Cornell Law Review

Volume 42
Issue 1 *Fall 1956*

Article 3

Tort Cause of Action

Peter Ward

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Peter Ward, *Tort Cause of Action* , 42 Cornell L. Rev. 28 (1956)
Available at: http://scholarship.law.cornell.edu/clr/vol42/iss1/3

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE TORT CAUSE OF ACTION†

*Peter Ward**

I. Statement of the Case

Thesis and Antithesis

Philip A. Landon in the fifteenth edition to Pollock, Torts, writes:

> . . . The truth is, and we can face it with equanimity, that the law of torts is just what Pollock declared that it could not be, a mere enumeration of actionable injuries. The law is today, as it has always been, that only that harm which falls within one of the specified categories of wrong doing entitles the person aggrieved to a legal remedy. The categories of tort (not of course, the categories of particular torts) are closed.[1]

W. T. S. Stallybrass in the tenth edition to Salmond, Torts, states the proposition and Sir John's conclusion in this manner:

> Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? Sir John Salmond took the view that the second of these alternatives was that which had been accepted by our law. "Just as the criminal law consists of a body of rules establishing specific offenses, so" he said, "the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offense, or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse."
>
> For Sir John Salmond there was no English law of Tort; there was merely an English law of Torts, that is, a list of acts and omissions which in certain conditions, were actionable.[2]

Stallybrass, in criticizing this position of Salmond, then adds:

> The safest conclusion seems to be that, although we have not yet discovered any general principle of liability, the Courts, where they are not fettered by any precedent, to-day have a bias towards holding that, where one man has intentionally or carelessly caused damage to another, he shall recompense him. In consequence, as the law develops we are moving in the direction of a general principle of liability.[3]

The problem thus posed by Sir Frederick Pollock and Sir John Salmond has not stirred up quite the same tempest on this side of the Atlantic.

---

† © Copyright 1956 by Peter Ward.

* See Contributors' Section, Masthead p. 74, for biographical data.

1 Pollock, Torts 45 (15th ed. 1951).

2 Salmond, Torts 15 (10th ed. 1945).

3 Id. at 17.

The great majority of American tort writers faced with this problem in semantics throw up their hands with Professor Wigmore and join in stating:

> The first wish is that we might proscribe, expell, and banish the obnoxious term "Tort" as the title of the subject. Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a contract. As if a man were to define Chemistry by pointing out that it is not Physics nor Mathematics. No half-way measures will do; the name must go.[4]

Jeremiah Smith in his classic article, "Tort and Absolute Liability—Suggested Changes in Classification,"[5] gives the interested reader page after page of definitions, all, more or less, in the nirvana-like style of Wigmore, whom he quotes.

Francis H. Bohlen, both as the Reporter for the Restatement of the Law of Torts and through his own voluminous writings, has done much to advance the theme of general principles in tort law. The Restatement breaks down into classifications based on conduct of the actor—intentional acts, negligent acts, and conduct entailing absolute liability. Tortious conduct is defined in section 6 of the Restatement: "The word 'tortious' is used throughout the Restatement of this Subject to denote the fact that conduct whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of Torts."

Fowler Vincent Harper in the preface to his treatise on the Law of Torts presents with nice simplicity the argument for common principles when he writes: "The unitary character of the law, therefore, is not to be looked for in the doctrinal development thereof, but in the broad notions of policy from which these doctrines derive. It is this social, rather than legalistic basis of tort law that affords the unifying principles."[6]

Dean William L. Prosser at the opening page of his second edition of the Law of Torts attempts a hornbook synthesis of these variable concepts in a polyglot definition:

> 1. "Tort" is a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of an action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.

The definitions are as numerous as the writers.[7] The problem remains.

---

4 1 Wigmore, Torts viii (1911).

5 30 Harv. L. Rev. 241, 319, 409 (1916-17).

6 Harper, Torts v, vi (1933).

7 For additional analyses and comparisons of Tort casebooks, see Ward, "Selecting a Tort Casebook or a Scenario entitled 'There were Seven'," 6 J. Legal Ed. 539 (1954).

Is tort liability to be determined by categories or principles? This is not simply a problem stirred up by academicians. The answer selected by the law professor, the practitioner, and the jurist has an immediate impact on the student, the preparation of the lawsuit, and the writing of the opinion. Thereafter, as inexorably as the principles of causality, the culture is affected, small and insignificant though the effects may be.

The purpose of this article is to pose the problem in this country in a more specific manner than has been done; to point out some of the difficulties and inconsistancies that the "torts" theory forces upon the three divisions of our profession and the public in general; to suggest that certain common denominators exist in the various "torts," which can be put together into what I call the Tort Cause of Action; to submit that this Tort Cause of Action approach helps overcome many of the difficulties of the "torts" concept; to advance the proposition that those principles common to tort liability are simply aspects of the same broad principles in legal liability. Thesis and antithesis thus lead to synthesis.

Synthesis: The Tort Cause of Action: civil liability for damages legally caused by violation of imposed duties.

Tort liability under the common-law system has from the very beginning been determined on the basis of a posteriori arguments in contradistinction to the a priori logic of the civil law. Yet, the inductive process of the common-law was undoubtedly less the result of design than of necessity. In the early development of fear-damage, a hatchet blow in the middle of the night before the startled eyes of Madam Tavern-Keeper was reason enough for Judge Thorpe to sustain a verdict of half a mark,[8] without needless concern for the principles which were being established that would make the brandishing of a dunning letter worth $500.[9] Peoples' claims had to be adjudicated on the facts as presented, not on theories yet unborn. As the case became cases; as the volume of tort litigation became identifiable and then unmanageable; as individual fact situations came to resemble each other sufficiently to be molded together under common principles of assault, of negligence, of induced breach of contract, etc.; then a posteriori arguments generated a priori thinking. My proposition is that the study of tort liability has attained sufficient maturity to make the search for general principles worthwhile and that, as discovered, they make the analysis of tort problems old and new more meaningful. Seventy years later we can see more clearly what Sir Frederick Pollock meant when, in 1886, he wrote: "It is not surprising in

[8] I. de S. et ux v. W. de S., Y.B., Liber Assisarum, f99, pl. 60 (1349).
[9] La Salle Extension University v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).

any case, that a complete theory of Torts is yet to seek, for the subject is altogether modern. . . . The really scientific treatment of principles begins only with the discussion of the last fifty years."[10]

II. Some Difficulties with the "Torts" Concept

The "Calf-Path," by Sam Walter Foss (1858-1911), neatly illustrates the difficulties that precedent poses not only in case development but in methodology.

THE CALF-PATH

One day through the primeval wood,
A calf walked home, as good calves should;
But made a trail all bent askew,
A crooked trail as all calves do.

* * * *

The trail was taken up next day
By a lone dog that passed that way;
And then a wise bell-wether sheep
Pursued the trail o'er vale and steep,
And drew the flock behind him, too,
As good bell-wethers always do.

And from that day, o'er hill and glade,
Through those old woods a path was made;
And many men wound in and out,
And dodged, and turned and bent about
And uttered words of righteous wrath
Because 'twas such a crooked path.

But still they followed—do not laugh—
The first migrations of that calf,
And through this winding wood-way stalked,
Because he wobbled when he walked.

The forest path became a lane,
That bent, and turned and turned again;
This crooked lane became a road,
Where many a poor horse with his load
Toiled on beneath the burning sun,
And traveled some three miles in one.

* * * *

The years passed on in swiftness fleet,
The road became a village street;
And this, before men were aware,
A city's crowded thoroughfare,
And soon the central street was this
Of a renowned metropolis;
And men two centuries and a half
Trod in the footsteps of that calf.

* * * *

[10] Pollock, Torts vii (1st ed. 1886).

For thus such reverence is lent
To well-established precedent.

* * * *

But how the wise old wood-gods laugh,
Who saw the first primeval calf!

As men wander down the crooked lane of "torts," words of righteous wrath are sometimes uttered by those who teach the subject, those who practice in the field, those who render judgment and those who suffer.

