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IS THE LAW OF NEGLIGENCE OBSOLETE?

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I. INTRODUCTION

SHAKESPEARE'S Hamlet, when pondering whether "to be or not to be," included among those "arrows of outrageous fortune" which made of death "a consummation devoutly to be wished" the "law's delay." Thus it can hardly be said that the problem of the slowness with which the wheels of justice grind—a problem exemplified today by the grievous calendar congestion in the courts, particularly as to negligence cases—is a novel one. The lack of novelty, however, is unfortunately no index of a lack of seriousness. Indeed, it is not too much to say that, especially in the large urban centers of the nation, the delay in the trial and decision of negligence cases is the largest single problem confronting the courts. Hence it is that the Honorable David M. Peck, Presiding Justice of the Appellate Division, First Department, New York State Supreme Court, in January, 1952 uttered what may be a prophetic warning for the bench and bar in New York City and even throughout the nation:

... we must acknowledge that for all efforts to date we have not found the way of handling the influx of accident cases and must recognize that present practices and procedures are insufficient. If we fail to take further measures and find the means of dispensing timely justice in these cases as a court service then we face the inevitable day when a public sufficiently aroused and exasperated will take these cases, automobile accidents at least, bodily out of the court and place them with an administrative agency like a compensation board.¹

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¹ "The Pillar of Justice." Address at the January 14, 1952 Meeting of Members of the Bar and Insurance Company Executives Invited by Justices of
Justice Peck, in the address in which he spoke that warning, painted a shocking picture of the "law's delay" in personal injury cases in New York's First Judicial Department. The Supreme Court tort jury calendar, he pointed out, is now almost four years behind—forty-six months to be exact, whereas the other calendars (non-jury, equity, condemnation, tax certiorari, motion, contract) are right up to date or virtually so.

The causes of this unreasonable delay, as seen by Justice Peck, are substantially these:

(a) The bringing of minor actions in the Supreme Court which do not belong there.

(b) The jury trial bottleneck. The jury trial became a bottleneck because it was generally sought by plaintiffs' lawyers who thought they might fare better with a jury than with a judge. When the jury trial became a bottleneck, it was sought by the insurers of defendants because it meant delay, and delay was considered an advantage in inducing settlements on terms favorable to the insurers.

(c) The policy of lawyers to delay the settlement of cases until the eve of the trial or after the start of the trial. Neither side gets serious about settlement until the trial is at least in the immediate offing.

As practices already in operation which are designed to remedy the deplorable calendar situation, the Presiding Justice referred to:

(a) The preference rule in New York and Bronx County Supreme Court Trial Terms which provides for

the Supreme Court and Presidents of Local Bar Associations to Hear Court Recommendations for Handling Personal Injury Litigation, 127 N. Y. L. J. 179 (January 15, 1952). The problem of calendar congestion is not, of course, limited to the Supreme Court in New York City. Thus Supreme Court Justice George J. Beldock recently pointed out the critical situation in the City Court in Brooklyn where the 1952 input of cases is expected to be 9,500 and the dispositions at most 3,500 or a net residue of at least 6,000 at the end of the year (Brooklyn Eagle, pp. 1, 10, March 9, 1952). See also Note, Calendar Congestion in the Southern District of New York, 51 Col. L. Rev. 1037 (1951), pointing out that there is approximately a three-year delay in one of the most important federal trial courts.
screening cases in the Supreme Court on the basis of a verified bill of particulars and attorney's certificate to ascertain whether a case belongs in the Supreme Court. If it does, it is preferred. If not, it is not preferred, which means in effect that its possibility of being reached for trial in the Supreme Court is rendered virtually nil, thus, as a practical matter, requiring the attorney to transfer the case to a court of lower monetary jurisdiction.

(b) The pre-trial conference which is a further preliminary screening of cases in pre-trial parts of the Supreme Court with the purpose of effecting settlements in those where trials are needless.

(c) The new rule allowing mutual examinations before trial of parties in negligence actions which allows both sides to get the facts when they are fresh, with consequent further opportunity for early settlement.

Justice Peck also urged that negligence lawyers help matters by bringing cases in the court in which they belong, by being ready for trial when reached, by waiving juries and expediting trials, and by settling all appropriate cases as early as possible. Finally, without making recommendations in this further area, he suggested that the bar give thought to possible modifications of the substantive law, such as abolishing the bar of contributory negligence and adopting a system of comparative negligence, and eliminating jury trials in negligence cases.

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2 It may well be that there is little difference in practical effect between verdicts rendered by juries and by courts. Judge Richard Hartshorne of the Court of Common Pleas, Newark, New Jersey, has pointed out his experience with jury verdicts over a period of 12 years. He kept a record of his agreement with the verdicts and discovered that out of 270 criminal verdicts he disagreed with only about 30 and out of 253 civil verdicts he disagreed with 33. In other words he agreed with 89% of the criminal verdicts and 85% of the civil verdicts. This article is also interesting as showing the large percentage of negligence cases which result in plaintiffs' verdicts. Out of 3,330 automobile accident cases checked by Judge Hartshorne, 2,386 verdicts were rendered for the plaintiff and 944 for the defendant. Hartshorne, *Jury Verdicts: A Study of Their Characteristics and Trends*, 35 A. B. A. J. 113 (1949).

