a so-called charitable institution, tried to shake the doctrine and again our Court declared: "A rule of non-liability, even though judge-made, that has become as firmly fixed in the law of this state as has the charitable immunity from tort liability, should not be abrogated otherwise than by a statute."[3]

In 1961 the Court once more struck down an attempt to shake the unshakable, and declared, with rising indignation, "It is to be hoped, therefore, that with this current decision, the appellants' contention will assume a state of quiescence so far as further insistent court action is concerned."[4]

But the contention did not remain quiescent. Like Phoenix it rose from the ashes and in 1965, the charity doctrine was not only shaken but toppled from its meretricious pedestal on which it had stood too long, and the Court declared, what should have been obvious from the first leaking hot water bottle that:

> [I]f a hospital functions as a business institution, by charging and receiving money for what it offers, it must be a business establishment also in meeting obligations it incurs in running that establishment.[5]

Another illustration: In 1913, George Bradley, with a purchased railroad ticket in hand, was waiting on the station platform when an iron brake bar flew from a passing freight train and injured him. He brought suit against the railroad company,[6] but the trial judge directed a verdict for the railroad. The plaintiff appealed, and the Supreme Court of Pennsylvania of that day, with a single track naiveté that is charming to contemplate, said that the plaintiff could not possibly recover because what had happened to him was an "accident pure and simple." What is any negligence case but the result of an accident pure and simple?

Forty years later, a similar case came before our Court. A metal coupler had detached from a passing train, and struck a truck traveling on a road parallel to the railroad track. The truck owner recovered a verdict, and the railroad company appealed. Its lawyer argued to us that the verdict should be reversed, citing as its authority "the fair and reasonable rule set forth in the *Bradley* case." We rejected this whimsical

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3. Knecht v. St. Mary's Hospital, 392 Pa. 75, 78, 140 A.2d 30 (1958), Musmanno, J. dissenting.

4. Michael v. Hahnemann, 404 Pa. 424, 426-27, 172 A.2d 769 (1961), Musmanno, J. dissenting.

5. Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 493, 208 A.2d 193 (1965), Musmanno, J. writing the Majority Opinion.

6. Bradley v. L.S. & M.S. Rwy. Co., 238 Pa. 315, 86 A. 200 (1913).

argument, stating that the *Bradley* decision, which had "been doing service for 40 years, was due for formal retirement without pension."[7]

As recently as 15 years ago, the Supreme Court of Pennsylvania was handing down decisions which could only have caused law students embarrassment as they prepared for the practice of the law which is supposed to produce justice, regardless of unusuality of circumstance. On January 15, 1951, A. W. Grotefend parked his automobile on private property adjacent to Pennsylvania Railroad tracks. Several hours later a tractor-trailer, like a meteor, came hissing through the air and landed on Grotefend's automobile. The tractor-trailer had stalled at a railroad crossing close by, but the engineer, heedless of the obvious barrier ahead of him, refused to reduce the speed of his locomotive and turned the tractor-trailer into a multiple-ton flying saucer which wholly demolished Grotefend's private transportation system. Grotefend sued the railroad company and won a jury verdict. Our Court reversed the verdict, stating that the plaintiff had not proved any negligence. My dissenting opinion endured for many pages, the final paragraph reading:

> Because of his experience on January 31, 1951, A. W. Grotefend will undoubtedly never park an automobile in the vicinity of a railroad track again, but from his experience with this lawsuit he will undoubtedly also feel that he should remain far away from the courts because, from his point of view, a collision with court-inspired law can be as devastating as a collision with a railroad locomotive.[8]

The Grotefends of today need not remain away from the courts because, as Melvin Belli interestingly points out in his estimable two-volume work, there has been a revolt in the law, and court decisions are currently becoming more identifiable with that ingredient which, in the days of common law pleading, was more or less a stranger in the courthouse, that is, common sense. In 1956 the Bobbs-Merrill publishing house brought out a book entitled *Justice Musmanno Dissents*, with an Introduction by Roscoe Pound, Dean Emeritus of the Harvard Law School. It was a compilation of the more important Dissenting Opinions I had written in the five years I had been on the Supreme Court of Pennsylvania up to that time. In those five years I had written more dissenting opinions than all the judges of the Supreme Court had collectively written in 50 years. Lawyers and law students have said that in reading the cases in *Justice Musmanno Dissents*, and observing the current state of the law, they have concluded that 65% of the principles upheld in those dissenting opinions are now contemporary law in the Commonwealth, either by court decision or legislative action.