Pedagogical Difficulties

I start with the difficulties faced by the teacher of "torts" not because of any supposed hierarchy of importance, but primarily because I am writing as a teacher faced with these concrete problems. Not too long ago the average number of hours allotted to the course in Torts was six per week throughout the academic year. Today the average number is five. At the Cornell Law School this means, because of the scheduling problems of examinations and vacations, that the faculty man has 73 periods of 50 minutes each in which to handle the field. How broad is the field of "torts"? Let me describe the coverage of the very excellent casebook used in the course at Cornell.[11] In addition to about 350 pages of materials, 415 principal cases are reported at varying length. Coverage starts with Battery, Assault, Intentional Infliction of Mental Disturbance, False Imprisonment, Trespass to Land, Trespass to Chattels and Conversion, Privileges of Consent, Self-defense, Defense of Others, Defense of Property, Necessity, Recovery of Property and Re-entry upon Real Property, Legal Authority, and Discipline. Then follows detailed coverage in Negligence and Causation. Problems in the defense of Assumption of Risk, Contributory Negligence, Comparative Negligence, and "Last Clear Chance" are reported in detail. Some materials on Punitive Damages, Measure of Damages in Personal Injury Actions, and the peculiarities of Survival and Wrongful Death statutes are presented. The cases move on to Strict Liability—Animals and Unusual or Ultrahazardous Activities. Cases on Nuisance, Misrepresentation, and Defamation abound. Liability toward Trespassing Children, Trespassing Adults, and Business Invitees as well as liability between Lessors and Lessees, Vendors and Vendees is carefully covered. Variations on the *Buick* case come in for their fair share of cases. The book climaxes with Injurious Falsehood, Right of Privacy, Malicious Prosecution, Abuse of Process, Interference with Contract, and Interference with Prospective Advantage ending on page 1239. To complete the coverage of the casebook I have

[11] Smith & Prosser, Cases & Materials on Torts (1952).

found it necessary to give additional lectures on intentional and negligent interferences with the family; tort aspects of respondeat superior; governmental and charitable immunities; employers' liability under common-law and under compensation statutes which include seamen. All this, please remember, must be communicated in 73 periods to approximately 130 first year law students who, expecting to spend at least two weeks on assault, find that just one period can be spared to "[i]f it were not assize-time, I would not take such language from you."[12] What happens when the curriculum planners in their constant yet justifiable juggling determine on a four hour course—or a course combining tort and contract claims? There comes a point where the instructor no longer can talk faster, when pure shame forbids him to rush heedlessly past the unanswered questions, when the tyranny of the clock must be overthrown. One answer, and that adopted by a rather large group of instructors, is to cover only a part.[13] But if, as Dean Prosser states in his hornbook, we are dealing with ". . . a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract . . . ." what help is it to the student-turned-practitioner when his client is pressing him for a telephone response to a multi-state libel situation, to recall that, due to the pressure of time, he missed exposure to that subject in the Tort Course he took. If the answer is "torts," can the teacher omit any of the important compartments? Yet how can he possibly cover them all? And, in covering them, can he ever be sure that he has them all? Part of the answer lies in my oversimplification. No one is really a "torts" purist. The pressures of coverage, of probing questions, of student case assignments—all these difficulties force certain generalizations in pedagogical approaches from Bohlen's:

(1) intent
(2) negligence
(3) strict liability

to Wigmore's tertiary order and division of:

(1) damage element
(2) responsibility element
(3) excuse or justification element[14]

to Jeremiah Smith's classification based on:

(1) breach of genuine contract
(2) tort, in the sense of fault
(3) so-called "absolute liability" imposed by courts, where there is neither breach of genuine contract nor fault.[15]

---

[12] Tuberville v. Savage, 1 Mod. 3 (1669).

[13] Smith & Prosser, op. cit. supra at ix where the editors state "It is an open secret that few teachers of Torts ever really succeed in covering even the major part of any casebook."

[14] Wigmore, "The Tripartite Division of Torts," 8 Harv. L. Rev. 200 (1894).

[15] Supra note 5.

The concept of liability based on fault waxed and, under the pens of Cardozo and Seavey, broadened into "the risk reasonably to be perceived defines the duty to be obeyed. . . ."[16] Albert A. Ehrenzweig saw a common principle of risk, but one involving, not foreseeability of risk, but rather typicality of risk.[17] The latest, and what appears to me to be one of the better efforts to solve the difficult problem of teaching tort liability, is presented, as one might well expect, by Leon Green.[18]

While basic principles involving conduct of the actor, interests violated, risks foreseeable or typical, help the teacher through some of the difficult problems of coverage inherent in the concept of "torts," inconsistancies plague the disciple of Salmond or Landon. Is nuisance one of the so-called torts, or does it simply typify a kind of damage—an injury to a particular interest brought about in one of several possible ways? What are the boundaries of misrepresentation? Where the plaintiff's damage is brought about through the defendant's misrepresentation, is the plaintiff's contributory negligence sometimes to be treated one way and sometimes another? Defamation—is it one tort or three?

The struggle the teacher and his students have on these points results from the problem of torts. Shall we label the publisher's liability for the intentionally conceived utterance, Defamation 1; his liability for carelessness, Defamation 2; his non-fault liability, Defamation 3? But if this is one rather than three torts what word shall we use? At this point in a class discussion I generally ask my students if there is any among them that can, in English, write the sentence "There are three 2's in the English language," meaning not three 2's but one word which will encompass the words two, to, and too. Someone always volunteers and thus very concretely poses the problem of "torts" in those situations whereby the damage may be brought about by conduct variously motivated.

The standard technique for developing the student's legal thinking during his first term in law school is not unlike the Topsy-like growth of the first six centuries of common-law. Piece after piece of disconnected material is stuffed into his cranium. The hope is that the student may

[16] Palsgraf v. Long Island Ry., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928); Seavey, "Negligence, Subjective or Objective," 41 Harv. L. Rev. 1 (1927); Seavey, "Cardozo and the Law of Torts," 52 Harv. L. Rev. 372 (1938); Prosser, "Palsgraf Revisited," 52 Mich. L. Rev. 1 (1953).

[17] Ehrenzweig, Negligence Without Fault (1951). Leading articles on the fault controversy include Baker, "An Eclipse of Fault Liability," 40 Va. L. Rev. 273 (1954); Griffith, "Fault Triumphant," 28 N.Y.U.L. Rev. 1069 (1953); Leflar, "Negligence in Name Only," 27 N.Y.U.L. Rev. 564 (1952).

[18] Green, "The Study and Teaching of Tort Law," 34 Texas L. Rev. 1 (1955).

glimpse a kind of pattern by Christmas, perhaps by the end of the term, surely by Easter recess. Necessity may well have required such a development by the early common-law judge, but the benefit of hindsight should permit us to offer a less confusing approach to the neophyte.

Problems of the Practitioner

The busy practitioner is not apt to become unduly agitated by either the polymorphic or monomorphic argument. His problems are not only different in degree, but in kind from those of the teacher.[19] He is fond of being practical. How many can even find, let alone utilize, those once-prized class notes wherein every symbol had a meaning, every underlining a special emphasis?

This difference between the teacher and the practitioner stems from the basic facts of practice and does much to affect his legal philosophy. The pressures upon a busy lawyer are far more severe and nerve-wracking than those under which a teacher operates. While the work load may be relative, this tension is not. The time he can set aside for academic theories, therefore, may be strictly limited. Probably, if he has adequate time for theorizing, it is because he has more time than clients!

Whether it is due to forces such as these or untold others, the effect seems to be that if you ask the lawyer what is the most important single question in a lawsuit, he will ask, "how much damage has the plaintiff suffered?" Instinctively, the lawyer practicing in the tort field, whether representing the plaintiff or the defendant, thinks of tort liability in the terms of his particular lawsuit rather than in general principles. His arguments are a posteriori rather than a priori. He is a ready-made disciple for Sir John Salmond. Nevertheless, he, too, both affects and is effected by the conceptual argument.

The lawyer is basically a fact-finder. Of course, that is a title generally reserved for a jury. But juries only get the facts as they are presented by counsel. What facts are important to his lawsuits? What facts are relevant? What divides facts from theories? Is a fact anything more than a point of view? An engineer in a defense plant engaged in the manufacture of tools and implements for the United States Government was allegedly charged by the plant president, within the hearing of plant employees, with being a communist. Is this actionable slander? Judge Martin M. Frank, sitting in Special Term, New York County, held the complaint stated a cause of action.[20] The New York Court of Appeals

[19] The author's background includes some twelve years of practice, ten of which were spent as a partner in a firm in general practice in Buffalo, N.Y.

[20] Gurtler v. Union Parts Mfg. Co., 206 Misc. 801, 135 N.Y.S.2d 709 (Sup. Ct. N.Y. County 1954).

said, "No."[21] Was it an important fact that plaintiff was a chief engineer? That defendant was a defense plant? That this was 1954, not 1944? Will not the lawyer's finding of facts be influenced by Pollock vs. Salmond? For the routine lawsuit, which makes up the bulk of the practice, the plural concept works out with few problems: the automobile improperly turning right on the red signal, the unprovoked fight in a saloon, the garage man who unjustifiably refuses to return your automobile, the false charge of embezzlement published to others without privilege, etc. These situations can easily be answered by referring to the appropriate Restatement of Torts sections, or any adequate hornbook, or a dozen controlling decisions. Here "torts" presents no difficulties.