This dark picture, drawn with few hopeful strokes, must give us pause to think. It is high time that the bar re-examined the whole foundation, substantive and procedural, of our accident law, for it is apparent that the foundation, at least in great urban centers of the nation, has become so weakened that the whole structure is tottering. Such a re-examination is a vast task which this article seeks to do only in bare outline. The purpose here is to present a summary of the evolution which during the past fifty years or more has occurred in the concept of negligence, especially from the substantive law viewpoint, and a partial analysis of that concept in terms of modern needs. As will be seen, it may well be that the complete answer to the accident problems of our modern age, if there is such an answer, does not lie merely in more pre-trial conferences or freer examinations before trial or more judges, but rather in basic changes in the legal structure of the law of torts or in the administration of that law, or both.

II. THE GENERAL PICTURE

It is but a commonplace to observe that the single most important, modern change in the law of negligence—as indeed in most other phases of the law—has been a steady, though at times almost imperceptible, movement away from the recognition of individual interests alone and toward the recognition of social interests. The theory of rugged individualism in negligence law, as in other realms of human existence, has yielded, for good or ill, to the theory of what might be called, paradoxically enough, “social individualism.” The law no longer looks upon accident litigation as a private contest between individuals with which society is not concerned, but rather as a process of adjustment between in-

4 “. . . under the extreme individualistic philosophy of the 18th and 19th centuries, nearly the whole of law was conceived and interpreted in terms of the rights of individuals, chiefly rights of property and contract, and in this way social interests were made to appear, at the most, as mere negative limitations upon the rights of individuals.” Bowman, Handbook of Elementary Law 80 (1929). Another thoughtful observer has phrased the change between the outlook of the 19th and 20th centuries thus: “While in general the 19th century saw the American primarily interested in getting ahead, the 20th century showed a new dominant force primarily concerned with the security of
individuals in which society has a vital interest. The effort in this paper, as above stated, is to show how this new outlook has manifested itself in alterations in legal rules, and to put forth some few remarks on the effectiveness of these rules in achieving the basic goals underlying tort theory.

Negligence as a ground of tort liability is, of course, a relative newcomer to the common law. The history of that development need not be traced here, except to mention that negligence came into its own only in the nineteenth century. The early common law, by and large, imposed no liability for failure to act and decreed strict liability for positive acts, irrespective of fault. With the advent of negligence theory, there came modifications in the direction, generally speaking, of relieving the actor from responsibility where he had acted without "fault" and holding him liable where he had acted with "fault." Liability was imposed where one had failed to act reasonably in any one of a myriad of circumstances in which the law saw fit to impose a duty of care—or, much more rarely, had failed to act at all in some few situations where the law ordained an affirmative duty.
III. EXTENSIONS OF NEGLIGENCE LIABILITY

The strictness, or the "defendant-mindedness" as it might be called, of early negligence law is too well known to require review. In 1881, Holmes could write with accuracy: "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune." But, since Holmes so characterized accident law, there has been a positive trend towards the extension of liability for negligence and the restriction of defenses, all directed towards shifting the economic loss from accident and not letting it lie where it falls. Sometimes this trend has been reflected in alterations in procedural rules, but more often in modifications of substantive law. Some illustrations may here be noted.

A. Extension of Duties of Manufacturers and Suppliers of Chattels

Since Winterbottom v. Wright declared that a supplier and repairer of chattels was under no duty to anyone other than his immediate promisee to employ reasonable care in order to discover defects, the law has undergone a complete transformation, and this in disregard of Lord Abinger's warning in that case that "[u]nless we confine the operations of such contracts . . . to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." This transformation began with the cases which permitted recovery for negligence in the preparation of dangerous articles intended to preserve, de-

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12 The present writers have analyzed this problem in more detail in McNiece and Thornton, Affirmative Duties in Tort, 58 Yale L. J. 1272, 1275-77 (1949). See also Notes, 33 Col. L. Rev. 868 (1933); 82 U. of Pa. L. Rev. 771 (1934); 4 U. of Chi. L. Rev. 461 (1937).
14 Id. at 114, 152 Eng. Rep. at 405.
stroy or affect human life. Later it was held that the rule extended as well to articles which are not dangerous in themselves, but are dangerous if negligently made. A further step in this growth was the expansion of the principle to cover the suppliers of chattels as well as the makers. Today the rule may be stated, with sufficient accuracy for present purposes, as follows: A manufacturer or supplier must employ reasonable care in the manufacture, assembling or supply of chattels which, while not necessarily dangerous in themselves, will constitute a menace to life and limb or to property if not manufactured or maintained with care, and this duty extends to anyone likely to be harmed by the defective chattel while being used for the purpose intended.