7. Mack v. Reading Co., 377 Pa. 135, 143, 41 A.2d 927 (1954).
8. Grotefend v. P.R. Co., 380 Pa. 439, 453, 110 A.2d 362 (1955).

For decades it was a legal defense in an automobile collision case for the defending motorist to say that the accident occurred because his car skidded. In one case which came before the Pennsylvania Supreme Court[9] the plaintiff had been driving westwardly on the Pennsylvania turnpike. Another car traveling eastbound in the eastbound lane skidded over the medial line and struck the plaintiff's car head-on. The Supreme Court held that the plaintiff could not recover because he could not say *why* the car skidded, even though it was on the wrong side of the highway!

It was not until 1963 that our Court corrected this lopsided reasoning. In writing the Majority Opinion which doomed the "skidding rule," I said that the defendant in the case before us was of the impression

> that once the word 'skidding' appears in the plaintiff's presentation of his cause, his case becomes an uncontrolled sled which toboggans out of the courtroom unless he can show how, why, when and where the skidding of the opposite party occurred. The word 'skidding' has no such automatic self-destroying connotation in the jurisprudence of this Commonwealth. If it has, it is repudiated here and now . . . When a motorist is on his right side of the highway, obeying all the rules of the highway, being careful, cautious and considerate of the rights of others, and suddenly he sees coming toward him, like a gargantuan genie, a destroying force, it is not for him to explain how and why the invader got into his way.[10]

All of this, of course, is elementary, as Sherlock Holmes would say to Dr. Watson, and yet who knows how many victims of skidding accidents have had to limp through life on borrowed crutches because courts have demanded an unrealistic quantum of proof? The law has skidded on many highways other than ice-encrusted ones. And that is what Melvin Belli's book, *The Law Revolt*, is about.

It is a fascinating work because each chapter has a happy ending, or at least it offers encouragement to those who love the law and wish to see it become in fact what it is supposed to be in theory, the embodiment of reason.

Mr. Belli was perhaps the person best equipped to write a book of this kind because he has "lived" the law keenly, passionately and devotedly. He is regarded as probably the most colorful practicing lawyer at the American bar. He is also described as one of the most "controversial," although I cannot help wonder how a lawyer can be regarded as other than controversial. A lawyer lives and thrives on controversy; he is trained for controversy. As soon as he enters a law case, he imme-

9. Richardson v. Patterson, 368 Pa. 495, 84 A.2d 342 (1951).

10. Campbell v. Fiorot, 411 Pa. 157, 160-62, 191 A.2d 657 (1963).

diately becomes the subject of conflict because there is already waiting for him an opponent who, like a professional fencer, is prancingly eager to lunge at him. Thus, whether a lawyer is naturally or not a belligerent, he is bound to be a controversialist. Of course, Melvin Belli is a specific kind of a controversialist because he has fought in so many battles and has aroused so much contention that it is difficult to contemplate him, like a prize fighter or gladiator, in any environment other than in a ring or an arena.

His unique style, passionate partisanship, dynamic energies, novel approach to legal situations and trial procedures inevitably provoke intense antagonisms which he returns in good measure, for his patrician face is never red from having been slapped on both cheeks. We all remember how, when he was handed that jolt in the Jack Ruby trial in Dallas, he seized a microphone in the courtroom and broadcast to the world the errors he believed had crowded the bench and invaded the jury box. He did all this with choice adjectives and tonal thunder, and the community rose in wrath against him. Bar associations, editors and others condemned him for his unconventionalities and then, while the smoke of bombardment still clouded the sky, he headed for the sophisticated cloisters of his elegant law offices in San Francisco, locked himself in his library, and, with jurisprudential know-how, deep-water erudition and analytic evaluation of facts, wrote out the 250-page appeal which later won for Jack Ruby a new trial, even though in the meanwhile Belli had been fired from the case by those he had most benefited at tremendous cost to himself.