When the lawyer isn't fact-finding he is predicting. A tremendous amount of time is spent in advising well-trained clients on ways in which to avoid damage liability. How successful his advice will be, assuming it is followed, depends on his ability to predict what the ultimate judge or judges in his case will decide. Here again the routine situation responds well to the "torts" concept of compartments wherein we can reach for our answer. The exception merely proves the rule.[22]

"Torts" has its difficulties for the practitioner in the unusual, the uncharted, the bizarre. When Arthur Wagner and his cousin Herbert boarded the interurban railway car between Buffalo and Niagara Falls, little did they realize the litigation that lay ahead, or the difficulties that Arthur's counsel would have in trying to stretch the sides of the negligence compartment so as to make room for the danger-invited rescuer.[23]

Or consider the case of Mr. Belt, an advertising man, who brought an action against the Hamilton National Bank for the wrongful appropriation of an idea for creating a radio program, the participants in which were to be school children who had vocal or instrumental talent. The bank allegedly used this idea, after its disclosure to the bank by Mr. Belt, without making compensation therefor. Plaintiff's counsel had no ready-made tort compartment available which would give effect to a property right in an idea, which idea was neither patentable nor subject to copyright. There was no specified category of wrongdoing entitling Mr. Belt

[21] Gurtler v. Union Parts Mfg. Co., 1 N.Y.2d 5, 132 N.E.2d 889 (1956), affirming 285 App. Div. 643, 140 N.Y.S.2d 254 (1st Dep't 1955).

[22] The author recalls his strongly urged advice in the case of Nicholas v. New York State Elec. and Gas Corp., 308 N.Y. 930, 127 N.E.2d 84 (1955). His partner had obtained a $40,000 verdict for the plaintiff which had been appealed. The Appellate Division, 4th Dep't, reversed and dismissed the complaint by a vote of 3-2. At the author's urging, the case (with a very expensive record) was taken to the Court of Appeals which by a vote of 4-3 affirmed the dismissal.

[23] Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921).

to a legal remedy. Fortunately for Mr. Belt, Judge Holtzoff, in denying a motion for judgment notwithstanding verdict, was able to agree with plaintiff's counsel and write:

> The principal question presented is whether there is a property right in an idea and, if so, to what extent. Originally at common law such a property right did not exist. This circumstance, however, is not determinative of the matter. One of the basic characteristics of the common law is that it is not static, but is endowed with vitality and capacity to grow. It never becomes permanently crystallized but changes and adjusts itself from time to time to new developments in social and economic life in order to meet the changing needs of society.[24]

Other problems of "torts" occasionally plague the practitioner as he presents his facts to the court. Are the facts all right and the theory all wrong? Has he made the mistake of applying for relief in the United States Court of Claims when it is later decided that he should have been in the District Court under the Federal Tort Claims Act—too late, perhaps? Will the judgment on his verdict be reversed because, in an action for deceit, the verdict was based on the wrong measure of damage although the Supreme Court of California was divided as to what was the proper measure anyway?[25]

The lawyer practicing in this field has worries that involve torts or tort liability, but then he is a professional worrier. Torts solve the routine problems. On balance he probably won't get excited about the Tort Cause of Action or any other theory except the one he needs for his particular lawsuit or client. A posteriori concepts work with him. It is not remarkable that the problems of the teacher and the practitioner differ, nor that their solutions are not always the same. Different responsibilities create different problems and solutions.

Juridical Difficulties

No apology is required by me, as a lawyer discussing the problems of the practitioner, or as a professor presenting pedagogical difficulties of the teacher. In suggesting some of the perplexities forced on the judge by the "torts" concept, refuge from the charge of pedantry is sought in the words of Benjamin Cardozo. Pleading for a Ministry of Justice to mediate between the legislature and the courts, his words seem appropriate to the law teacher looking at the courts.

> For there are times when deliverance, if we are to have it—at least, if we are to have it with reasonable speed—must come to us, not from within, but from without. Those who know best the nature of the judicial process,

[24] Belt v. Hamilton Nat'l Bank, 108 F. Supp. 689, 690 (D.D.C. 1952), aff'd, 210 F.2d 706 (D.C. Cir. 1953).

[25] Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954).

> know best how easy it is to arrive at an impasse. Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.[26]

As with the practitioner, the routine case seldom presents to the jurist the dilemma of "torts." But in the hands of a zealous practitioner, how many routine cases appear in the advance sheets?

Arvid Oksa took out a $5,000/$10,000 motor vehicle liability policy in April, 1951, which enabled him to comply with the New York Motor Vehicle Safety Responsibility Act then in force. Effective July 1, 1951, the Act was amended to require minimum coverage of $10,000/$20,000. In August, 1951, the plaintiff's automobile was involved in an accident. Thereafter Mr. Oksa's license to operate a motor vehicle was suspended because his liability policy did not meet the financial responsibility requirements of the 1951 amendment. Mr. Oksa sued the insurance company for damages because it had not increased the limits of liability of the policy to satisfy the new requirements. The complaint contained four counts—alleged respectively in terms of contract, custom, negligence, and conspiracy to defraud. The district judge dismissed. On appeal in a per curiam opinion, the Court of Appeals for the Second Circuit in affirming stated: "The appeal is utterly futile. How the appellant could have hoped to succeed is beyond comprehension."[27] Yet, is it "beyond comprehension" if one thinks in terms of general principles rather than compartments? The pendular swing of court decisions on the effect of delay by insurance companies in acting on applications might be somewhat analogous.[28] Appeals there have not always been futile.

Cases involving damage to land, chattels, and easements constantly perplex the judge with the difficulties of "torts." The Socony-Vacuum Company was the owner of an easement to maintain and operate a pipe line across certain rural property in Cattaraugus County, New York, owned at the time by the Vacuum Gas Burner Company. The defendant, pursuant to a contract with the Vacuum Gas Burner Company to level the latter's property, operated a bulldozer in such a manner that he ran

---

[26] Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 115 (1921).

[27] Oksa v. Am. Employer's Ins. Co., 218 F.2d 585 (2d Cir. 1955).

[28] For a detailed analysis of this problem of delay see Prosser, "Delay in Acting on an Application for Insurance," 3 U. Chi. L. Rev. 39 (1935).

into and broke the plaintiff's buried line. The instrument creating the easement was duly recorded, but there is no proof that the defendant had actual knowledge of the location or even the existence of the line. There was no evidence of negligence on the defendant's part in striking the pipe line. Judge Hamilton Ward granted the defendant's motion for a non-suit and dismissal of the complaint.[29] In his opinion, Judge Ward struggles with the problem of "torts":

> From an analysis of the pleadings and briefs, it appears that the plaintiff seeks to recover on the theory that the defendant committed a trespass to its easement and to its pipe line. If this court understands correctly the substance of the plaintiff's position, it attempts to claim an actionable wrong by the defendant against its easement of a type which might have been covered at common law by an action of trespass on the case and further, a wrong against its personalty, i.e., the pipe line, as a trespass to chattels, which might have been founded at common law on the ancient actions of trespass *vi et armis or de bonis asportatis.* It does not seek to recover on the theory of a trespass *quare clausum fregit* to its easement. Because of the requirement that trespass *quare clausum fregit* must be against a possessory estate in real property, it was well established at common law that an easement, being an incorporeal hereditament was not such an interest as would support that action (citations omitted). . . . It is important to analyze the act which constitutes the alleged trespass before it can be found to be actionable under the principles underlying any of the common law actions of trespass.[30]

Finding neither negligence nor intent, the court dismissed the complaint.

Problems in limitation of time for the commencement of actions whipsaw their way through the compartmentalized theory of "torts." When, in 1953, Mr. Swankowski brought an action against his doctor for allegedly permitting a surgical needle to remain in his abdomen, the fact that Mr. Swankowski learned of this nearly three years before commencing his action was to cause him nearly as much pain as the needle. Judge Conn of the Ohio Court of Appeals[31] gave him the orthodox answer that, if anything, this act fitted into the compartment of "malpractice," which was barred by the one year statute of limitations, rather than the "deceit" tort, to which a four year statute of limitations was applicable.