Thus the law has striven to keep pace with the economic changes which have converted this nation from an agrarian economy into a great industrial machine which constantly pours forth a stream of chattels dangerous to life and limb, or at least to property, if not carefully controlled. Happily, the legal changes thus far wrought show no sign of producing "most absurd and outrageous consequences."

B. Extension of Duties of Owners and Occupiers of Land

One of the most significant aspects of the broadening liability of land occupiers has been the startling alterations

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17 Professor Ehrenzweig in his recent work, Negligence Without Fault (1951), sets forth the thesis that liability without reference to moral fault should prevail for harms which flow from typical risks of the enterprise, a typical risk being one whose general character or type frequently attends the operation in question. Professor Malone in his review of the volume, while recognizing its significance as a contribution, concludes that "... the problem of risk sorting will become aggravated, rather than simplified, under the author's proposal..." Malone, The Brave New World—A Review of "Negligence Without Fault," 25 So. CALIF. L. Rev. 14, 20 (1951).
18 For a fuller discussion of the principles of liability in this area, see
in the law relating to trespassers. While the traditional rule that a land occupier is liable to a trespasser only for "wilful or wanton" negligence has not changed significantly in its verbal formulation, the practical effects of that rule have been vastly altered by applying to mere ordinarily negligent conduct the brand of "wilful or wanton" and by denominating persons who, traditionally viewed, are trespassers as "licensees." 19 There can be little doubt that an increasing general concern for personal rights, as opposed to property rights, a concern which is typical of the whole national politico-economic shift from laissez-faire to what might be called a semi-paternalism, has been at the root of these modifications in legal principles. Moreover, whereas years ago there were not many serious dangers to be encountered on land, today power transmission lines and machinery of various sorts in farm and urban communities present new hazards which the courts have attempted to meet with new rules.

Important extensions of liability, unnecessary to detail here, have also appeared in the rules relating to lessors and vendors of land,20 and even the long standing doctrine that a possessor need not protect persons outside his premises against risks incident to the natural condition of the land seems to be eroding away, at least in urban centers.21 That doctrine grew up in an agricultural economy when land was largely in a natural state and when the burden of inspection would have been a heavy one; not unnaturally, therefore, modifications in it are occurring as the pattern of land use shifts, with extensive exploitation of land giving way to intensive exploitation.


19 Eldredge, *Tort Liability to Trespassers*, 12 TEMP. L. Q. 32 (1937), contains a thoroughly documented study of this trend. One of the newer cases showing the tendency on the part of the courts to extend protection to persons on land is Pedro v. Newman, 277 App. Div. 567, 101 N. Y. S. 2d 146 (1st Dep't 1950).


C. Other Extensions of Liability

Increased recognition has been given in the courts to emotional disturbance as an element of damage, and it is no longer a bar to recovery, in most jurisdictions, that physical harm was brought about through emotional shock without physical impact.\(^2\) Even those states which still nominally adhere to the "no liability without impact" rule have stripped the principle of much of its harshness by diluting it with frequent exceptions.\(^3\) Underlying these developments are the more complete knowledge of human psychology available in the modern age and the recognition that a mechanized civilization is certain to have a large quota of psychic injuries with which the law must deal fairly.\(^4\)

Another factor which has broadened the vistas of liability has been the movement away from court-made standards of conduct in particular cases; this, of course, has made it simpler for a plaintiff to get to the jury on the issues of negligence and contributory fault.\(^5\) A more liberal interpretation of the doctrines of last clear chance\(^6\) and res ipsa

\(^{22}\)See, e.g., Orlo v. Connecticut Company, 128 Conn. 231, 21 A. 2d 402 (1941); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); Smith, Relation of Emotions to Injury and Disease, 30 Va. L. Rev. 193 (1944).


\(^{24}\)The recognition of the right of privacy and the advocacy of the elimination of truth as an absolute defense to defamation have been other manifestations of the trend towards recognition of injuries to mental interests. See Harnett and Thornton, The Truth Hurts: A Critique of a Defense to Defamation, 35 Va. L. Rev. 425, 437 (1949); Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725, 731 et seq. (1937); Feinberg, Recent Developments in the Law of Privacy, 48 Col. L. Rev. 713 (1948).\(^{25}\)

\(^{25}\)Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law and Contemp. Prob. 476 (1936); James, Accident Liability: Some Wartime Developments, 55 Yale L. J. 365, 374 et seq. (1946). As has been pointed out in Shulman and James, Cases on Torts 625-626 (1942), "It is clear that the application of such [court-made] standards tends to keep an issue from the jury. This in turn helps defendants, for if a plaintiff can get to the jury he has far more than an even chance of winning a verdict. This is well-recognized by negligence lawyers and so the matter of settlement is governed to a very considerable extent by the likelihood that plaintiff will get by a motion for a non suit, directed verdict, new trial, or judgment N.O.V."\(^{26}\)

\(^{26}\)Chesapeake and O. Ry. v. Pope, 296 Ky. 254, 176 S. W. 2d 876 (1943); Krause v. Pitcairn, 350 Mo. 339, 167 S. W. 2d 74 (1942); Chadwick v. City of New York, 301 N. Y. 176, 93 N. E. 2d 625 (1950); see also Prosser, Torts 408 et seq. (1941). The Chadwick case extends the rule to cover the situation where the defendant does not actually know of the particular plaintiff's peril but at least knows that someone is in danger.
loquitur has had a similar effect. Yet another area of liability extension is found in the tendency of courts towards recognition of principles of recovery for pre-natal injuries.