This is one of the reasons why Melvin Belli is "colorful." He is a triple-threat man: a resourceful and aggressive advocate, a profound scholar, and a literary craftsman. Already he has written a score of books and there is no law library which does not display his work on much-read shelves, and they have become much-thumbed text books in practically every law school.

If one desires to obtain a comprehensive view of the law as it is today, without reading through the 105 encyclopedic volumes of Corpus Juris, with all its pocket parts, I know of no book which depicts the current landscape of the law in broad, vivid strokes as proficiently, interestingly and attractively as *The Law Revolt.*

Mr. Belli says in the Introduction to his book that law is "where the action is." This mirrors reality. The law is omnipresent even though it may not assert itself until after the automobiles collide, the stocks crash, the contract is written and then torn apart, the wills are prepared and loving relatives don armor, and taxes are assessed and the sheriff appears. There is no type of human relationship or of physical endeavor that cannot become so entangled that the courts finally have to be appealed to

for the sword that severs the Gordian knot. Mr. Belli reminds us that "In America, the American exclaims, when all else has failed, when other redresses are unavailing, 'All right, then I'll go to court!' "

What happens then when he gets into court? Those who have never been to court still cherish the dream that the law is magic, and that its wand will restore to the victim what has been unjustly taken from him, and impose punishment on those who have stolen from the treasure box of his constitutional rights. Disillusionment inevitably awaits the person who reads the history of the law and glances into the star chamber proceedings of England, looks on trial by ordeal, and enters into the labyrinths of common law pleading. Belli tells of the agony of William Cullen Bryant, one of America's stellar poets, who, beginning in his adult career as a lawyer brought suit in libel in behalf of his client Bosey. At the trial, the Judge entered judgment for Bryant's client. The defendant appealed, and the Supreme Court of Massachusetts reversed the judgment not because Bosey was not entitled to judgment but because Bryant had made a mistake in his common law pleading. Said the Court: "The judgment must therefore be arrested (for improper pleadings). . . . In a matter of technical law, the rule is of more consequence than the reason for it; and however we may lament the lost labor and expense of the suit, we find ourselves wholly unable to prevent it."[11] Could anything be more unjust than the proposition that a rule is of more consequence than the reason of it?

This arbitrary denial of justice and arrogant betrayal of reason was eclipsed about a hundred years later by the same court (with different members, of course) in the Sacco-Vanzetti case. After the men had been convicted of robbery and murder, a certain Madeiros confessed to having committed the crime. An impartial investigation followed and some fifty persons verified the details of Madeiros' confession, which excluded Sacco and Vanzetti from any participation in the South Braintree robbery and murders. After denial of a new trial by the trial court, the defendants appealed to the Supreme Court of Massachusetts which rejected the appeal, laying down, with the rejection, one of the most incredibly inhuman doctrines ever spoken in a court of law, namely,

> [I]t is not imperative that a new trial be granted even though the evidence is newly discovered, and, if presented to a jury, would justify a different verdict. The rule is the same even though the case is capital.[12]

Later on, when I was a member of the Sacco-Vanzetti defense staff, I filed a petition for writ of certiorari in the Supreme Court of the United

11. Bloss v. Tobey, 19 Mass. 320 (1824).

12. Comm. v. Sacco, 259 Mass. 128, 137, 156 N.E. 57 (1927).

States. The callousness of the Massachusetts courts in refusing a new trial, even though newly-discovered evidence could admittedly have brought about an acquittal of the condemned men, was equalled by those courts in refusing to grant a stay of execution, even knowing that our case was awaiting hearing in the highest court of the land. And, in consequence, two innocent men went to their flaming death in the electric chair.