In New York a plaintiff's counsel was more successful in persuading the court to apply the period of limitation designated in the complaint by counsel. Plaintiff's employee, acting without authority, delivered a quan-

---

[29] Socony-Vacuum Oil Co. v. Bailey, 202 Misc. 364, 109 N.Y.S.2d 799 (Sup. Ct. Erie County 1952), 37 Cornell L.Q. 804 (1952). The New York Court of Appeals has recently struggled with the problem of intent and negligence in trespass cases. Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954), 40 Cornell L.Q. 387 (1955).

[30] 202 Misc. at 365-66.

[31] Swanskowski v. Diethelm, 98 Ohio App. 271, 129 N.E.2d 182 (1953).

tity of wax to the defendant. More than three years after defendant's refusal to return it, plaintiff sued in quasi-contract for the value of the wax. The defendant moved to dismiss the complaint on the ground that it was barred by the three year statute covering actions to recover damages for an injury to property. By carefully framing his complaint as an action for restitution rather than in tort, he persuaded the court that the six year rather than the three year label governed.[32]

This poses a further difficulty inherent in "torts." How to distinguish between compartments in torts, compartments in contracts, and compartments in sales? How to differentiate between false imprisonment in an action at common law and an action in admiralty?[33] In an action by a patient against a hospital for the furnishing of impure blood in a blood transfusion for a stated sum, the New York Court of Appeals held the act was primarily a hospital service and not within the Sales Act, so as to permit the patient to recover on the theory of a breach of warranty.[34]

The plaintiff, a seaman, sued in Admiralty under the Jones Act for injuries allegedly resulting from the defendant's negligence and for unpaid expenses for maintenance and cure. Upon his death prior to trial, the district judge dismissed the negligence action, but permitted recovery for maintenance and cure on the theory of non-abatement of contract actions.[35] Judge Rifkind writes with refreshing candor in the District Court:

> The second question is whether the claim for maintenance and cure abated on Sperbeck's death. No answer to this question has been provided by the authorities. Counsel informs me that diligent search has not discovered a case directly in point. The argument has therefore taken a turn toward the classification of the claim for maintenance and cure as contractual, delictual or belonging to an independent category. Of that, too, there is no clearcut determination. When the legal materials are as plastic as they are on this question the forms of logical deduction are illusory since the desired conclusion is surreptitiously introduced into the premises. It may as well, therefore, be done candidly. Preferring to hold that the claim for maintenance and cure does not abate at the death of the seaman entitled thereto, I chose to classify the claim pro hac vice as contractual.[36]

Judge Frank, writing the opinion for the affirming court of appeals, seems to completely overlook this demonstration of "hunch" jurispru-

[32] Dentists' Supply Co. v. Cornelius, 281 App. Div. 306, 119 N.Y.S.2d 570 (1st Dep't 1953), aff'd mem., 306 N.Y. 624, 116 N.E.2d 238 (1953). As to the effect of this decision upon the "gravamen" theory in New York, see 39 Cornell L.Q. 755 (1954).

[33] Forgioni v. United States, 202 F.2d 249 (3d Cir. 1953).

[34] Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954), 40 Cornell L.Q. 803 (1955).

[35] Sperbeck v. A. L. Burbank & Co., 88 F. Supp. 623 (S.D.N.Y. 1950), aff'd, 190 F.2d 449 (2d Cir. 1951), 25 So. Calif. L. Rev. 343 (1952).

[36] Id. at 625.

dence which once so interested him, and he subconsciously plays out the game he facetiously wrote about under the formula R $\times$ F = D (Rules times Facts equals Decision).[37]

> But how the wise old wood-gods laugh,
> Who saw the first primeval calf!

Impact on the Layman

In an action for a declaratory judgment on a fire insurance policy, Judge Cuthbert Pound, in reaffirming the personal nature of the contract, disposes of plaintiff's arguments thus: "These reasons may savor of layman's ideas of equity, but they are not law."[38] Taking this quotation out of context undoubtedly does a disservice to the memory of Judge Pound, a liberal judge,[39] yet it illustrates a distinction between positive law and living law that many laymen conceive of as existing in the minds of the legal professionals.

Picture the interdepartmental consternation in the Argonne Company[40] an employer of harbor workers and longshoremen. It was paying substantial insurance premiums required by the Longshoremen's and Harbor Workers' Compensation Act.[41] Presumably the employer was familiar with section 5 of the Act which provides that the liability of the employer for compensation for injuries sustained by the employees in the course of the employment "shall be exclusive and in place of all other liability of such employer to the employee, his legal representatives, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury . . . ."[42] After paying the "exclusive" compensation as provided by the act to its injured employee, additional damage liability was assessed under a compartment of "torts" hitherto undiscerned—a wife's action for loss of consortium because of injuries negligently inflicted on her husband.

Or consider the appreciative remarks that must have been muttered by the employing Rothschild International Stevedoring Company.[43] One of its employees was killed aboard ship. The widow sued the shipowner

[37] Frank, "What Courts Do In Fact," 26 Ill. L. Rev. 645 (1932).

[38] Brownell v. Board of Education, 239 N.Y. 369, 374, 146 N.E. 630, 632 (1925).

[39] See Edgerton, "A Liberal Judge: Cuthbert W. Pound," 21 Cornell L.Q. 7 (1935).

[40] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950), 36 Cornell L.Q. 148 (1950).

[41] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1952).

[42] 33 U.S.C. § 905 (1952).

[43] States S.S. Co. v. Rothschild Int'l Stevedoring Co., 205 F.2d 253 (9th Cir. 1953), 67 Harv. L. Rev. 884 (1954). See also Weinstock, "The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers," 103 U. Pa. L. Rev. 321 (1954).

under its non-delegable duty to provide longshoremen with a safe place to work. This suit being settled, the shipowner recovered its loss, by way of indemnity, from the employing stevedore company, notwithstanding the so-called exclusive section 5.

Every difficulty that "torts" poses to the jurist and the practitioner is magnified for the public. Obviously, the necessary technicalities of the law are apt to escape the understanding of the lay public. However, it would seem reasonable for the legal professionals to assume the responsibility for reducing to a minimum this sense of "apartness." Positive law does not anchor itself in the living law when it declares that a tort labelled "intentional interference with contractual rights" requires as a sine qua non to the tort some sort of a contract[44] and then adds that if this contract which is being interfered with is a land contract, the very fact that a valid contract exists will defeat the plaintiff who sues in New York for the tort of "slander of title."[45] Similarly is the layman puzzled by the professionals' attempted distinctions between nonfeasance and misfeasance, between legal duties and moral duties. It is not suggested that a concept of general principles of tort liability will provide a legal "do-it-yourself" kit for the layman. It is suggested that a plural torts concept raises for the public as many difficulties as it solves.

III. The Doctrine of the Tort Cause of Action

If the idea of "torts" as "a mere enumeration of actionable injuries"[46] raises as many problems as it appears to solve for the teacher, the practitioner, the jurist, and the public, can an improved methodology be evolved which avoids this weakness? I suggest that such an improvement is perfectly feasible. As pointed out in Part I, many legal writers have preferred to describe tort liability in terms of exclusion rather than inclusion. When classification is based on conduct of the defendant, by definition, cases identifiable with the intentional infliction of harm exclude those cases based on negligent conduct and those cases wherein liability is thrust on a non-fault basis. In cataloguing tort liability in accordance with the particular interest of the plaintiff that has been violated, by definition, a grouping of land-interest cases exclude cases involving damage to reputation. An arrangement based on similar fact situations has perhaps the most exclusions of all. Combination of these and other sorting systems only reduces the degree of exclusion. The deterrent to a unitary inclusive process of analysis is really the same deterrent that

44 Lumley v. Gye, 2 El. & Bl. 216 (Q.B. 1853).

45 Felt v. Germania Life Ins. Co., 149 App. Div. 14, 133 N.Y. Supp. 519 (1st Dep't 1912).

46 See note 1 supra.

forced the early common law to a plural exclusive theory of "torts." That is—how to describe a compartment elastic enough to hold all the so-called "torts" thus far labelled and those yet to be catalogued? It is like the problem faced by the modern physicists. How to design a container to hold a fire hot enough to consume all known substances? The solution the physicist offers is a radical one—substitute electro-magnetic forces for top, sides, and bottom. The solution to the legal problem may be equally radical—conform the tort compartment to the lowest common denominators present in the various "torts." I suggest that such common denominators do exist and can be identified.