Extensions of negligence liability have also been accomplished through the warranty device. For a good many years the implied warranty of fitness has meant strict liability between persons in contract relationship, but this older doctrine has been widened in an effort to protect consumers so that today manufacturers are often being held strictly liable to consumers not in privity of contract with them.

See, e.g., Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940 (D. D. C. 1948); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P. 2d 687 (1944), aff'd, 93 Cal. 2d 43, 208 P. 2d 445 (Cal. Dist. Ct. App. 1949); Godrey v. Brown, 220 Cal. 57, 29 P. 2d 165 (1934). The Ybarra case carried the res ipsa doctrine to great lengths. There plaintiff was operated on for appendicitis, and, when he came out of the ether, it was discovered that he had suffered a traumatic injury to his shoulder. It was held that res ipsa applied as against the diagnosticon who was present at the operation, the surgeon, the anaesthetist, the nurses, two orderlies, and the superintendent of the hospital, even though no one of these defendants was in exclusive control of the situation.


Gregory refers to this development as the "jumping warranty" and comments: "This perversion of good old legal doctrine is bewildering; it is all right, perhaps, as far as the social result is concerned, but it is a type of judicial legislation which is defensible only if the courts call it by its right name of absolute liability without fault, or, if I may suggest a new term, enterprise liability." Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359, 384, 395 (1951). The author cites as indicative of the new trend: Coca-Cola Bottling Co. v. Smith, 128 Texas 214, 97 S. W. 2d 761 (Tex. Civ. App. 1936); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925); Mazetti v. Armor and Co., 75 Wash. 622, 135 Pac. 632 (1913). Professor Whitney in his Law of Sales § 143, p. 217 et seq. (1947), points out that in New York a manufacturer is not liable for breach of implied warranty of quality to the ultimate consumer in the absence of negligence. So that, before the manufacturer can be held liable on the implied warranty, two suits are necessary, one by the consumer against the dealer and then another by the dealer against the manufacturer. Professor Whitney suggests that since the manufacturer is going to be ultimately liable anyway, the procedure should be shortened by allowing the ultimate consumer to sue the manufacturer directly and thus make one suit out of it instead of two.
IV. THE IMPACT OF INSURANCE

At least with presently available modes of legal analysis, the alteration in legal doctrines, heretofore discussed, cannot conclusively be shown to be directly traceable to the growing use of liability insurance. Doubtless, however, the effects of insurance in distributing losses over a wider social group and protecting individual defendants from economic ruin have been important considerations weighing in the judicial minds which have fashioned these changes. Moreover, insurance has played a more overt role in recasting some other tort doctrines. Since our concern is with the broad outlines of this recasting, rather than with specific documentation, it is only necessary here to point up a few illustrations.

A. Suits by Minors and Spouses

Although courts have for centuries entertained actions involving property rights between parent and child, it is the traditional rule that an unemancipated minor child may not sue his parent for a personal injury sustained through negligence because such a suit, it is said, tends to disrupt family tranquillity and is unfair to the other children because it results in allocating to the suing child some fixed portion of the family's monetary resources. Obviously these dangers, assuming that they were ever a justifiable reason for barring such litigation, have no basis in fact when the parent is insured, and there are some indications that the courts are

30 For a more detailed analysis of the role played by liability insurance, see James and Thornton, The Impact of Insurance on the Law of Torts, 15 LAW AND CONTEMP. PROB. 431 (1950).


32 Indeed McCurdy states that "... the strongest argument against such actions is ... the danger of domestic collusion." McCurdy, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1030, 1052-1053 (1930).
reframing the rule so as to permit a child-parent suit when the burden of damages has been shifted to the insurance carrier.\textsuperscript{33} Similar considerations apply to litigation between husband and wife. The theory of the principle which forbids such suits is that domestic peace will be threatened by their allowance. Yet, while a majority of courts still follow the old rule,\textsuperscript{34} there are definite indications that forward-looking judges, realizing that the presence of liability insurance removes the threat to family harmony, are gradually eliminating the interdiction on husband-wife suits.\textsuperscript{35}

B. Direct Suits by Injured Parties Against Insurers

The basic common law view was that a contract of liability insurance is limited to the insurer and the insured so that a party injured by the insured's negligence could not directly invoke its benefits.\textsuperscript{36} A process of evolution,\textsuperscript{37} fortified by statutory enactments, has resulted in the present pre-


vailing rule that, after judgment has been obtained against an insured and returned unsatisfied, an action may be brought by the injured victim directly against the insurance company. Some few states even permit such an action prior to judgment against the insured.