One could also gasp in realizing that it was not until 1964 that Massachusetts eliminated prisoners' cages in the courtroom. Governor Endicott Peabody sent to me the pen with which he signed the bill outlawing this inhuman practice. He accorded me this honor because ever since the execution of the "poor fish peddler and the good shoemaker," to which the cage in which they were exhibited to the jury, together with perjured testimony, district attorney falsities, and judicial tyranny, staggering to behold, contributed to their immoral conviction, I had campaigned for the elimination of this practice of the medieval ages.

In this regard, Melvin Belli bespeaks my sentiments when he says:

> I've always felt that a lawyer should be heard in court *and out of court* . . . that a lawyer should be a leader in the community, and particularly in community thought on controversial issues.
>
> . . .
>
> If my "colorfulness" has exceeded the bounds of propriety on occasion it is only because I have felt that one had to ring the bell to get the people into the temple.
>
> I'd rather sit next to an honest man who wears a dinner jacket with a red, white and blue striped necktie, in grossly bad taste, than one in impeccable full dress who'd paid for his dinner with counterfeit money![13]

There has been much that has been counterfeit in the law, and it is gratifying to read how Mr. Belli tells of the worm that turned, the sleeping giant who awakened and the pinioned civilian who broke his bonds through the law, that is, through revolt in the law. For instance, when an insurance company in a personal injuries case, harassed the plaintiff by having private detectives trail him, by taking movies of him and otherwise interfering with his enjoyment of normal life, Mr. Belli went into court and obtained an injunction against this invasion of his client's rights of privacy.

It used to be that most judges (and there are a few left) felt themselves guardians of the treasuries of defendants in civil cases. The gen-

13. M. BELLI, THE LAW REVOLT, 344-45 (1968).

eral impression abided that plaintiffs (especially in personal injury cases) were in constant conspiracy to magnify their injuries, produce manufactured evidence and shed crocodile tears in order to achieve excessive verdicts. The judges took it upon themselves to squeeze the tears out of the verdicts and then cut the cloth of the verdict down to fit the frame of their preconceived idea that the victim of an accident should not, because of that fact, become rich.

It embarrasses me to recall the number of times my colleagues on the Supreme Court applied pruning shears to snip in an area which I regarded as non-snippable. In 1955 we had before us a case where the jury returned a verdict for the plaintiff in the sum of $8,422.[14] The plaintiff had suffered a serious injury to his right knee cap which saddled him with a 15% permanent knee impediment. His doctor had testified that in running, the plaintiff's knee might "give out." The plaintiff testified that his knee "feels like you have a real bad headache in your knee. You get a thumping."

Although the plaintiff was only 24 years of age and, therefore, had a life expectancy of 43 years, the majority of our court reduced the verdict from $8,422 to $6,422. In my dissenting opinion I asked my colleagues what type of diagnostic lenses they had in their judicial spectacles which enabled them to say that $8,000 shocked their conscience and that $6,000 satisfied them to a microscopic satisfaction. I informed them further that "[t]he swing of a knee hinge cannot be measured with such precise monetary calipers that one can say with mathematical certitude where the free arc ends which makes $8,000 shockable—but $6,000 just right."

In another case[15] the jury returned a verdict of $20,000. The trial court reduced it to $14,000. Our Court, on appeal, cut the verdict down to $8,000. I asked, in my dissenting opinion, how this Court could, "solely from the cold, printed page, unwrinkled by the corrugations of pain that the jury and the trial judge saw on the face of the victim . . . , lop off $6,000 . . ." The plaintiff was a railroad worker and his back had been severely injured. I pointed out "that a back injury to a railroad worker, who must move about in the turbulent arena of shifting locomotives, drifting cars and falling missiles from overloaded gondolas, increases the hazards of his work immeasurably. The perils of a railroad track are legendary and the difference between safety and serious injury or death is often the matter of a split second's physical movement."