Dean Prosser defines the traditional elements of the negligence cause of action as follows:

> The elements necessary to a cause of action based on negligence are:
> a. A legal duty to conform to a standard of conduct for the protection of others against unreasonable risks.
> b. A failure to conform to the standard.
> c. A reasonably close causal connection between the conduct and the resulting injury.
> d. Actual loss or damage resulting to the interests of another.[47]

Not included in the definition are words describing a cause of action itself. In discussing the meaning of that term, Mr. Justice Cardozo stated:

> A "cause of action" may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of *res judicata* (citations omitted). At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed.[48]

Judge Learned Hand later added:

> Courts have vacillated in defining a "cause of action," some taking the view that it is the nexus of all those facts that must be proved to enable the plaintiff to recover; others, that it is only the interest—or "right"—for whose invasion the plaintiff seeks redress.[49]

Demonstrating the kinship of substantive and adjective law, the mixing of common-law and code pleading, I entitle this process of analysis The

---

[47] Prosser, Torts 165 (2d ed. 1955).

[48] United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67 (1932).

[49] Burns Bros. v. The Central R.R., 202 F.2d 910, 911 (2d Cir. 1953).

Tort Cause of Action. From the law of negligence, I have taken the four terms which are familiar to all legal professionals: *duty, violation, cause, and damage.* My proposition is that these common denominators may be discerned in varying degrees in all the so-called "torts." I propose to examine each of these four terms, but in a different order than that just stated.

Damages

The dollar problem of "torts" is not whether actual damages are required, but rather in what cases will they be presumed, and when must they be alleged and proved. Certainly a common denominator to all actionable injuries is the factor of *injuria.* The Restatement of Torts oversimplifies the question of damages in discussing trespass to land by stating:

> One who intentionally enters land in the possession of another without the consent of the possessor or other privilege so to do, is liable for a trespass under the rule stated in section 158, although his presence on the land causes no harm to the land, its possessor or to anything or person in whose security the possessor has a legally protected interest.[50]

It would perhaps be more accurate to point out that proof of this particular *damnum* raises a presumption of *injuria.*

Plaintiff Dixon brought an action in trespass *quare clausum fregit* against Clow. At the trial Dixon asked the court to charge that the "jury had a right to presume damages from the acts proved. But the court refused so to charge; and instructed the jury, that they doubted much whether the jury could find a verdict for the plaintiff, when he not only had not proved any sum as damages in consequence of the defendant's acts, but after being enquired of by the court whether he intended to prove the amount of his damages, his counsel answered that he did not intend to offer any proof of the amount of damages."[51] On appeal, this refusal to charge was held to be improper in that the plaintiff was entitled to a verdict for nominal damages at the least.[52]

Similarly, in the action of trespass *vi et armis,* the least unpermitted touching of another is a sufficient *damnum* to presume *injuria* and permit the recovery of nominal damages at the least.[53]

---

[50] Restatement, Torts § 163 (1934).

[51] Dixon v. Clow, 24 Wend. (N.Y.) 188, 189 (1840).

[52] The matter of nominal damages presents a hard problem for the practitioner dealing with statutory costs. He may get a verdict for nominal damages, yet have a judgment for costs assessed against him. See N.Y. Civ. Prac. Act §§ 1472, 1475.

[53] Dean Prosser at p. 31 of his Law of Torts (1955) defines the contact required in battery as any unpermitted or unprivileged contact. On the other hand Restatement, Torts

In actions of trespass to chattels, *de bonis asportatis,* again the problem of actual damages is a problem of adjective rather than substantive law. Will damages be presumed on the analogy to trespass *quare clausum fregit,* or is the interest in personalty sufficiently subordinate to that in realty so as to require proof of damages?[54]

Throughout the entire field of negligence damages are essential and are to be proved rather than presumed. The difficult problem of damages in the field of defamation is not whether they must exist, but whether they will be presumed, as in the actionable *per se* situations, or whether they must be specifically pleaded and proved. So on through misrepresentation, disparagement, malicious prosecution, abuse of process, and finally the prima facie tort; it remains a problem of proof rather than of the cause of action itself. Judge Cardozo in the *Palsgraf* case wrote: "One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person."[55] Some of the more recent writers might disagree as to the future of damage liability,[56] but perhaps it is not expecting too much to suggest that although damages alone may not be enough, whether presumed or proved, they are a sine qua non to civil liability and a denominator common to all "torts." The judicial recognition of peculiar damage as differentiated from the measurement of damages, i.e., the prenatal injury cases, is not properly a part of the denominator *damages.* Depending on one's frame of reference, *damnum* is either a *cause* or a *duty* problem.[57]

---

§ 13 (1934) speaks of harmful or offensive contacts. Which definition is accepted might mean the difference between liability or non-liability in a case like Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), involving a playful but unpermitted tap on the shin given by one school boy to another while class was in session.

[54] The older text writers say no proof of actual damages is required: Salmond, Torts 318 (10th ed. 1945); Pollock, Torts 277 (14th ed. 1939); cf., 15th ed. (1951) at p. 264. The Restatement, Torts § 218, comment f and the more recent writers indicate proof of actual damages is required: Harper, Torts 53-54 (1933); Prosser, Torts 65 (2d ed. 1955). The case authority for either proposition is very limited.

[55] 248 N.Y. at 345, 162 N.E. at 101.

[56] See W. G. Friedman, "Social Insurance and the Principles of Tort Liability," 63 Harv. L. Rev. 241 (1949).

[57] Judge Pilcher, in J. D'Almeida Aranjo Lda. v. Sir F. Becker & Co., [1953] 2 Q.B. 329, 335, 2 All E.R. 288, 291, cites the following passage from Cheshire, Private International Law 659 (4th ed. 1952):

> " . . . remoteness of liability or remoteness of damage must be distinguished from measure of damages. The rules relating to remoteness indicate what kind of a loss actually resulting from the commission of a tort or from a breach of contract is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated. Damage may be, but damages can never be, too remote. . . . "

Cause

What a slippery word![58] Efforts to master it recall the words of T. S. Eliot in *East Coker*.

> Trying to learn to use words, and every attempt
> Is a wholly new start, and a different kind of failure
> Because one has only learnt to get the better of words
> For the thing one no longer has to say, or the way in which
> One is no longer disposed to say it. . . .

The jurisprudens, the scientist, the lawyer, the teacher, the witness, the judge, and the jury all struggle with the term. And struggle they must, for certainly here, somehow, someway, we are dealing with a basic determinant of tort liability. No matter what label the category of wrong-doing bears, somehow we must connect the defendant to the plaintiff's damages, be it by chains or gossamer threads.

The difficulty lies in the degrees of causation. Drop a stone into a pond. As the stone strikes the surface of the water, concentric ripples race outward, ever diminishing. How far out can we pursue the ripples of causation and still identify a denominator common throughout tort liability? Connecting the stone-thrower to the damage caused by wave motion of the remote water particles technically may be one connected series of events for the jurisprudens or the scientist, but grosser calipers measure cause in fact and remote consequences. The cause in fact of the wave motion was the stone striking the surface of the water. Without the stone, there would have been no ripples. Nevertheless, liability for damages caused by remote ripples may or may not be thrust on the stone-thrower. He will be excluded from tort liability unless he can be connected with the events surrounding the throwing of the stone. In the logomachy of causation, it is this cause in fact that I have selected as another common factor throughout "torts." This limited theory of causation is not without difficulties. What is the cause, as thus defined, of P's death after receiving from X and Y simultaneously, two head wounds, either of which independently is capable of killing him? Superficially, cause in fact flounders. As a practical answer there is no problem; X and Y are both causes in fact. The lawyer's function (and the establishment of cause in fact is primarily a matter for the practitioner) is to

[58] Beale, "The Proximate Consequences of an Act," 33 Harv. L. Rev. 633 (1920); Bingham, "Legal Cause at Common Law," 9 Colum. L. Rev. 16, 136 (1909); Bohlen, "The Probable or Natural Consequence Test," 49 Am. L. Reg. (n.s.) 79 (1910); Edgerton, "Legal Cause," 72 U. Pa. L. Rev. 211, 243 (1923); James and Perry, "Legal Cause," 60 Yale L.J. 761 (1951); McLaughlin, "Proximate Cause," 39 Harv. L. Rev. 149 (1925); Smith, "Legal Causes in Actions of Tort," 25 Harv. L. Rev. 103, 223, 303 (1911); Green, Rationale, Approximate Cause (1927); Foss, The Calf Path (1896).

discover and present those facts which connect the defendant's act to the plaintiff's damage—to establish that the metal in the patented scaffolding was bent while cold, thus setting up an internal strain, subsequently shattering the metal under a slight impact, and catapulting the plaintiff to the ground. In thus limiting cause to a factual investigation and excluding the policy considerations of remote consequences, cause can be traced as a substantive requirement in all the various "torts." The defense of contributory negligence may involve analysis under cause only if the degree of contributory fault is sufficient to be a cause in fact. Otherwise, it would be treated as a policy matter under another denominator—Duty. What, though, is sufficient to be a cause in fact? Here is where the degrees of causation make difficult the gross division of causation into factual cause and liability for remote consequences. In the vast majority of situations the division is workable. In the bizarre cases, cause in fact can only be pinned down by policy consideration. Jeremiah Smith suggested that an event was a cause if it was a substantial factor in bringing about the damages.[59] Actually, this is a policy consideration. As a result of this shadow-land between cause in fact and cause in policy, the bizarre case makes one judge, Andrews, say that Helen Palsgraf's problem is one of causation; the other, Cardozo, that the anterior question is one of duty. Yet the principle of cause in fact does exist throughout the field of tort liability. Policy discussions of proximate and legal causation, of remote consequences, creep in unavoidably as the analysis begins to shift from the denominator *cause* to the denominator *duty*.

