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Luke K. Cooperrider

University of Michigan Law School

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A COMMENT ON *THE LAW OF TORTS*

*Luke K. Cooperrider**

THE recently-published treatise by Professors Harper and James, *The Law of Torts*, which is the subject of this article is no routine publication. It is not a mere recasting in different language of an already familiar synthesis; nor is it the kind of book one keeps around for casual reference. It is, rather, a statement of a philosophy of tort liability which, by reason of its consonance with much of the currently vocal thought in the field, and by reason of the powers of analysis and expression that the authors have brought to bear, is almost certainly destined to be one of those landmark works which occupy a generative rather than merely derivative relation to the law. No lawyer who hopes to be well informed with regard to current and probable future developments in tort law can afford not to examine it, and this means examination in the round, not by occasional limited reference. This is not to imply that he will find such a task burdensome, for the literary, one might almost say narrative, qualities of the book are indeed unusual. Here is a law book with a plot.

For these reasons, and because it is the work of such eminent authors, it is with great trepidation that I venture upon a commentary which, because of my own convictions regarding the function and content of tort law and the proper function, in our system, of the judges to whom it is entrusted, must be a vigorous criticism. This criticism goes not to the authors' interpretation of the law as it is, an interpretation which is, in my opinion, both accurate and uniquely helpful, but to their belief as to what it ought to be, and therefore to the direction which they seek to impose upon future development. The discrepancy between the "is" and the "ought" the authors find principally in that segment of the law which applies to "accidents." But before encountering this, the subject of controversy, I should like to describe briefly and comment upon the treatise as a whole.

*Professor of Law, University of Michigan.—Ed.

It is in three volumes. Volume 3 contains a conventional index and table of cases, plus a table of statutes and a fifty-page bibliography of periodical literature organized in accordance with the chapter headings of the treatise. This innovation alone would be an extremely valuable addition to the library of any lawyer concerned with tort problems.

The text of the treatise is divided into three "Parts." Reading from right to left, "Part Three," entitled "Conflict of Laws" is a short chapter which attempts little more than to suggest the choice of law problem as it affects tort litigation. It will serve as an effective memorandum of an issue that may otherwise frequently be overlooked. The remaining 950 pages of Volume 2 are occupied by "Part Two" of the text, entitled "Accidents," of which more later. Volume 1 contains "Part One" which, apparently because a title such as "Those Subjects Ordinarily Dealt With in a Treatise on Torts Which Are Not Covered in Part Two" is somewhat lacking in elegance, the authors have called "Intended Torts." In addition to the subjects which are customarily so described this part includes chapters on defamation, business torts, misrepresentation, tort liability as affected by family relationships, recovery for emotional disturbances and contributory tortfeasors.

Part One is a conventional approach to that part of the subject matter assigned to it. Much of it will be not unfamiliar to those who have used Professor Harper's 1933 text. There have been added a liberal cross reference to the *Restatement* and, in the body of the text, an occasional quotation from principal cases to throw light on judicial attitudes in particular circumstances. In comparison to the old Harper, the chapters on Malicious Prosecution, Defamation and Misrepresentation have undergone the most extensive revision, and can be regarded as substantially new treatments. Particularly worthy of notice is the very extensive and penetrating analysis of the policy basis of liability in these areas. The Malicious Prosecution chapter, for instance, offers¹ a comparative discussion of malicious prosecution, false arrest and defamation—a concordance and rationalization of the three torts which should prove most useful to a lawyer who may be uncertain which line of thinking to pursue in the case at hand.

¹ Sections 4.11, 4.12. Section and page numbers in this and succeeding footnotes are references to HARPER AND JAMES, *THE LAW OF TORTS*, Boston: Little, Brown and Company, 1956.

The discussion of the basis of liability for misrepresentation also deserves special mention. The authors have made a valiant attempt² to impose a system upon these cases. The system is intellectually attractive enough, and my principal doubt relates to its effectiveness as a control. The point is made, and with this it seems to me impossible to disagree, that the courts in making use of the "misrepresentation as of his own knowledge" technique are in fact branding as fraudulent statements which may have been honestly and even innocently made. Recognizing this, then, as an instrument of strict liability, the authors suggest that the criterion of liability in any particular case is "What does common sense, in view of the accepted business and social mores of the community, entitle one person to expect from another who purports to furnish information or make statements for his guidance in a business transaction?" The circumstances will indicate to the (judge's? jury's?) common sense whether a person of ordinary intelligence would be expected to rely upon the actor's statements. In some situations (trade talk) the danger signals are so distinct that no person will be permitted to say he relied even on the honesty of the statement, because few persons would. In other situations a person in plaintiff's position may be "practically justified in expecting sincerity and honesty . . . but nothing further."³ In still other situations, because "the ethics of business practice" justify it, the one may be expected to use reasonable care to avoid misleading the other. And finally "there are situations in which action is commonly taken in business negotiations in reliance upon the assumed existence of certain facts. Business proceeds upon the assumption that representations are true." This includes the case where the actor's "manner of giving the information constitutes such an assumption of complete knowledge that the psychological effect upon the other is calculated to divert that self-protective investigation which might otherwise be made."⁴

This is not the place, and I am not now prepared, to criticize this rationale in detail. But I doubt that all or even nearly all "trade talk" cases have involved situations wherein "common sense" would indicate that the ordinarily intelligent buyer or seller would have placed no faith in the honesty of his opposite num-

² Sections 7.4-7.7.