My colleagues were not moved. The jury had awarded the plaintiff $20,000, but when he finally left the shearing machinery of the courts,

14. Logue v. Potts Mfg., 381 Pa. 144, 112 A.2d 370 (1955).

15. Duff v. The Monongahela Connecting R.R. Co., 371 Pa. 361, 365, 369, 89 A.2d 804 (1952).

he had $8,000. When he paid for his medical bills and attorney's fees, he would have reason to wonder if the original verdict had not been counterfeit money.

Melvin Belli was one of the pioneers in fighting for the acquisition and retention, of adequate awards. He says in his book:

> The procedure of *demonstrative evidence*—black boards, skeletons, aerial photos, enlarged x-rays, models, experiments, blow-up of transcript pages and records and reports, extended opening statements (all of which I think I had some part in initiating)—is a Revolution in the civil law. . . . The end result of demonstrative evidence is the Adequate Award. But it is also a more factual, a more just, a less confused, a more analyzed, a more consonant end result of the trial with the compensation, in dollars—modern dollars.[16]

It is a strange thing that while appellate judges feel they have a duty to reduce an excessive award, it does not occur to them that there might be a corresponding duty to increase an inadequate award. In one of my dissenting opinions[17] I pensively soliloquized:

> If we can be shocked by an excessive verdict, why can we not be shocked by an obviously inadequate verdict? If too much causes a revulsion, why shouldn't *too little* awaken an equal abhorrence? If we recoil from a verdict which is bloated, why should we be indifferent to a verdict which is gaunt?
>
> Why should an overfull larder shock our conscience more than an empty or half-full one? Why should an extra loaf of bread be more disturbing than a desiccated crust?

Melvin Belli devotes a section of his book to this interesting subject and hopefully predicts that there will be a day when an additur will be just as much normal procedure as a remittitur.

> The issue of additur was not presented until modern times but it is a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. Its acceptance, though still somewhat retarded, is growing, noted the California Supreme Court. The Court felt additur should not be treated differently from 'other modern devices aimed at making the relationship between judge and jury as to damages as well as to other matters one that preserves the essential of the right to jury trial without shackling modern procedure through out-moded precedents.'[18]

16. M. BELLI, *supra* n.13, at 371.
17. Takac v. Bamford, 370 Pa. 389, 88 A.2d 86 (1952).
18. M. BELLI, *supra* n.13, at 424.

How far should precedents control decisions? It would be a catastrophic mistake to assume that because precedents are from time to time, overruled, that, we should not be guided by decisions based on the wisdom of the past. Without stare decisis there would be no stability in the law. The ship of the law should follow that well-defined channel which, over the years, has been proved to be safe and trustworthy. But, on the other hand, it would not comport with wisdom to say that when shoals rise in a heretofore safe course, and rocks emerge to encumber the passage, the ship should pursue the original course merely because it presented no hazard in the years that have gone.

The doctrine of stare decisis does not demand that we follow precedents which experience proves now violate accepted principles of justice.

A precedent hoary with age is not for that reason unauthoritative, especially when the principle therein asserted has been re-affirmed over the passing years. But when the old oaken bucket is replaced by a modern drinking fountain which responds to a pedal push, and quenches the thirst of the drinker instantly and wholesomely, one does not insist on creaking a crank to bring to the surface the moss-covered bucket of yore.

Melvin Belli points out that the revolution in the law which he describes has come about through *due process*:

> Predictably and certainty (stare decisis and status quo) are not absolute immutable terms. They are *relevant* and *relative* to the changed social, economic and moral conditions of the times during which they are applied. *They are immutable but at the same time must have a built-in commodity of growth to be consonant with modernity, otherwise they wouldn't be compatible*; they'd be an out of context compatibility.[19]

There has been an explosion in the law, yes, but it is the kind of explosion which in my boyhood days, as a coal miner's helper, I saw miners employ in order to bring down a harvest of coal which, otherwise, through the ordinary use of pick and shovel, would not have been accessible. Progress in the law must always be through due process. Mr. Belli tells us:

> And, at last, probably the most exemplary that there has been a Revolt on the civil side in the common law is the pronouncement from the conservative House of Lords that 'stare decisis has been abandoned as an instrument ratio decidendi . . .'[20]

What this all amounts to is that so long as stare decisis is taking the ship steadily across the ocean to its intended destination, it should not

19. *Id.* at 8.
20. *Id.* at 377.

be thrown overboard. However, when magnetic universal forces affect the reliability of the compass, adjustments are imperative. We recently approved in our Court a verdict of $237,500 for a leg amputation. Commenting on this affirmance, Mr. Belli says:

> Carefully dissecting defendant's many appellate complaints most of which, before the Revolt, would have resulted in reversal . . . , Justice Musmanno concludes of and about defendant's complaints: 'This, of course, is to ignore fact for fancy, positive evidence for guesswork, and demonstrated proof for dialectic legerdemain. The jury and the court below rejected this line of disputation and it finds no more concurring approval here.' So, in The Civil Law Revolt, that is, also, *where the now action is*—without ancient 'Dialectic legerdemain.'[21]

While an adequate award is not of itself the whole answer to the demand for justice in the civil courts, Mr. Belli queries if one can deny the significance of money in modern day society?

> Of course, social position and decorations even in a democracy may substitute for money. And some altruistic individuals still live for *service* to other human beings alone, the goodness, and if there is the necessity of self award, the satisfaction goodness by itself brings. But money in our society has become a status of social position, of capacity, and indeed, of worth to and in the community. This is not an unnatural result because money was intended as a medium of exchange and expression as a readily understood common denominator of one's worth.
>
> So in the civil revolt, if there has been a revolt, it should be particularly represented and reflected in the end result of the civil law suit, damages, or quantum, or—money, the amount paid.[22]

The courts are realizing more than heretofore what it means to litigants to get the money to which they lay claim. In reading the opinions of a century or more ago—those long, polished, sapient opinions charming with embroidered pedantry, one gets the impression that the money or the house or the office the complaining party was seeking was merely an annoying fish in the sea of academic philosophy in which the opinion writer was floundering. It would never have occurred in those days for a judge to absolve an insured from the obligations imposed on him by fine illegible print in the policy. Courts more and more are looking for the meat in the coconut unhampered by the hardness of the shell of formalism. Mr. Belli finds:

21. *Id.* at 377.
22. *Id.* at 398.

> Courts now are increasingly finding the fine print, embodying all types of waivers and disclaimers in insurance contracts, unfair to the insured or against public policy—if the print is too fine to read, it becomes too fine for the law.[23]

In one of my Opinions I said:

> Diminutive type grossly disproportionate to that used in the face body of a contract cannot be ignored; it has its place in law . . . but where it is used as an ambush to conceal legalistic spears to stab other rights agreed upon, it will receive rigorous scrutinization by the courts for the ascertainment of the true meaning which may go beyond the literal import.[24]

Another community liberated in the Law Revolt is the one made up of victims of defective devices and contaminated beverages. For an indeterminate period in our law, the person who was made violently ill by ingesting a fly in the baker's pie or drinking from a Coca-Cola bottle in which reposed chewing tobacco could not obtain adequate redress in the courts because it was practically impossible for him to prove that it was the baker's negligence which allowed the fly to buzz into the custard or the bottle manufacturer who allowed his quid to drop into the vat of molten glass. The victim could bring an action, of course, but invariably he could only get a couple of hundred dollars in settlement of what is known as a "nuisance case."

The Law Revolt has changed this, because courts realize that ailments resulting from the ingestion of defective drugs or contaminated food can disable a person as grievously and as permanently as the injuries resulting from being run over by a truck. Now, one can proceed to trial against the alleged offending manufacturer or tradesman not only on the basis of negligence but on the basis of warranty. Belli's law firm has been in the forefront in the warranty revolt. In the case of *Escola v. Coca-Cola*[25] where he represented the plaintiff, the Court held:

> The civil disability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe.

Belli states the situation clearly in his book by asking: "What is the real problem, negligence v. warranty, what is its practical thrust?"