Duty

The selection of the principles *damages* and *cause* will perhaps arouse only mild criticism. Terming the policy denominator *duty* will be considered more than contributory negligence on my part; it is assumption of the risk! Felix S. Cohen had a description for "peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics"—"transcendental nonsense"![60] He points out, "Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormative principle."[61] Dean Prosser agrees that attempted solutions based on duty "are shifting sands, and no

[59] Smith, supra note 58, at 309.

[60] Cohen, "Transcendental Nonsense and the Functional Approach," 35 Colum. L. Rev. 809 (1935).

[61] Cohen, supra note 60, at 820.

fit foundation . . . . There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. . . . That is merely a dog chasing its own tail."[62]

Agreed. That very drawback of the word is its principal virtue in solving the semantic difficulty inherent in settling on a term which will communicate with a degree of reasonable probability, that bundle of juridical reflexes, from hunch to *stare decisis,* discernible throughout "torts" that determine the liability for the immediate and the remote consequences of human relationships. Duty, in the sense I use it, is thus correlative not with "right" but with "interest." The nexus here is the judge. Whether the "tort" is slander or assault, negligence or ultrahazardous activity, false arrest or false imprisonment, the interests of one must be weighed against those of another or others on scales of absolute or relative values. This weighing process is considered by some in terms of proximate or legal causation.[63] Others weigh in terms of duty, generally as limited to a particular tort or torts.[64] In either process, the factors used are about the same—gravity of harm, social utility of conduct, ease of damage prevention, administrative difficulties, prophylactic effects, time and space factors, sense of "rightness" or "wrongness," foreseeability, typicality, spreading the risk, impact of insurance, principles of order, state of mind of actor, state of prejudice of counsel, court, and jury.

While a student at Cornell, Hamilton Whited Budge, now practicing in California, was discussing with me this curious legal phenomenon. His suggestion as to why some instinctively analyze in terms of duty, and others in terms of proximate causation has proved unforgettable. As Budge put it, the relativist is forced to think in terms of duty; the absolutist (that is, in the terms of human rights) in terms of proximate cause. Regardless of the nature and type of damage, the relativist recognizes no absolute duty in the first instance to avoid damage. To the human rights absolutist, on the other hand, certain kinds of damage self-evidently thrust a duty of responsibility, unless the policy considerations of causation insulate.

62 Prosser, op. cit. supra note 16.

63 Supra note 57.

64 Bohlen, "Owners Duty to those Rightfully in Possession," 69 U. Pa. L. Rev. 142, 237, 340 (1920); Green, "The Duty Problem in Negligence Cases," 28 Colum. L. Rev. 1014 (1928), 29 Colum. L. Rev. 255 (1929); James, "Scope of Duty in Negligence Cases," 47 Nw. U. L. Rev. 778 (1953); Winfield, "Duty in Tortious Negligence," 34 Colum. L. Rev. 41 (1934).

In theory, it might make no difference if the separate roads traveled by the relativist and the absolutist arrived at the same determination of the case. In practice, however, it may make a great deal of difference whether the policy question is solved on a duty or a cause basis. When the solution is sought in the terminology of duty, no one questions but that the determination is to be made by the judge, who, in theory if not in fact, is better trained for the job than the jury. If, however, the solution is sought in the terminology of causation, and the court fails to separate the problems of cause in fact from the policy issues of proximate causation, and dumps the dual problem of causation into the lap of the jury, then obviously all roads will not lead to Rome. A failure to see this balancing of interests denominator as one principle of tort liability rather than two sometimes leads to the curious case of the twice-blessed defendant. This is the fortunate defendant who has his responsibilities first weighed on the scale of duty and then reweighed in the balance of proximate cause.[65]

It is under this duty denominator that the one percent contributorily negligent plaintiff can best be analyzed; that the defenses of consent and assumption of risk can best be evaluated; that the dilemma of governmental immunity, whether it destroys that right or the remedy, can be faced;[66] that *damnum* as differentiated from *injuria* is to be recognized or denied. As the cause in fact was preeminently the province of the practitioner and the jury, the denominator of duty is used by the judge to shape the everchanging outlines of the Tort Cause of Action. Appropriate here are the words of Dean Prosser as he criticizes the term duty.

> When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: the hand of history, our idea of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.[67]

As an element in the negligence cause of action, the word duty has always been familiar to the legal professionals. Heretofore, little specific

[65] Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955), 41 Cornell L.Q. 329 (1955). The notewriter, after trying to decide whether the Court of Appeals had determined on non-liability of the state for damages on the basis of duty or proximate cause when a convict escaped from a negligently maintained minimum security prison and frightened to death a person whom he forced to aid him in the attempted escape, acknowledges with admirable restraint that "There is some uncertainty as to which one of the two formed the basis for the Court of Appeals' decision. . . . " 41 Cornell L.Q. at 330.

[66] See the opinions of Justices Field and Nelsen writing respectively for the majority and the minority in The Siren, 74 U.S. (7 Wall.) 152 (1868).

[67] Prosser, op. cit. supra note 16.

use of the term has been made in the other "torts." Occasionally, it crops out—a nuisance case,[68] a statute of frauds situation,[69] an action for trover and conversion,[70] a novel damage theory.[71] Nevertheless, the considerations that determine it are present throughout the field of tort liability. It is a common denominator that can be identified and employed. The same considerations of conflicting interests that determine the extension of liability of manufacturers of chattels for negligently caused injuries to those not in privity are present in atomic radiation cases, group libel situations, human dignity affronts, false imprisonment and deceit cases. The difference lies only in the degree of recognition between old and long-familiar faces, and those just now seeking our acquaintance. "New occasions teach new duties."[72]

Violation

Whereas, under damages the injury to the plaintiff's interest was considered, this factor finds its common thread in the conduct of the defendant. In each of the so-called "torts," when damages to the plaintiff have been admitted, when the cause in fact of these damages has been obviously the act of the defendant, when the policy considerations of potential liability have been determined, the question still remains for solution: "Did the defendant conduct himself in a proscribed manner?" Remember that in the Tort Cause of Action I am considering, not the sides of a box, not clear-cut lines of division, but general principles underlying tort liability which tend to interpenetrate in places. This difficulty was apparent in my discussion of damages. Within that denominator was grouped the facts determining injuries, not *damnum.* Similarly, under cause, it was the cause in fact rather than the consideration of proximate cause that was identified. So here, in dealing with the problem of violation of duty, it is the "factness" of the violation rather than the "oughtness" that is considered as a denominator of tort liability. The "oughtness" of *damnum,* of legal causation, of justifiable conduct are all proper considerations denominated as duty. Thus, while the "oughtness" and "factness" of the violation may in many instances be difficult

---

[68] Ware v. Cincinnati, 93 Ohio App. 431, 111 N.E.2d 401 (1952).

[69] In re Madsen's Estate, 259 P.2d 595 (Sup. Ct. Utah 1953).

[70] May v. City Nat'l Bank and Trust Co., 258 P.2d 945 (Okla. 1953).

[71] Swan v. First Church of Christ, Scientist, in Boston, 225 F.2d 745 (9th Cir. 1955) (Action against a church and its board of directors and publishing society to recover damages for defendant's refusal to reinstate plaintiff's name on defendants' published list of the church's religious healing practitioners, as requested by him after his withdrawal of name therefrom).