³ P. 541.

⁴ *Ibid.*

ber. I also doubt that the "as of his own knowledge" routine is restricted to those situations where the party claiming he has been deceived has in fact been disarmed by the assertiveness of the other's statement. When vendor says to purchaser that the boundary of the lot which he wishes to sell lies along the line A-B, certainly the one understands as well as the other, whether the statement is made loudly or softly, in terms of "I know" or only "I think," that the most that can be said is "To the best of my knowledge." So although I think the authors' rationale sheds much light on these cases in a general way, and is a very distinct aid to understanding, I do not believe it to be a case description which is accurate in detail. I should not leave the impression that the authors claim it is, for they concede that "in some instances . . . the case law seems to defy clarification." But I would argue further that, if it is deemed desirable to impose upon the decision of actual cases some sort of control along the lines the authors have indicated, taking into consideration the new style aloofness of the judge from application of the law to the facts of the case, standards as general as these are much too flabby to do the job.

The organization of materials in Volume 1 has a distinct advantage over other recent treatises from the point of view of the practicing lawyer. All matters concerning intentional interference with the possession and use of land, including trespass and its privileges and nuisance, are concentrated in one chapter. One who needs to do so, and certainly this is the principal benefit a practicing lawyer receives from a treatise, can quickly and painlessly put his problem in context by reading ninety consecutive pages of the book, and be relatively certain he has touched all bases. To the student or teacher, who is more likely to be interested in the generality of a concept, this arrangement is less appropriate and involves some repetition in discussion of privilege. It is not, however, a serious inconvenience. Negligent injury to land and strict liability are of course located elsewhere, but categories as large as these are not frequently overlooked. Interference with chattels (trespass, conversion, and appropriate privileges) is treated in the same way, as is interference with the person. The former has received a much more detailed treatment (120 pages) than is customary in treatises on torts, which is, in my estimation, a further recommendation.

Volume 2 departs entirely from the black-letter style of hornbook and restatement and actually constitutes a collection of

essays on the various major points connected with what the authors call "accident liability." It is an excellent commentary, and nothing which I have to say about it should leave any impression to the contrary. Most of these essays again have a familiar look to those who have followed Professor James' publications in the periodicals, but the whole is greater than the sum of the parts. In particular the chapter on Legal Cause comes as close to imparting an understanding of that problem as anything in print of which I am aware. The traumatized researcher will be comforted to encounter here some reassurance in the statement that "the fact is that in a great number of situations it makes very little difference what test is used." "And in such situations it is obvious from even cursory reading of the cases that many courts indulge in random, standard definitions of proximate cause merely as a 'warm-up' exercise; formulas are collected indiscriminately and then often accorded no further consideration (by relating them to the merits of the case, and the like)."⁵ The chapters on the Nature of Negligence, Function of the Judge and Jury in Negligence Cases, and Duties of Owners and Occupiers of Land are also particularly helpful.

The significance of the title chosen for Part Two is explained, and the choice justified, by the first three chapters in the volume. These chapters the reader should most certainly examine, at an early opportunity, for himself, but because they are basic to any critique of this part of the treatise their content must be described here in some detail.

The authors are greatly concerned with the number of accidents that occur every year in the United States, with the human and economic costs of these accidents to our society, and with the random incidence of that cost upon individuals, their families, and persons dealing with them, an incidence which, inevitably, is highly regressive. They are further concerned with the inadequacy of the common law system of tort liability as an instrument for dealing rationally with this problem. They compare, unfavorably, that system, which requires the injured person to seek compensation through the judicial process, with all the delays, uncertainties and further economic loss which this entails, with the workmen's compensation system which provides promptness and certainty of award and payment.

⁵ P. 1160, n. 48.

Their attention next is directed to the causes of accidents in modern life. An examination of various studies made in the past twenty-five years convinces them that a large proportion of all accidents are consequences of "accident proneness"; e.g., statistics are quoted which indicate that 4 percent of all drivers cause one third of all automobile accidents. Going behind this proposition they then give a short summary of conclusions they find in the literature as to the causes of accident proneness in various contexts, industrial accident, the highway, the home, etc. At this point I have some difficulty following the argument. The authors seem to conclude that there is relatively little correlation between this factor and physical or "psychomotor" characteristics, that there is greater correlation with mental attitudes and characteristics (depression, anxiety, etc.), and that youth and inexperience are associated with a disproportionate number of accidents—a fact which they conclude has little significance to their inquiry. They wind up with this statement:⁶

"Significant for their absence from the causes of accident proneness are 'carelessness' or 'fault.' 'Recent medical research has shown that "accident proneness" may be an innate characteristic of some individuals and a personal phenomenon independent of any question of responsibility, conscious action or blameworthiness.' "

At this point the statement appears quite tentative, and the evidence adduced to support it is, for me, less than satisfactory. It is important, however, to note it carefully, for it is a leit-motif that recurs throughout the remainder of the work, the foundation for the very extensive critique of modern tort concepts which follows. The absence of "blameworthiness" in the personal conduct which causes accidents is the nub.