He answers the question:

> A defective or unwholesome commodity is put into the stream of commerce. If plaintiff, the consumer, sues in *negligence*, he

23. *Id.* at 444.

24. Cutler v. Latshaw, 374 Pa. 1, 7, 97 A.2d 234 (1953).

25. 24 Cal. 2d 453 (1944).

> must show that the commodity was *negligently* fabricated. But plaintiff cannot go into defendant's factory, in most cases, to prove this. (Legally now he can, but practically it would cost him too much money, too many experts and too much discovery.) He wants to come up with some sort of a practical "res ipsa loquitur" (in function and result warranty and res ipsa loquitur sometimes coalesce). The consumer or *user* of a deleterious or unwholesome or improperly fabricated product wants to show that it is just that, that he has been proximately damaged by the product, then rest. Warranty permits him so to do—and what's more, his damages in doing this are now higher than in suing in negligence, for, in warranty, with rare exceptions defendant can't show how "careful" he was "to make the jury feel sorry for him."[26]

Some ten years ago in the famous Sal Cutter poliomyelitis case Belli recovered a verdict of $675,000. The defendant did not appeal the verdict and, later, on the basis of this pilot case, the defendant settled other pending cases against it by paying $2,000,000.[27]

Although Pennsylvania is sometimes regarded as overly conservative in adopting needed reforms in the law, it pleases me that our Supreme Court has taken, I believe, the lead in rejecting the presumptuous argument that the defendant in a given case was not responsible for the plaintiff's injuries because the alleged tort was "an act of God." In March, 1958, Bowman's back was broken when a telephone pole, whose wires were heavily laden with snow, fell on him. In the ensuing lawsuit against the telephone company, charging negligence in failing to inspect the pole, the company stated it was not liable because the fall of the pole was an act of God. We rejected the defense. I wrote the Majority Opinion:[28]

> It cannot be asserted that it was the hand of God which pushed over pole No. 16 to break Bowman's back. Snow fell, as it falls every winter in the temperate zone, and provident people anticipate this type of atmospheric precipitation by taking necessary precautions against its inflicting excessive damage. . . . [I]t is not enough in order to escape responsibility, for the owner of an instrumentality which inflicts damage, to assert that the instrumentality was propelled by the Supreme Being and that, therefore, he can shake the clinging snow of responsibility . . . off his hands.
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> . . .

26. M. BELLI, *supra* n.13, at 562.
27. THE VERDICTS WERE JUST (A. Auerbach & C. Price, ed. 1966) 194.
28. Bowman v. Columbia Telephone Co. 406 Pa. 455, 179 A.2d 197 (1962).

> Man in his finite mind cannot pass upon the wisdom of the Infinite. There is something shocking in attributing any tragedy or holocaust to God . . . The defendant in [this] case knew that pole No. 16 carried 28 wires and that [they] formed a grill which would receive and hold on to snow, especially if it was wet. It thus became a question of fact for the jury to determine whether the company could anticipate what should be the strength of the pole to sustain the total weight of the snow.

There is one pocket, however, in the Law Revolt, which still holds out against the forces of imperative correction, and that is, what Mr. Belli, calls "No impact torts." In April, 1950, eight cows invaded the farmland of Mrs. Bosley, destroying gardens and trees. They brought along with them their boy friend, a 1500 pound Hereford white-faced bull. When Mrs. Bosley saw the bull she screamed and the bull chased her. In her fright she stumbled and fell and the bull came within inches of goring her, when he was driven away. Because of the fright and exertion in running, Mrs. Bosley sustained a serious heart attack. She brought suit against the owner of the bull. She was non-suited and our Court affirmed on the basis that there had been no physical contact between the bull and the plaintiff. I dissented, saying, inter alia:[29]

> [I]f one can die with laughing, perish with weeping and freeze from fear, how can it be said that there is no tie of contact between the terror of immediate death caused by the charging of a ferocious beast and a heart ailment which contemporaneously occurs and thereafter unceasingly continues?
>
> . . .
>
> The nervous system is peculiarly susceptible to non-tangible excitation, and it is not to be denied that the wrecking of nerve ganglia can often be more disabling than the breaking of bones or the tearing of flesh. And where it is definitively established that such injury and suffering were proximately caused by an act of negligence, why should the tortfeasor not be liable in damages?