C. Governmental and Charitable Immunity

Governmental immunity is grounded in the notion that tax money should be employed to support public projects and not to satisfy private claims. Whatever may have been the justification for such immunity in the days when government's main functions were to keep the peace, protect against foreign aggression, and deliver the mails, it is clear that there is little to be said in favor of the immunity in today's era of government as a huge business. Remedial statutes have recognized this fact, and, even without such statutes, many governmental subdivisions have attempted to use the insurance device as a mode of protecting victims injured by the activities of governmental agents. The difficulties facing such attempts are many and have been described elsewhere, but, all-in-all, it is safe to say that the remedial statutes and the insurance device are paving the way for a more just distribution of losses in this area.

40 Fuller and Casner, Municipal Tort Liability in Operation, 54 Harvard L. Rev. 437 (1941); Note, 33 Minn. L. Rev. 634 (1949); see also Claims Against the State in Minnesota, 32 Minn. L. Rev. 539 (1948); Shumate, Tort Claims Against State Governments, 9 Law and Contemporary Prob. 242 (1942); Lloyd, Municipal Tort Liability in New York, 23 N. Y. U. L. Q. Rev. 278 (1948).
Charitable immunity is similarly premised, at least in part, on the idea that the charity’s resources are in the nature of a “trust fund” and are to be used to advance the direct purposes of the charity rather than to pay private judgments.\textsuperscript{43} Where insurance is present there is no inroad into the “trust fund,” except to the extent of payment of premiums out of the fund, and thus a growing minority of jurisdictions have struck down the immunity defense under such circumstances.\textsuperscript{44}

V. Present Status of the Negligence Concept

We see, then, that the law of negligence has undergone noteworthy expansion in the past fifty or more years—an expansion which has been consistently in the direction of (a) altering legal rules so as to increase the duties imposed upon defendants, and (b) permitting more issues to go before juries which tend to be, as a rule, “plaintiff-minded.” The most important manifestations of this expansion have been in the fields of manufacturers and suppliers of chattels, owners and occupiers of land, and governmental and charitable immunity. In addition, noticeable but less obvious changes have occurred in the doctrines of \textit{res ipsa loquitur} and last clear chance, as well as in the rules relating to implied warranties, psychic injuries, pre-natal injuries, suits by minors and spouses, and direct suits by injured parties against insurers.

It is believed that these trends have been a manifestation of public awareness, which has filtered into the judicial process, that the economic loss due to accident should be distributed over wide groups rather than ruinously imposed upon individuals. Since, by and large, the kinds of persons who are most likely to be defendants—corporations, municipalities, and so on—are more capable of distributing these

\textsuperscript{43} Mr. Justice Rutledge wrote an excellent essay on the theories underlying charitable immunity in President and Directors of Georgetown College v. Hughes, 130 F. 2d 810 (D. C. Cir. 1942).

\textsuperscript{44} Illustrative are: O’Connor v. Boulder Colorado Sanitarium Ass’n, 105 Colo. 259, 96 P. 2d 835 (1939); Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938); Wendt v. Servite Fathers, 332 Ill. App. 359, 76 N. E. 2d 342 (1947).
losses than are the average plaintiffs, rules of law have been and are still being altered to facilitate such distribution.45

The presence of liability insurance on the scene has been an important factor in achieving these shifts in legal principle. Furthermore, the effect of insurance is not limited to alteration of legal rules, for, when juries know that defendants are very probably covered by insurance, they are certainly more likely, at least in close cases, to cast the burden of the losses upon the insurance companies, knowing that they can redistribute such losses among large groups of policyholders. Thus we seem to be evolving a type of "common law social insurance."

And yet this system of "common law social insurance" is, it must be admitted, a most haphazard and only partially satisfactory one. While it cannot be conclusively demonstrated, it is certainly the common feeling of many negligence lawyers that juries in numerous instances reach their verdicts (generally for plaintiffs) in disregard of applicable rules of law laid down in the courts' charges; typical is the juror's disregard of the rules relating to negligence and contributory negligence. It is also common knowledge that trial courts in most instances do not set aside such verdicts, first, because of their limited power to interfere with jury findings, and secondly, because of their reluctance to interfere even where they technically have the power so to do.46 When this reluctance of trial judges to interfere with jury verdicts is combined with the disposition of appellate courts to sustain such verdicts where possible, on the theory that only questions of fact are concerned, it becomes obvious that in many cases plaintiffs gain recoveries in spite of, rather than pursuant to, the theoretically applicable principles of substan-

46 E.g., in Murphy v. Peterson Cipher Code Corp., 278 App. Div. 966 (2d Dep't 1951), although the trial judge severely castigated the jury for bringing in a plaintiff's verdict and stated that he did not want that jury "back here in any case that I am sitting on," he refused to set the verdict aside even though, in his view, a preponderance of evidence on the issues of negligence and contributory negligence was not presented and the plaintiff's burden of proof was not met. (Record on Appeal to the Appellate Division, folios 444-461, 469.)
tive law. Even the most ardent advocate of the jury as a leavening influence in the law can hardly take joy in such a situation.