The argument next proceeds to a critique of the current concept of the general basis of liability in tort, i.e., of the idea that "fault" is a condition of liability and *should be* a condition of liability. They submit first that that fault which is sufficient to support an action in negligence does not correspond in fact to moral blameworthiness, at least to the extent that the criteria of negligence are objective rather than subjective, because the fault

⁶ P. 740. In the second sentence the authors are quoting Bristol, "Medical Aspects of Accident Control," 107 A.M.A.J. 653 at 654 (1936).

principle achieves its general odor of fairness "from the assumption that the actor had a choice and of his own free will chose a culpable line of conduct and was therefore morally to blame." Hence, to compare a man's conduct with an abstract standard when in fact he may have been unable to conform because of slow reaction, faulty perception, poor judgment or main awkwardness is not consistent with the basic assumption. The development of the fault criterion of liability is then explained as "another manifestation of the individualism which underlies laissez faire as a political philosophy." "A fleet of trucks cannot be operated, a railroad run, or a skyscraper built without the certainty that the enterprise will take some toll in human life and limb. It is the very gist of the fault principle to privilege the entrepreneur to take this toll, so long as the activity is lawful and carried on with reasonable care."⁷

Comparing their conclusions as to the causes of the great bulk of all accidents with their concept of morality, the authors conclude that the fault principle does not in fact produce results which are morally supportable, and that if the law were to be further "refined" so as to make liability rest more nearly on personal blameworthiness the result would be even more indefensible, as it would tend to send large numbers of accident victims home empty-handed. Their answer to this dilemma is to fall back on a "broader moral consideration," "social morality," which calls for a distribution of all accident losses over society without regard to fault. Naturally such a principle would better serve one objective of a legal system dealing with accidental loss, compensation of the victims. Further than this, the authors submit, a strict liability system, by bringing into play affirmative remedial conduct on the part of insurance companies, industrial corporations, and other large loss-bearing units, would be superior to the fault-based present system in deterring accident-causing conduct. In answer to the argument that such a change would place an undue economic burden on enterprise they suggest that a system similar to workmen's compensation, with fixed limitations on recovery, might well be no more expensive than the present law with its unlimited liability.

Finally, in a chapter entitled "The Principle of Social Insur-

ance," the authors produce an additional thought-provoking thesis. Fault as a condition of liability is bound up with the assumption, true when it arose, that the lawsuit is a contest between the two parties alone, that all that can be accomplished is to shift the loss that has occurred from the shoulders of the victim to the shoulders of the person who caused it, and that there is no social gain from this and no reason for doing it except to satisfy a demand for fairness and deter dangerous conduct. "Fairness" in an individualist society was identified with the idea that one should not be liable in the absence of fault. Today, on the other hand, accidental loss presents a much greater problem than it has in the past. It falls on the shoulders of people who can ill afford it, and the best way to deal with it is to compensate the victim without regard to how it occurred and shift the loss not to another individual but to society generally, or some large segment of it, thus saving the victim from ruin without placing an undue burden on the innocent cause. They then proceed to show that our present common law system goes farther toward accomplishing this end than one might at first suppose. Consider, for instance, the effect of such factors as strict liability arising from extrahazardous activity, *res ipsa loquitur*, vicarious liability, compulsory automobile insurance, automobile owners' responsibility laws, comparative negligence statutes, etc., some of which tend to assure liability in the first instance, others of which, combined with the increasing prevalence of liability insurance, tend to spread the loss that is thus imposed. The total practical effect is augmented by the practices of insurance companies themselves, e.g., the broadening of coverage of policies to include others than the named insured, medical payments provisions, and settlement practices (which the authors find tend to assure prompt and adequate compensation without regard to fault to persons suffering minor injuries, but do not do the same for major victims).

This indicates the general basis of their critique, and the general outline of the system the authors believe should prevail. An acceptable system would (1) assure that all persons injured by accident receive at least a basic compensation for that injury. That compensation, perhaps, should not include such inflatable items as pain and suffering, which the authors do not believe represent an actual hard-money loss, and should perhaps be arranged on an installment basis and subject to limitations in amount, in analogy to workmen's compensation, but the contours on this