[72] From an old Welsh tune "Once to Every Man" with words by James Russell Lowell.

to consider separately, each separate tort requires a factual answer to the question earlier posed: "Did the defendant conduct himself in a proscribed manner?". The defendant, while driving his automobile, ran into and injured the plaintiff, breaking his arm. At the time the plaintiff was walking across the street at an intersection. There is no question as to the existence of damages, only how much. Cause in fact is clear. The standard duty of care was long since formulated by Judge Brett in *Heaven v. Pender*[73] as:

> The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The defendant swears he was crawling at a snail's pace, that the light was green for him and red for the plaintiff, that the plaintiff dashed out from between two parked cars, and practically climbed up the radiator of his car. Not so at all, the plaintiff claims. The defendant was racing forty miles an hour in a 10 mile an hour zone, trying to beat the light that had already changed. He deliberately drove into plaintiff who was in the middle of the street, on the crosswalk.

Did the defendant violate the duty of due care? Was the plaintiff contributorily negligent as a matter of fact? Did the defendant, in fact, intentionally strike the plaintiff, and thus subject himself to liability for a battery, hence not dischargeable in bankruptcy? Was the automobile in fact an experimental jet-propelled type that, without any intent on the part of the defendant, went out of control? The fact of conduct, the fact of the state of mind, the fact of the ultra-hazardous instrumentality are to be determined throughout the field of tort liability whether it be by a jury, a judge without a jury, or an administrative agency.[74] The defendant in fact did the particular damage. Damages alone are not yet a sufficient basis of recovery. Damages brought about by certain patterns of activity thrust civil liability; patterns still to be discovered will extend or change the thrust liability. In each instance, a common denominator is present—did the conduct of the defendant violate the particular pattern? Here, for instance, the question is not, should fault be the test of defendant's conduct. That determination can best be taken up under

---

[73] [1883] 11 Q.B. 503, 509 (C.A.).

[74] For an excellent development of the details of proof see Morris, "Proof of Negligence," 47 Nw. U. L. Rev. 817 (1953).

the denominator of duty. Under violation the question more properly is, assuming the test is fault, did the defendant's conduct in fact violate the standards of fault.

IV. Some Advantages of the Synthesis

Part II of this article presented some of the difficulties faced by the legal professionals and the public under a system of tort liability based on specified categories of wrongdoing. The Tort Cause of Action, as explained in Part III, is not meant to be a competing system to "torts." It is not a choice between "torts" or the Tort Cause of Action. It is not Pollock or Salmond. The Tort Cause of Action is merely a synthesis of basic factors which apparently shape the determination of tort liability. It describes a method for analyzing tort liability. Its purpose is not revolutionary but evolutionary. The methodology of the Tort Cause of Action is not to attack "torts" where it works, but where it doesn't work. If the synthesis be accepted as a tool rather than a goal, I suggest that the Tort Cause of Action can be very useful in overcoming some of the difficulties inherent in "torts."

The more recent developments in the area of tort liability present many instances of judicial and legislative thinking along the lines of unitary principles. The so-called "prima facie" tort is an example of this type of thinking. Mr. Justice Holmes put it this way:

> It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.[75]

This thesis presents certain underlying factors shaping liability in a particular section of the tort field. The factors thus described are:

(1) damages
(2) intent
(3) justification.

Absent any traditional compartment within which the injury complained of might fit, the prima facie tort has developed as a comprehensive method of analyzing intentional conduct. It seems unfortunate that in New York, where this methodology has had its greatest development, the present tendency of the courts seems to consider this as merely another rather specifically limited tort rather than as a tool to aid in

[75] Aikens v. Wisconsin, 195 U.S. 194, 204 (1904), referred to with approval in Advance Music Co. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946). For an excellent note on the subject, see "The Prima Facie Tort Doctrine," 52 Colum. L. Rev. 503 (1952).

the analysis of unusual "intentional conduct" cases.[76] If the doctrine of the prima facie tort is properly a synthesis of the basic factors underlying tort liability in the intentional conduct cases, the synthesis of the Tort Cause of Action is logically the next step.

Along with intentional conduct, liability for negligent conduct is in the process of being pressured and shaped by evolutionary devices. Courts are prone to say that negligence is never presumed, it must be alleged and proved. By definition, fault is essential to liability based on negligent conduct. Yet peculiar cases keep coming up in today's specialized society wherein the lawyer for the plaintiff cannot prove orthodox fault. Historically, the doctrine of *res ipsa loquitur* was a tool to use when the facts of the case made it clear that the conduct of the defendant was the actual cause of the plaintiff's injury, but the details of that conduct, for the purpose of determining the element of violation or negligence, were unavailable to plaintiff.[77] What is to be done for Mr. Ybarra, who entered the hospital for an appendectomy and came out unable to lift or rotate his arm? Somewhere, somehow, along the chain of four doctors and two nurses, someone acted negligently. But who? A verdict against all of them was affirmed by a California court, using *res ipsa* as the tool.[78] Inherent in the decisions is the thesis, not that fault is being abandoned, but that the more orthodox devices of inferences or presumptions have to yield their rigidity of form to the substance of the facts. Thus the tool of *res ipsa loquitur,* in California at least, seems to be evolving into a limited method of attacking some of the technical difficulties inherent in the tort of negligence.

The difficulties posed by statutes limiting the time for the commencement of actions based on the various "torts" has been referred to previously.[79] In seeking solutions to this problem the courts have developed a process of analysis known as the "gravamen" theory.[80] Simply stated, it is a matter of substance over form, of disregarding the label of the

[76] Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953); Brand v. Winchell, 283 App. Div. 338, 127 N.Y.S.2d 865 (1st Dep't 1954); cf., Schisgall v. Fairchild Publications, 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. N.Y. County 1955), 41 Cornell L.Q. 507 (1956). In the Rager case, the Court of Appeals deliberately expressed its views upon the subject of the damages requirement.

[77] Byrne v. Boadle, 2 H. & C. 722 (Ex. 1863); Benedict v. Potts, 88 Md. 52, 40 Atl. 1067 (1898).

[78] Ybarra v. Spangard, 93 Cal. App. 43, 208 P.2d 445 (1949). Previously, the California Supreme Court had reversed a judgment of non-suit. 25 Cal. 2d 486, 154 P.2d 687 (1944). This decision is criticized by Seavey, "Res Ipsa Loquitur: Tabula in Naufragio," 63 Harv. L. Rev. 643 (1950). For a defense of it see Prosser, "Res Ipsa Loquitur in California," 37 Calif. L. Rev. 183, 223 (1949).

[79] See supra p. 39.

[80] 1 C.J.S., "Actions," § 46.

complaint in favor of the material part of the allegation. In this way the courts, using factors basic to liability and without the specific help of legislation, have been able to overcome the artificial limitation of compartmentalized "torts."[81]

Legislators, by establishing definitions on a broader basis than specific categories of wrongdoing, help solve these difficulties. The New York General Construction Law, section 37(a), defines personal injury as follows: " 'Personal injury' includes libel, slander and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another." In describing the procedure for presenting a claim against the governing body of any school district, the New York Education Law uses the broadest language:

> 2. Notwithstanding anything to the contrary hereinbefore contained in this section, no action or special proceeding founded upon tort shall be prosecuted . . . against any teacher . . . unless a notice of claim . . . .[82]

Note the title of the general enabling legislation authorizing certain claims against the federal government, "The Federal Tort Claims Act." Section 130 of the New York Decedent Estate Law speaks of an action to recover damages "for a wrongful act, neglect or default. . . ."

Here and there, efforts are being made to solve some of the difficulties inherent in a plural torts system by analytical methods based on observed unitary principles. The only difference between the methods presently being employed and the Tort Cause of Action is one of degree. Denominators common to specific sections or groups have heretofore been sought. The methodology of the Tort Cause of Action takes the next and obvious step of identifying denominators common to the entire area of tort liability, and utilizing these common factors of Damages, Cause, Duty, and Violation to seek solutions to problems not easily solved by a plural concept.

Describing "torts" in terms of the Tort Cause of Action offers many pedagogical advantages. Fortunately for the teacher in this field, the law of "torts" is more than adequately documented. There is a rich abundance of texts, studies, and restatements. Unlike so many other fields, where the teacher has to utilize a rather large proportion of his class time just teaching what the routine law is, in the field of tort liability that

[81] The present position of the New York Court of Appeals as to the gravamen theory is, to say the least, unclear. See note 32 supra. The gravamen theory appeared well established in Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938), but the subsequent decisions in Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953) and Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955) cast doubt on the present status of the gravamen theory.