It is also true that our present system of rough social justice lends itself well to perjured testimony. We have all heard much of the peril of fraud and perjury in "trumped up" divorce and annulment cases, yet the negligence lawyer knows only too well that unscrupulous attorneys and litigants may, and sometimes do, act unethically in order to build up the thin framework of a case sufficiently to enable it to go to a jury.

But the greatest evil in negligence law today is that it does not produce a proper distribution of the economic loss. Studies have shown that the general effect of our present system, even where there is insurance, is probably to overcompensate those who have suffered minor injuries and to undercompensate those who have suffered major hurts. The more serious the injury, the less the chance of full compensation. If there is no insurance, there is perhaps one chance in four that the injured party will receive any payment at all.

Moreover, as has already been discussed, it is obvious that in many or most cases, particularly those involving large claims, protracted litigation, frequently involving long calendar delays, will precede any recovery.

VI. THE FUTURE

The foregoing discussion, we suggest, indicates at least a grave possibility that the concept of negligence, as it exists

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47 This tendency of juries to disregard rules of law has even greater effects in a period of inflation such as the present. Not only do juries sometimes give away defendants' money in disregard of legal rules, but, in a time such as this they are likely to be overgenerous in doing so. See Pederson v. Corrier, 91 Cal. App. 84, 204 P. 2d 417 (1949); Neddo v. State, 275 App. Div. 492, 90 N. Y. S. 2d 650 (3d Dep't 1949); Belli, The More Adequate Award (1952); Belli, The Use of Demonstrative Evidence in Achieving the More Adequate Award (1952).

48 Smith, Compensation for Automobile Accidents—A Symposium, 32 Col. L. Rev. 785 (1932). Dean Smith's cogent observations are based upon the report of the Columbia University Council for Research in the Social Sciences of February 1, 1932.

49 Ibid. More recent reliable figures are not available, and it may be that today's inflated economy has resulted in a greater percentage of injured persons recovering in the absence of insurance, but the percentage is still doubtless niggardly.
today, is outmoded and obsolete, particularly in urban centers where the problem of calendar delay is such a critical one. While the great expansions which have occurred in the frontiers of liability are, for the most part, all to the good, and while there has evolved a rough and in many ways commendable system of common law social justice, the time has come for a basic re-evaluation of the law of negligence.

"The accident problem of our mechanical age calls for two things: accident prevention and the compensation of the victims of accidents that do happen." 50 It is a tragic indictment of our present system that it has substantially failed in both these aims. For example, more than one million persons have been killed by automobile accidents in the United States 51 and most of these death cases very probably have never been properly compensated. Of course, all the blame, particularly as to accident prevention, cannot be laid at the doorstep of the judge or lawyer, but it does seem obvious that some alterations in the treatment of accident cases must come about. The bench and bar, intimately concerned as they are with accident litigation, are the logical ones to take the lead in effecting such changes.

It is not the function of the present article to present a detailed blueprint for solution of these problems but only to underline their magnitude. Yet some possible alternatives may be at least suggested.

One possibility of improvement, which appeals to the present authors because it is a real step forward and yet does not require radical innovation in substantive tort law (and thus might more readily receive acceptance by the bench, bar, and legislature), is to keep our legal doctrines as they are except for such evolution as will naturally come about, and to supplement them with statutory enactments requiring potential defendants to carry adequate insurance in critical liability areas, such as in the automobile accident field. This method would increase the extent to which accident vic-

50 James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L. J. 549, 569 (1948).
tims obtain redress for their injuries, and might well, if the insurance rates were graduated in terms of the safety records of the insured persons, aid considerably in accident prevention. It would not in itself, however, protect a plaintiff from the "law's delay" or prevent a needy injured person from being barred from redress by the operation of a rule of law such as contributory negligence.

If compulsory insurance were superimposed upon our present legal structure and this combination further strengthened by a system of substantial state aid to disabled and impecunious accident victims who have been entirely barred from recovery by contributory negligence or who have been inadequately compensated in the light of their economic need and loss of earning power, this solution might be a workable one. Such state aid could conceivably be modeled on an expanded version of the recently adopted and very forward-looking New York Disability Benefits Law. The problem of the "law's delay" could be met by advances from a state disability fund which would be made to a needy plaintiff pending trial with the agreement that the advances would be repaid upon the plaintiff's achieving an adequate verdict. If such a verdict were not forthcoming, the needy plaintiff would retain the advances.

Advance payments would, it seems, be a necessary element of any such scheme, at least until such time as procedures are devised for a true speed up and streamlining of court procedures. Justice delayed is, in truth, justice denied when we are dealing with a family breadwinner who has been struck down by an accident, for it is small comfort for such a plaintiff to receive a substantial award made years after the crushing burdens of medical and other expenses have had to be met. Under the present system, a plaintiff of this type is apt to accept a very inadequate settlement from the insurer because he needs money immediately and cannot afford to await the trial of the action.