side of the coin are by no means so distinct as on the other. (2) The system should be so designed that the ultimate incidence of liability would be upon an agency—insurance company, large corporation, etc.—which could and would distribute the cost widely through the instrumentality of price, either of product, service or insurance policy. This picture of an ideal state of law is about as far as the authors go in the direction of a systematic proposal. Approving references are made to such things as the proposals for a statutory automobile compensation plan and recent literature advocating “enterprise liability,” but they have neither a legislative program nor a systematic accident jurisprudence of their own to promote. Only in the product liability field do they advocate that the courts, on their own responsibility, openly depart from that principle of liability which they now follow and accept instead implied warranty as the basic rule. For the rest, the authors are content, having isolated what they consider to be the basic oughts, to refer back to them constantly as criteria for evaluating the decisions and the rules which make up the corpus of the law relating to liability for accidentally-caused injury. As I read their book these principles, which are for them basic, can be summarized as two slogans, “Let All Accident Victims Be Compensated,” and “Let The Loss Be Spread.” They apparently contemplate that with these slogans constantly before them, the courts will be able to remake the law themselves. Legal questions will be resolved in conscious accordance with the slogans; fact questions will be so resolved, consciously or no, in a great majority of instances by the jury.

There remains to be examined the effect which their basic assumptions have upon the authors’ approach to the substance of the law. Every legal principle and the result of every case is examined through one lens. The principle or decision is good if it tends to further the objectives expressed by the slogans. It is bad if it seems to look in the other direction—without regard to other criteria. The consequence is that with reference to existing doctrine the authors take a distinctly and professedly ambivalent attitude. The principal objective is to make it easy for the plaintiff to recover, since the loss-spreading objective can be left with a light heart to defendants’ instincts of self-preservation. With this in mind the authors recognize, rejoice in, and seek to exploit the proverbial tendencies of juries. As the jury is a die loaded in favor of plaintiff, any rule which tends to send a case

to rather than keep it from the jury, or which tends to give the jury a wider discretion, is to be approved. Any rule having the opposite effect is to be frowned upon. One of the best means for accomplishing this purpose is Brett's magic dictum from *Heaven v. Pender*. This principle, that one owes to another an obligation of care *in any case* when he should realize that his conduct, if not carried out with care, will cause danger of injury to that other, of course is not and never has been law. The authors would like to make it so and in this way override many of the limitations on liability which have in the past been phrased in terms of "no duty of care." For example, as to the duties of the occupant of land toward trespassers they say: ". . . the traditional rule confers on an occupier of land a special privilege to be careless which is quite out of keeping with the development of accident law generally and is no more justifiable here than it would be in the case of any other useful enterprise or activity."⁸ They harbor similar opinions concerning the liability of a construction contractor for injuries caused by defects in the structure after it has been accepted by the owner,⁹ liability for prenatal injuries,¹⁰ and problems of recovery for injury resulting from negligently caused emotional disturbance.¹¹ "It is submitted that these questions will be solved most justly by applying general principles of duty and negligence, and that mechanical rules of thumb which are at variance with these principles do more harm than good." The only limitations upon the generality of Brett's dictum which the authors accept as part of their ideal jurisprudence, perhaps because they consider them not very significant in fact, are the excuse from liability toward the unforeseeable plaintiff and, curiously, for unforeseeable *type* of harm.

But beyond the duty hurdle lies the breach. Consistently, and with complete candor, the authors oppose any restriction upon the jury's freedom to deal with the problem. The proposition is that the question of negligence, *vel non*, in any case involves only an assessment of the reasonableness of the actor's conduct. That is a function assigned to the jury, and any judicial invasion of this function by "rules of thumb" or specific standards of con-

⁸ P. 1440.

⁹ P. 1043.

¹⁰ Pp. 1028-1031.

¹¹ P. 1039.

duct ("stop, look and listen," "step in the dark," etc.) is an offense not only against the theory of common law trial procedure, but also, and for this reason principally to be condemned, in the generality of its application (including contributory negligence), against the compensation slogan.

Other examples of applying the same criteria to existing doctrine, to proposed changes, or to the facts of life in a jury trial are their disapproval of vicarious responsibility based upon joint enterprise reasoning¹² (again because of its application to the contributory negligence issue), their suggestion that the operation with the consent of the owner type of statute found in the automobile accident field be copied with reference to all "dangerous instrumentalities,"¹³ and their joy in the fact that juries customarily disregard instructions on contributory negligence.¹⁴ They assert and advocate that there is a double standard of negligence as between plaintiff and defendant, i.e., that the tendency to relax in favor of subjective standards is noticeable only as to plaintiffs.¹⁵ They advocate an objective standard of wanton and willful misconduct, qualified by the proposition that even mere negligence may constitute wantonness if accompanied by a wanton state of mind. (And what remains of the guest statute when an unrestrained jury sinks its teeth into *this* one?)

This general attitude, which in the instances recited above can be related to the proposition that accidents which result from conduct which is not morally culpable should nevertheless be compensated, carries over into issues of the lawsuit which are *not* directly related to that proposition. For instance, one who believes that *A*, who *caused* an injury to *B*, should be required to pay for it whether he was at fault or not, does not necessarily conclude further that a court should bend over backward to make it easy for *B* to prove that he *was* injured or that the injury was *caused by A*. It must be remembered, however, that the critique of fault as the basis of liability is mere inducement. The operative principle is the compensation slogan. Therefore the authors' disapproval of "rules of thumb" which tend to limit the discretion of the jury by imposing standards as to sufficiency of evidence ap-

¹² P. 1418.