[82] N.Y. Educ. Law § 3813, subd. 2, effective July 1, 1953.

job has been done by recognized masters and presumably the students will read the suggested text. The classroom teacher can more properly apply himself to the questions raised by the routine situations covered in the students' reading and to the development of a background against which his students can learn to fit the pieces of that which today is the unusual, tomorrow the routine. This is not "ivory tower" stuff. It is the heart and soul of legal education. Of course, the "is-ness" of the law must be taught. But that includes not only what the law was when the professor went to law school, but also what it is right now, and what it may well be ten years from now when our quondam student is urging a position in the highest court of his jurisdiction. It is in this area of analysis that teaching tools are scarce. The numerous tort casebooks, as differentiated from texts, excellent as they all are, spend so much coverage on the routine and established "is-ness," devote so many cases to the teaching of the law, that out of the 73 periods in a five-hour course very little time is left for the process that directs its focus primarily on the student rather than on the professor—the learning process, the creative process. A classroom presentation of "torts" cases in assault and battery, trover and conversion, negligence, strict liability, misrepresentation, defamation, interferences with contracts, etc., grouped not thusly, but analyzed primarily as problems involving damages, cause, duty, and violation serves the dual purpose of helping the students discover both the law and the facts. As to the law, he can be stimulated both to verify the law as it is and to assist in its development. As to the facts, he can learn the process of finding, investigating, and establishing them.[83] In this way he becomes sensitive to the problems of the practitioner and the jurist.

While the dividing line between law and fact is often vague and indistinguishable, as was pointed out in Part III of this article, there are great areas of fact-finding and law-giving. A methodology of tort analysis recognizing this major division should be of assistance to the practitioner and the jurist. The developments in adjective law have proceeded far in advance of substantive law in this regard. Over one hundred years ago, the New York Legislature appointed a commission "to revise, reform, simplify, and abridge" the practice and pleading before courts of record in New York, instructing the commissioners "to provide for the abolition of the present forms of actions and pleadings in cases at common law; for a uniform course of proceeding in all cases whether of legal or

83 Those interested in tort pedagogy may well ask: "where are such teaching tools?" The author hopes to be able to provide an answer in the not too distant future. There is presently available an excellent article by L. Green, "The Study and Teaching of Tort Law," 33 Texas L. Rev. 1 (1955).

equitable cognizance, and for the abandonment of all Latin and other foreigu tongues, so far as the same shall by them be deemed practicable, and of any form and proceeding not necessary to ascertain or preserve the rights of the parties."[84] The procedural reform brought about by the "Field Code" in New York in 1848 was continued in 1938 by the adoption of the Federal Rules of Civil Procedure. In spite of the criticism often urged that this departure from the precision of common-law pleading makes for slipshod practice and poor law, only a few jurisdictions still maintain a writ system based on forms of action.[85] The Tort Cause of Action simply attempts to apply the same principles of reform and development to the substantive law of tort liability. The primary function of the practitioner as a fact-finder and fact-pleader is recognized. The primary responsibility of the jurist for the determination of the law is acknowledged. The tools with which the lawyer primarily attacks the tort problems are the facts involved in damages, actual cause, and violation. Duty is the workshop of the judge. While there will be, of course, a constant overlap, many of the difficulties faced by the practitioner and the judge under a plural "torts" concept disappear when the responsibility of each is brought into a proper perspective.

Mrs. Kathryn V. Bartow was seven months pregnant. She and her husband had recently sold their farm to Mr. R. D. Smith, and some wrangling grew out of the sale. On a Saturday afternoon in Norwalk, Ohio, while Mrs. Bartow was walking with her mother, Mr. Smith stepped up to her, and in the presence of people that were walking to and fro, in a loud voice and with a flushed face, it is alleged he repeatedly called Mrs. Bartow a "God damned son of a bitch" and "a dirty crook." Distraught and embarrassed, with passers-by stopping to stare, Mrs. Bartow's mother took her quickly by the arm and rushed her into a nearby store. Mr. Smith's voice followed her into the store. For weeks Mrs. Bartow could not stop sobbing. Medical attention was required because of her nervousness. Fortunately, she went through her childbirth without any adversity. Mrs. Bartow instituted an action for damages in the Court of Common Pleas of Huron County, Ohio, against Mr. R. D. Smith. The trial court granted the defendant's motion to dismiss on the opening statement of counsel for plaintiff and the allegations of the petition as summarized above. The Court of Appeals reversed the Court of Common Pleas and held that the plaintiff, on the petition and opening statement, was entitled to submit her evidence to the jury. The Supreme Court of Ohio, splitting four to three, reversed the judgment of

[84] N.Y. Sess. Laws 1847, c. 59, § 8. See Clark, Code Pleading (2d ed. 1947).
[85] Clark, op. cit. supra at 23-54.

the Court of Appeals and affirmed that of the Court of Common Pleas.[86] To the majority of the Supreme Court, the positive law of Ohio had no traditional compartment fitting the facts alleged. The powerful dissent of Judge Hart sought to shape the positive law to the living law of the laymen, accountably disturbed by the technicalities of "torts" and who seek, not a perpetuation of the mistakes of the past, but an adjustment to the problems of the present and the future.

V. Beyond Tort Liability

If the Tort Cause of Action successfully identifies and synthesizes the basic factors of *duty, violation, cause* and *damages* in the area of tort liability, are they unique to that area? I advance the proposition that those denominators of tort liability are simply aspects of the same broad determinatives of legal liability.

Certainly, compartmentalized thinking is not unique with "torts." Robert S. Stevens, former dean of the Cornell Law School and Professor of Law Emeritus there, sharply brings into focus the problem of categories as he writes a plea for the continuation in the law school curriculum of a course in Equity.

> A course in Equity can have an incidental pedagogical value. There has long been a degree of criticism that law is taught by courses which have been given subject-matter titles like Torts, Contracts, Property, Criminal Law, Procedure, etc., and that students are apt to regard these as actual divisions of the law rather than segments set apart artificially for convenience in teaching. Equity has no comparable subject matter; it is a way of thinking, a method of trying to administer justice. It has invaded and supplied adjuncts to all the topical fields of law. And, therefore, when the student studies the appeals to equity against the commission of a personal tort, against the breach of a contract, for the protection of property interests, against the commission of a crime, or against a criminal prosecution, this tends to break the barrier of the artificial compartmentalization.[87]

The field of Quasi-Contracts is an early attempt to bridge the artificial gap between torts and contracts. Unfortunately, it too has become stylized into a third compartment.[88] Thomas Cowan thinks contracts and torts should be merged into a course entitled Obligations.[89] He raises the delightful query, would a course in Obligations be a box or a bag? Curriculum committees are constantly at work breaking down the old

86 Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

87 Stevens, "Brief on Behalf of a Course in Equity," 8 J. Legal Ed. 422, 425 (1956). A companion article, "A Plea for the Extension of Equitable Principles and Remedies," appears in 41 Cornell L.Q. 351 (1956).

88 Corbin, "Waiver of Tort and Suit in Assumpsit," 19 Yale L.J. 221 (1910); Hume, "Unjust Enrichment: The Applicable Statute of Limitations," 35 Cornell L.Q. 797 (1950).

89 Cowan, "Contracts and Torts Should be Merged," 7 J. Legal Ed. 377 (1955).

WILLIAM C. RUGER
LAW LIBRARY
SYRACUSE UNIVERSITY

course divisions and rebuilding broader areas of integrated materials. Perhaps the most comprehensive attack on this problem of teaching within a legal system is presently being carried out at the Yale Law School, as the result of a generous gift from the Ford Foundation. Within the common-law system, the subject matter compartments are being broken down by expanding concepts basic to the determination of legal liability.

F. S. C. Northrup believes that if enduring peace is to be established, the rule of law must be extended to the whole world.[90] He finds an international law conceived by one culture and thrust upon another not only ineffective but hazardous. His solution is to seek out and identify those denominators common in each world cultural group. Once identified, they can be synthesized into a pluralism of the world's living law.

A Ford Foundation grant to the Cornell Law School will permit American and foreign scholars to explore common legal problems.[91] Rather than seeking out the living law of a nation or cultural group by sociological methods, a program of seminars, attended by such foreign and American scholars, is being planned as a part of the program. Certain specific factors affecting legal liability in this country (for which in the tort field contributory negligence might be used as an example) will be analyzed by the experts in an attempt to discover what effect is given to these determinative factors in other nations and systems.

It is a mighty long jump from "attractive nuisance" to a world order and I suppose only a professor would attempt it. Yet, if common to the "torts" of trover and violation of the right of privacy, are factors of damages legally caused by violation of imposed duties, perhaps it is not too far-fetched to suppose that in a relational definition of law[92] these determinators transcend the subject matter of tort liability.

90 Northrup, The Taming of the Nations (1952).

91 135 N.Y.L.J. 1, Apr. 20, 1956 page 1. See also 41 Cornell L.Q. 437 (1956).

92 The author's frame of reference is outlined in Ward, "Meditations," 7 J. Legal Ed. 376 (1955).