52 Efforts have been made in the past to develop safety reward plans for individual automobile drivers. Swayer, Frontiers of Liability Insurance, 39 Best's 439 (1938). Such attempts seem, however, to have been largely abandoned. 43 Best's 13-14 (1942).

53 Laws of N. Y. 1949, c. 600.
The foregoing suggestion, which may be summarized as the existing legal structure plus compulsory insurance plus, where necessary, state aid to the needy accident victim (the latter without regard to his personal fault) would result mainly in shifting the loss from accidents directly to the private insurers of defendants who have been guilty of negligence, and thus indirectly to the premium-paying group to which such defendants belong (automobile drivers, real property owners and so on). In the cases of non-negligent defendants or inadequate verdicts, the state would step in to help a needy accident victim, and thus the public as a whole would bear a certain amount of the burden.

Another possible scheme is to cast aside entirely the traditional doctrines of negligence law in critical accident areas, and place the problem of injury redress, at least as to automobile accidents, in the administrative realm, by analogy to the Workmen’s Compensation statutes which cover industrial accidents. A fairly strong case for this solution can be made. It may be urged that, just as in the industrial field, a certain toll of property damage and human suffering—sometimes because of individual “fault” and sometimes not—is necessarily concomitant in other areas of a mechanized civilization. Even with vigorous safety campaigns, there will probably always be a reasonably large and comparatively irreducible residuum of accidental damage, and it may be argued that society at large should bear the burden lest it be inflicted ruinously upon the individual. Strict liability of this sort is not necessarily the “radical” innovation it may at first appear to be. Indeed it may even be said that such a change, rather than introducing a new and strange doctrine, would in some sense be only a return to the strict liability of the writ of trespass in the earlier common law, although the burden of damages would be spread over the public rather than, as under the early law, placed upon the individual.

An objection which can be made to this latter suggestion, and indeed to any solution involving an extension of the insurance concept, is that such extension may possibly reduce the exercise of care and increase accidents rather than decrease them. In some areas, of course, the presence of insurance may not have a substantial effect on the exercise of care.
For example, if one is driving an automobile, he is careful, if at all, mainly because he is concerned with his own safety, and it is unlikely that he will be any the less careful no matter how heavily he may be insured. But in some other fields the picture may be different. For instance, a homeowner may be more diligent in seeking to protect business visitors and licensees against injuries if he knows that the financial burden of a liability suit is to rest upon him rather than upon an insurance carrier. It may also be noted that the ready availability of a recovery in the form of insurance or compensation may be expected to produce in some plaintiffs the psychological phenomenon of fancied or exaggerated injuries—the well known "compensation neurosis." It is believed that these possible disadvantages are outweighed by the benefits to be gained by the wider use of insurance.

The present authors do not, however, favor the compensation method. It is our belief that the courts, trained as they are in dealing with the facts and equities of particular cases, and having broad latitude in awarding damages, can more justly determine accident cases than can an administrative tribunal confined within the limits of a schedule requiring fixed monetary awards for certain injuries. Furthermore, it does not seem necessary to create a new and additional tribunal if our present institutions can be used to solve the problem.

Yet, if the administration of accident law is to remain with the courts, certain procedural modifications must come about. As already noted, Justice Peck has made a number of excellent suggestions along these lines, and they need not be restated here. One further point should, however, be discussed.

The main stumbling block, so far as the factor of delay in the administration of negligence law is concerned, is the jury. It is the jury, too, which has been accused, probably with much justification, of not following in practice the theoretically applicable principles of substantive law. If an extension of insurance coverage, as outlined earlier, were combined with elimination of the jury trial, it would be possible to compensate speedily all those plaintiffs who have a legitimate cause of action measured by the traditional prin-
ciples of fault. While this is not, of course, a step lightly to be taken, particularly in view of the state constitutional questions involved, it may well be desirable as a long-run solution. In any event, the present authors do not regard it as a necessary immediate element of the system of extension of insurance coverage suggested above.

In place of the present single judge and jury system there might be substituted a three-judge bench, specially assigned to a Negligence Part of the court. These judges would become, from continuous practice, experts in the field, and thus one of the advantages of the administrative method would be present. On the other hand, they could make awards based on the justice of the whole case rather than, as administrators would, based on a rigid system of fixed valuations for certain injuries. Whether more judges would be necessary under such a practice is a question not free from doubt. Since the system would, it is hoped, eliminate long calendar delay, settlements would be more frequent and the volume of cases tried less in number. Trials would also be more expeditious.

Of course, this three-judge method, since it would involve the application of the present-day rules of negligence and contributory negligence, would not solve the problem of the plaintiff who has been injured through some fault of his own. In one way or another the burdens of such a plaintiff, if he is indigent, are going to fall on the public. As has been pointed out above, the extension of state disability benefits would take care of that difficulty.