¹³ P. 1382.

¹⁴ Pp. 894, 1262.

¹⁵ Pp. 904, 1228.

plies with reference to proof of cause in fact and damages, as well as to proof of negligence, contributory negligence, etc. *Res ipsa loquitur*, and its recent fancy California offspring, *Ybarra v. Spangard* and *Summers v. Tice*, "never had it so good."

And so it goes. There is no neutralism here. The authors have a position on everything, and their position is as predictable as the hour the sun will rise. Because of their consistency, their willingness to follow their basic assumptions as far as they will carry, and because of the relentless logic and penetrating analysis which they bring to bear in the process, it is a position which is difficult to attack. This is particularly true for the reader who has not so precisely isolated and identified the basic assumptions upon which rests his own ideology of tort liability. I believe it is essential, however, that an attempt be made, for, in the legal literature of the day, judicial and extra-judicial alike, I hear very clearly the strains of the bandwagon.

First, let me carve out an area of agreement, or at least of *nolo contendere*. I agree that the accident problem in America is a most serious problem, and that the sum total of human misery would be distinctly reduced if it were not necessary for the unfortunate victims to shoulder the burden all by themselves. I would suppose, however, that the great bulk of the more serious accidents of a type appropriate to tort liability occur in one of two contexts, industrial employment and automobile use. The first of these two categories is already, for the most part, treated in accordance with the authors' theories, and I am not inclined to argue that the second should not be. The sheer bulk of the automobile accident problem is such that unusual measures are suggested. Conceivably, as Professor Ehrenzweig has suggested, the liability insurers, by progressively increasing the coverage of their policies, will solve this problem for us. If they have such ambitions, they should certainly be encouraged. If they do not, the next question, presumably, is whether a compensation scheme analogous to workmen's compensation is feasible. That is a question which can hardly be answered *ex cathedra* and would seem to be addressed more appropriately to the legislature than to the judiciary. Possibly analogous action would be appropriate in other accident contexts. But what of the argument that the courts, absent legislative action, should manipulate their conduct of litigation in such a way as to *tend* to bring about the desired end?

An example of the authors' point of view on a particular prob-

lem which illustrates how far they are willing to go is their position with reference to the common law misfeasance-nonfeasance distinction. Remember, the basic objective is compensation. The means to the end is the discountenancing of restrictions upon the jury. The rule that a person who is in no way responsible for another's peril has no duty to render assistance to the one imperilled is viewed as "an attitude of rugged, perhaps heartless, individualism" which the courts have increasingly tended to restrict in scope. The rule of *Union Pacific R. Co. v. Cappier*,¹⁶ whereby there is no duty to render assistance even if the plaintiff's injury is caused by the defendant's non-negligent conduct, is expressly disapproved, on the ground that "there is a growing belief that the beneficiaries of an enterprise which creates risks should pay for the casualties it inflicts without regard to fault. It is a lesser burden, by far, to impose on the beneficiaries the milder duty of furnishing reasonable rescue or first aid. This is simply requiring a man to minimize the consequences of risks which society gives him the privilege to create."¹⁷ The authors then point out a number of respects in which they conceive the basic rule has been limited in recent cases, from which they find to their own satisfaction that a "trend" exists, and argue finally:¹⁸

"It may not be long before some pioneering court will take the further step urged by Ames some fifty years ago. Plaintiff has been injured by defendant's inexcusable failure to act under circumstances wherein action would be effective, easy, and commanded by every social and moral consideration. *The real basis of objection to liability is that the law should not try to enforce unselfishness or make one man serve his fellows.* In a society whose values are still significantly individualistic, this objection deserves great weight. But, we submit, those values would be properly safeguarded under Ames's rule by its careful limitations and its coincidence with the universal moral judgment of our society." [Emphasis supplied.]

I respectfully submit that the authors are here guilty of the same fallacy which they have criticized in other contexts, that of thinking of the rules of tort law as rules of human conduct rath-

¹⁶ 66 Kan. 649, 72 P. 281 (1903).

¹⁷ P. 1047.

¹⁸ P. 1049.

er than as mere criteria for adjudication between two parties of a claim for money. Part of their critique of the fault principle is that it involves an assumption that legal liability will deter faulty conduct, an assumption which they question. It seems quite clear to me that nobody, with the possible exception of a timid lawyer or a malpractice-sensitive doctor, will be influenced in his actual conduct by the rule which here prevails, *whichever* way it goes. The bystanders at the scene of a drowning or other tragedy are not likely to consult attorneys before acting or withholding action. The problem, then, is not whether the law should try to make man serve his fellows, but whether Joe Smith, who did not, or rather as to whom—if the evidence were interpreted most strongly in favor of the plaintiff—it would be possible to say that he did not react with the promptness and competence that he *should* have displayed, should be subjected to the peril that a jury, exercising its *ex post facto* discretion perhaps years after the event, will require him to *pay* for X's misfortune. Even in the authors' own frame of reference, I have never been able to understand why Joe Smith rather than X should pay the premiums on *this* insurance. X would have suffered the same misfortune if Smith had never been born.