The hopeless, almost ludicrous, inconsistency in the law on this subject is that the owner of a horse may recover for a physical ailment suffered by his horse resulting from fright, but a human being may not sustain an action for injuries resulting from the same kind of fright.

> [I]f evidence may be submitted to prove the deterioration of a horse caused by a fright, why may not evidence be accepted with regard to disability sustained by a human being as the

29. Bosley v. Andrews, 393 Pa. 161, 187, 190, 194, 142 A.2d 263 (1958).

> result of extraordinary terror due to the fault of another? And if it be said that a horse dismayed by an automobile will from then on be afraid of automobiles, can it not also be said that, very likely, Mrs. Bosley will from now on be afraid of bulls?

I ended my rather lengthy dissent in this fashion:

> In recapitulation I wish to go on record that the policy of non-liability announced by the Majority in this type of case is insupportable in law, logic, and elementary justice—and I shall continue to dissent from it until the cows come home.[30]

It will be seen from this case, and many others, of course, that the Law Revolt has by no means reached its fullest development. There are several areas in the law where further revolt is required. I have dissented in a number of cases on the subject of governmental immunity. To me it is nothing less than outrageous that in a democracy where every person, firm and organization is liable for its torts, the government, which is supposed to symbolize the ultimate in legal, as well as moral responsibility, should be immune from liability for the negligence of its servants, agents and employees.

Another sector on the battlefield where reinforcements are needed to break through enemy opposition is the one imprisoning rights guaranteed under the 14th Amendment. Stephen Girard, by his will written in 1830, founded a college restricted to "white orphans." The college, because of public supervision, public inspection and the expenditure of public funds, has in effect become a public institution and, thus, under the 14th amendment, may not bar applicants on the basis of race. The Pennsylvania courts still refuse to recognize this fundamental proposition. In one of its decisions, the Majority Opinion of our Court declared that "a man's prejudices are a part of his liberty." In my dissenting opinion, I observed:

> The Majority Opinion quotes over and over the line which is slightly revolting to me that a man's prejudices are part of his liberty . . . I would say that a prejudiced person may have the right to hurt himself through the indulgence of his prejudices, but he has no right to affect the liberty of others.[31]

Still another sector in the law revolt, where additional push is required is that one which prohibits actions in tort between members of the same

30. Prosser and Smith, in their book on Torts quoted from my dissenting opinion in this case and then added in a footnote: "The balance of the dissenting opinion of Justice Musmanno, which runs to a great many pages, is well worth reading, if only as an unusual piece of literature, and a spectacular diatribe of a disgusted judge." PROSSER & SMITH, CASES ON TORTS, 453 (3d ed. 1962).

31. Girard Will Case, 386 Pa. 548, 639, 127 A.2d 287 (1956).

family on the basis that such litigation might disrupt the peace of the family. Yet the law allows intrafamilial *assumpsit* suits where more ill will can be engendered than in a lawsuit between, for instance, parent and child where, because of insurance coverage, there cannot possibly be any real animosity.

But let us rejoice that the revolt is on. Rome was not built in a day, nor can all the legal rubble of the centuries be swept away in a generation. The steam shovels of common sense and the bulldozers seeking a keener appreciation of humanity are working, and let me humbly suggest that we continue to work to make true what I said in one case:[32]

> As much as the lay world may assume that law consists of a game in the abracadabra of words, and as much as that assumption may have been true in Shakespearean days, it is reassuring to note that the law of today aims at realities and the achievement of a justice which will appeal to the reason of the most unlettered man on the street. *Law is simply justice in action* (emphasis added).

32. Jeannette Glass Co. v. Indemnity Ins. Co., 370 Pa. 409, 88 A.2d 407 (1952).