In recapitulation, it is seen that the law of negligence has undergone great changes for the better in the modern era. Vistas of liability have been broadened, and enlightened views of risk-spreading have gained much adherence. It may be that another century of growth in the traditional common law pattern would see a solution to our accident problem. But undirected evolution is a woefully slow process in an atomic age. Change, of course, is not per se progress, but, on the other hand, we must not let a too deferential attitude towards the law of the past weigh us down and result in a
"dead hand" approach to the future.\textsuperscript{54}

The law of negligence as it exists today is obsolete.\textsuperscript{55} It is necessary that procedural changes be made in the administration of that law to eliminate the inequities which today exist. It is also necessary that a more than adequate system of distributing the losses attendant upon our industrial society be devised. This can all be achieved within the structure of our present judicial system and it must be achieved if that system is to survive.

Just as science is replacing the internal combustion aircraft engine with the jet engine, so must the law replace its present methods with a "jet-propelled" system of tort justice.\textsuperscript{56} The need is great. The solution is not clear. But time

\textsuperscript{54} Dean Prosser puts it pithily: "We may find someday that a professor arising in the classroom in 2551 will refer to the obsolete and ridiculous rules on negligence that we are applying today in the same spirit of hilarity with which we refer to the old Mosaic law. Our whole law of torts today may someday be as obsolete as the law of weregild and deodand. We are simply a part of the endless progress and development of things to come." \textit{Modern Trends in the Law of Torts}, 16 \textit{NEVADA STAT}. B. J. 51, 71, 72 (1951).

\textsuperscript{55} "... our society has undergone radical changes, and its needs, as we now see them and have seen them for several decades, are far different from what they were a century ago. And the simultaneous growth of insurance, with its possibilities of risk-spreading and loss absorption, has changed our social context as much as any other single development. Things have been happening through legislation in other departments of social life to forward the ideal of mutual interdependability in our state and national communities. ... [O]ur courts are undermining the old fault principles, little by little, in a manner which leaves many of us puzzled and confused about the present state of the law. ... Whether ... a new theory should acknowledge absolute liability only for the consequences of extrahazardous conduct or should take the form of an outright enterprise liability analogous to that reflected in the Workmen's Compensation Acts is a matter 'which wiser heads in time may settle.'" Gregory, \textit{Trespass to Negligence to Absolute Liability}, 37 \textit{VA. L. REV.} 359, 396, 397 (1951).

\textsuperscript{56} It seems clear that we are living in an era in which the law of yesterday will be discarded and that of tomorrow fabricated. As Judge Learned Hand, some fifteen years ago, in the foreword to the 50th volume of the Harvard Law Review, put it, "The period to be treated in these articles has therefore been the seeding-time for a crop of new ideas, based upon a revolutionary outlook. Final adjustments, if any are to be final, are certainly far in the future, but whatever the course may be, these years will be looked back upon as those in which the questions to be answered were emerging, and becoming clamorous." \textit{Foreword}, 50 \textit{HARV. L. REV.} 1 (1936). Professor Wilson has noted the same trend in these words: "We are in the process, apparently, of establishing new standards of social values, perhaps even new ideals, made necessary by changed and changing conditions." \textit{Preface}, \textit{WILSON, CASES ON TORTS} (1939). See also Horne, \textit{Courts Rewriting Accident Concept}, N. Y. Times, p. 26, col. 2 (September 12, 1951), and Meriam and Thornton, "Accidental Injury" in the Court of Appeals: The Metamorphosis of a Rule of Law, 16 \textit{BROOKLYN L. REV.} 203 (1950), for a study of these changing values as reflected in workmen's compensation cases.
is running out, and the day for re-evaluation and recasting of accident law is at hand. Deploring the present situation is not enough; action should be the order of the day.\(^\text{67}\)

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67 New York has taken at least some action towards increased use of the insurance device. As a supplement to its Motor Vehicle Safety—Responsibility Act [Vehicle and Traffic Law, Art. 6-A], that state recently enacted legislation [Laws of N. Y. 1952, c. 493, approved by the Governor on April 4, 1952] which prohibits minors from operating motor vehicles on public highways unless covered by the standard automobile liability policy, with minimum coverage of $10,000 for bodily injury to, or death of, one person, $20,000 for one accident, and $5,000 for property damage.

There is also an undercurrent in New York flowing in the direction of an automobile compensation statute. Thus a bill was introduced in the 1952 legislative session [S. 2243, A. 2585] by Senator Zaretzki and Assemblyman Katz, both of New York City, which would have created a temporary commission of three senators, three assemblymen, and three appointees of the Governor to study the need for a compensation plan for persons injured in motor vehicle accidents. The bill did not pass. The present authors are not, of course, opposed to the principle of broader compensation in the automobile accident field [see on this point James and Thornton, The Impact of Insurance on the Law of Torts, 15 Law and Contemp. Prob. 431, 443 (1950)]. Our feeling is, however, that, under present conditions, it is more desirable to leave the mechanics of a broader method to be worked out by the courts within the framework of our present system as supplemented by statutes requiring wider insurance coverage.