The rule here under attack is one which is intimately associated with what remains of the autonomy of the individual. To say that society should succor the unfortunate is one thing. To say that George should have done it, and if he did not he should be made to smart, is quite another. The authors' response is that there is no real difficulty because the rule which would impose liability can be suitably hedged, e.g., "defendant might be held only where a reasonable man would have realized plaintiff's grave danger, and lack of danger to himself, and where reasonably effective means of rescue were easily accessible as defendant knew or should have known, etc."¹⁹ And this, of course, is the conventional argument for razing any of the common law barriers to liability. They are made to appear out of line, out of date, irrational, arbitrary, and one is assured that no danger will accompany their removal because there will be substituted only the usual standard of reasonable conduct. So it is said of all the "rules of thumb" and duty limitations. It is sought only to impose the

¹⁹ P. 1046, n. 9.

normal responsibility for conduct, and no man will be held liable unless his conduct was unreasonable. This argument, of course, assumes away the whole problem. It becomes a mockery when, as here, the proponents have elsewhere maintained that all these questions must be left to the jury and that juries automatically find for plaintiff. To overturn this rule means that *A* who merely walks down the street subjects himself to the peril that he will encounter a situation which will permit *X* to sue him and take his all because, with the help of clever counsel, *X* can persuade a jury that *A* did not make use of reasonably effective means of rescue which were, as *A* knew or should have known, easily accessible to him. In my opinion it is a reckless suggestion and would have no effective limitation. It could, however, operate quite effectively to blanket in under the system a large segment of accidental loss that might otherwise go uncompensated because it could not be attributed to the affirmative conduct of any conceivable defendant.

These instances will suffice to suggest the ultimate implications of the book. I raise my voice in dissent for a number of reasons. Starting from the assumption that individual accidental losses are losses to society, and compensation of such loss is a social gain, the authors conclude that society should take affirmative steps to guarantee that the compensation will occur. In passing, we might point out that there is no essential difference in this respect between accidental loss and any other kind of loss. The individual and society will be handicapped to the same extent by disability which results from illness as by that which results from accident, by economic loss from natural causes as by loss from accident, and, for that matter, the individual whose impecuniousness results from his own improvidence or incapacity, or from the vagaries of the economy, labors under a handicap not different in kind from that which, in the instance of accidental injury, the authors seek to remedy by means of the money judgment. It may be a pertinent inquiry, therefore, whether if one starts with such comprehensive objectives there is any reason to consider accidental loss as a peculiar problem. It is only *one* of the elements of distributional inequality in any social system which is not the embodiment of the principle "to each according to his needs." I do not mean to imply that it is impossible or undesirable to seek the remedy of one ill while others are left unattended. I do suggest, however, that the system the authors contemplate,

using their own basic assumptions as the criteria, would be incomplete, both internally and externally. There would be a proportion of accidental losses which would be uncompensated, if for no other reason than that the unfortunate plaintiff would find himself in the increasingly improbable position of being able to find nobody to blame but himself. There would also be large categories of loss, not accidental in origin but of an equal significance to society, which would be untouched by the system.

Aside from this, the "loss distribution" aspect of the system is a naked assumption, the validity of which there is reason to doubt.²⁰ The ability of a given defendant to pass on the loss imposed upon it would depend in large part upon extrinsic factors such as the general condition of the economy, the defendant's competitive position, etc. The distribution, therefore, would actually occur in an uneven manner, with the consequence that to a greater or less degree in individual instances the loss would rest exactly where it was imposed by the court. If this fact is combined with the natural consequence of the authors' allocation of function between judge and jury, a capricious original incidence of liability, the resultant it seems to me is indefensible.

A statutory insurance scheme designed to cover medical costs and permanent disability arising from accidental causes, supported in some measure out of tax funds, would be a more logical derivative of the authors' basic assumptions. There would be more complete coverage, the recovery could be subjected to reasonable controls, and less violence would be done to the integrity of the common law system. If universal compensation is the objective, should it not be accomplished through a scheme that would compensate the loss without forcing upon plaintiff and his counsel the undignified beating of the bushes for a "connectible" defendant? Furthermore, it seems perfectly reasonable to refer such a problem as we have here to the legislative power which, let us hope, still has *some* function to perform in the establishment of such broad policy as we are here discussing. Such a referral, though it may be more typical of the nineteenth century than of our emancipated modern courts, would also be a test of the authors' assumption that the behavior patterns of juries in individual cases

²⁰ Plant, "Strict Liability of Manufacturers for Injuries Caused by Defects in Products," 24 TENN. L. REV. 938 at 946 (1957).

are strong evidence of a deep-seated popular feeling of need for drastic change in the law.

In other words, as it seems to me, one who shares the authors' basic assumptions that the most important function of tort law is to assure compensation might well be repelled by the way in which the authors contemplate this objective should ultimately be achieved. Their system would be stigmatized by gross inequalities of treatment as between injured persons and as between defendants and, so far as I can see, by an unsystematic and fortuitous distribution of the cost burden. It would involve imposition of liability which in many cases would have a heavily punitive effect upon individuals as well as upon business organizations (whose feelings are not worthy of consideration) in many instances where the person mulcted would quite reasonably have no feeling of responsibility whatever for what had occurred—indeed, as in the occupant of land cases, he might well feel that he himself was the injured party.

In large measure the authors seem to advocate that the courts substitute for the traditional framework of decision in accident cases one guiding principle—legal questions shall be so resolved as to advance the principle of universal compensation. This principle is to be applied, not only to the interpretation of judicial precedent, but also to the construction of statutes, although the consequence is a light regard for statutory language.²¹ If a court should consciously follow their urgings in toto, its doing so would involve an assumption of legislative powers considerably more grandiose than those, even, to which we have become accustomed. If it is competent for a court to make such decisions, must we not recognize the possibility that other persons may have other views as to what should be the guiding principle of tort law and, if so, must they not have their days in court? Should we then be surprised if the lobby forms just outside the judge's chambers? Is a trial, or at least an appellate argument, to take on the aspect of a legislative committee hearing? Without the paraphernalia of the legislative committee, can it be argued that a court is equipped to make decisions such as these? Is there nothing involved here but a philosophical principle which can be accepted simply on the basis of one's own intellectual conviction of its validity, supported by the abstract arguments of a legal treatise?

²¹ Wrongful death statute, p. 1333; sales act, p. 1576; guest statute, p. 961.

A greater probability is that courts which have no such grandiose ambitions may, without realizing the full implications of their actions, accomplish the same end by accepting the urgings of these authors in many seemingly minor details. There are many places where their arguments based upon the compensation principle are reinforced by aesthetic principles, and where for that reason a court is most likely to give way. The result will be to accelerate a development already underway which carries the marks of a remaking, not only of the jurisprudence of this country, but of the entire fabric of political control. The potentiality of this change has always been with us by reason of our carefully nurtured illusion that "the common law" is one system. This fiction was innocuous enough when *stare decisis* was a conviction of sufficient strength to impose a degree of discipline upon the law of the separate jurisdictions. That restraining hand is being shaken off, however, as the courts begin to take seriously what they have been told about their "legislative powers." When this happens, and the commanding sound of its own voice out of the past fades into the background, a court feels most strongly the need for a means of deciphering the scrambled message from the other forty-eight jurisdictions. The consequence is an ever-increasing judicial reliance upon the treatise, restatement or monograph, the work of a "systematizer" who by his very nature is subject to an extreme degree to the pressure of an idea. The judge of the old school conceived of his function in terms of marginal differentiation between cases. His differentiations, of course, had a discretionary quality, but the discretion was exercised on an *ad hoc* basis, within the general framework of earlier decision, and had, therefore, an effectively if not distinctly circumscribed scope. The method has its disadvantages; its product is likely to be untidy, at best, and the trees may frequently obscure the wood. But surely it is the very essence of the common law aspect of our political system and the basis of our willingness to live in large measure free of a "written law." These *limited* acts of discretion we have been content to leave to the magistrate, conscious of the necessity which requires it, and confident that the great decisions which establish and change broad policies and determine the essential framework of society will be made by the elected political representatives over whom we exercise a direct control. The "systematizer," however, is subject to such a limitation only to the extent that he chooses voluntarily to recognize it and, because of his remote view

and intellectual compulsion to generalize, he will tend to a greater or lesser degree to reject it. Furthermore, because he has no home jurisdiction and can be selective about the authority he chooses to "follow," and because in the reports of the more than half a hundred common law jurisdictions he can find authority, direct or analogical, for almost any position he may wish to take, the ideal system he derives is in fact *his* system—a set of concepts constructed around and designed to effectuate his own views as to the basic policy of the law—though it is clothed with the appearance of judicial parenthood. So compiled and so shaped it goes back to the courts, who accept it as the product of enlightened opinion and, because they no longer feel bound by their own earlier decisions and do not wish to be thought backward, as the guide for decision in litigated cases. Undoubtedly great progress has occurred in our jurisprudence, made possible by these very facts. So long as the changes made are corrective in nature, involving "legislation" of approximately the same amplitude as that which we have customarily committed to our courts, the effect is probably largely beneficial. I submit, however, that when appellate courts in the exuberance of their newly-recognized freedom to make the small decisions begin to operate upon the assumption that they are equally free to make the great decisions, they exceed the scope of their warrant.

The subject of this discussion, however, is not the court which sees itself as a super-legislature, but rather the court which, because it no longer feels itself strictly bound by its earlier decisions, tends for that reason to give greater weight than it has in the past to outside authority, on a case by case basis. The constant aesthetic urge to reorganize the law in accordance with ever broader generalizations mingles with these authors' primary compensation principle to produce the greatest pressure upon traditional common law rules at those points where their contours are not regular. In negligence law the great generalizations are Brett's dictum at the duty level and the definition of negligent conduct in terms of a departure from a jury-determined norm of reasonableness at the breach level. Thus any "no duty rule" not based upon the scope of foreseeable danger, and any "rule of thumb" which subtracts from the jury's power to determine the "reasonableness" of the parties' conduct, not only tend to defeat compensation in some cases but also are aberrational in terms of the aesthetic principle and therefore to be decried by all right thinking jurists. The

judge who yields to these point-by-point pressures will be convinced that he is vindicating rather than working against the common law tradition. If you accept the compensation principle as the controlling criterion of liability in tort you will not be bothered by this. If you are still so medieval in your outlook as to believe that criterion must be defined in terms of some other concept or view of justice, you may be, because the irregularities of contour which are now being "rectified" were the product not only of judicial respect for the autonomy of the individual, but also of judicial realism as to the validity of the results the courts could hope to achieve.

There is much more at stake here than superficially appears, for a "law" of negligence derived from such all-encompassing generalizations as these is not a system of law at all, but only a conceptual conduit through which all cases are funneled into the jury room. The trial judge, whose will to direct a verdict for insufficiency of evidence is rapidly being beaten down by the appellate courts,²² by these two related developments will lose all opportunity to control the outcome of the case. The articulated principles of law, whatever may be their content, will appear only as instructions to the jury, and hence will have at most a precatory effect. The actual criteria for the adjudication of the claim will be solely those which the particular jury, in the individual case, chooses in its uncontrolled discretion to apply in the secrecy of the jury room, unencumbered by the embarrassing necessity of explaining its decision. This, of course, has always been true to some extent, but so long as there was available to the judge a selection of devices for disposing of the case without or despite a jury verdict, the consequences could be kept within tolerable limits, i.e., within that group of cases where reasonable men *really*

²² The lead in this movement is being assumed by the Supreme Court of the United States in cases arising under the FELA. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957); *Webb v. Illinois Central R. Co.*, 352 U.S. 512 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). While these cases themselves involved not the reversal of verdicts directed by trial courts, but rather the reversal of appellate decisions that the verdict *should* have been directed, the conclusion of one who examines them must be that it is a rare case indeed in which a directed verdict for defendant will stand. Although the Court's position here is partly accounted for by its desire to reform the particular statute, there is no reason to believe the extreme position here taken on the function of the jury will be limited to FELA cases. Consider, for instance, *Hopkins v. E. I. DuPont de Nemours & Co.*, (3d Cir. 1952) 199 F. (2d) 930, and the dissenting opinion of Judge Washington, which attracted the support of three other circuit judges in *Jamieson v. Woodward & Lothrop*, (D.C. Cir. 1957) 247 F. (2d) 23 at 34.

could fairly disagree, and where the litigants, therefore, could have no real basis for complaint whichever view prevailed. This involved only an acceptance of the inevitable. It is a far different proposition if *all* cases in which plaintiff is able to satisfy the requirement of the more "liberal" contemporary courts that he produce a *token* of evidence of negligent conduct which "played a part"²³ in causing his injury are on such showing to be turned over to the jury for disposition. To me this involves a shocking abdication of judicial responsibility which is in no measure made more commendable by the fact that its proponents see it as an indirect approach to a basis of liability in tort which they deem preferable to that recognized in the past.

It is, then, entirely possible that without being conscious of what we are doing we may jettison completely the intricate system by which our forebears sought to achieve a modicum of what we have called "rule of law" in favor of one by which disputes between individuals will be committed to the uncontrolled discretion of the tribunal. And the tribunal, here, is not a trained and experienced magistrate, full of years and wisdom. It is the common law jury, a device which, for the ascertainment of truth, is removed but by two steps from trial by ordeal and by one from the wager of law. There are those who view this as the ultimate flowering of the democratic method, and for that reason as a desirable development. I do not.

The judges of an earlier day were modest in the claims they were willing to make for the law of torts. They did not conceive that it was their mission to sally forth to remedy all the ills of society armed only with the money judgment. There were areas of conflict between persons where, by reason of the limitations of their techniques, they frankly feared to tread, recognizing the danger that their interference, in the long run and in the generality of cases, would work more harm than good. They understood juries as well as Messrs. Harper and James, and because they assumed that their function was, to the extent possible, to do justice according to law between plaintiff and defendant, they worked out a system of checks and balances between judge and jury so that that objective could at least be approached. To my

²³ Apparently now established as the test for cause in fact in FELA cases. See the Supreme Court opinions cited in note 22, and *Thomson v. Texas & Pacific Ry. Co.*, 353 U.S. 926 (1957)

mind that modesty of objectives was and is sound. To my mind, further, a jurisprudence which contemplates that the judiciary shall, on the one hand, assume the burden of legislating to the extent of radically changing the broad and far-reaching underlying policy of the law, and on the other hand shall abdicate completely to the jury the function of applying that policy to the case at hand, is not. Its substantial acceptance by the courts would, it seems to me, subject to grave question the continuing validity of the common law system itself.