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Tort and Insurance Law: How Times Have Changed!

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On reaching the half-century mark, it behooves the Tort and Insurance Practice Section to briefly review the trends in tort and insurance law between 1933 and 1983. Legal historians will someday record the developments in full, considering all of the nuances and forces that brought them about. The goal of this article is to highlight some of those changes, factors and developments.

Early tort law was primarily dominated by the concept of liability, and not until the late 19th century did the fault concept come into focus with the development of the negligence action as a basis for the expansion of tort liability.[1] Thus, tort law developed along two lines: (1) That a person acted at his peril and was strictly liable for injuries which his action caused; and (2) That a person should be held liable only for fault or antisocial conduct.

In 1933, the negligence, or fault, concept was predominant. Traffic and transportation accidents accounted for a large proportion of the civil damage suits brought in American courts.[2] However, at the same time strict liability principles were starting to be recognized in the adoption of workers' compensation statutes and by legal rules relating to trespass to land, ultrahazardous activities, carrier's liability for transported goods and respondeat superior. The seed for the erosion of the fault aspect of negligence also was growing with the expansion of the doctrine of *res ipsa loquitur*, the disappearance of immunities and the attacks on the common law doctrines of contributory negligence, assumption of risk and last clear chance.

But the trend toward acceptance of the liability concept was only one of the factors beginning to alter tort and insurance law in the early 1930s. A variety of other factors also have contributed to the evolution of today's tort and insurance law.

Professional organizations

Prior to the creation in 1933 of TIPS, then known as the ABA's Insurance Law Section, only one national legal organization emphasized tort and insurance law: the International Association of Insurance Counsel. The IAIC was an organization of lawyers specializing in the defense of tort and insurance claims. The Insurance Law Section was formed by the ABA as a national organization designed to bring together all lawyers interested in tort, insurance and compensation law. Later, the Federation of Insurance Counsel and the Association of Insurance Attorneys, both primarily interested in the defense of tort and insurance claims, were formed. The claimant's, or plaintiff's, bar was organized in 1946 as the National Association of Claimants Counsel of America (later Association of Trial Lawyers of America) for the purpose of "providing strong, competent and vigorous representation to the injured victims of society."[3] In 1961, the Defense Research Institute was organized for the purpose of bringing those interested in defending tort and insurance claims under one umbrella.[4]

The impact on the development of tort and insurance law by these groups has been tremendous.[5]

Judicial activism

Traditionally, judges were concerned with precedent and the concept of *stare decisis*. Changes were made slowly but steadily as new factual situations were presented to the courts. But in recent years, judicial activism has become more prevalent and the courts have moved more rapidly than legislatures in developing new tort and insurance concepts.[6]

The trends in courts have been: (1) The examination and revision of rules of law which are claimed to have outlived their usefulness; and (2) The enunciation of new principles of responsibility which have imposed liabilities in areas previously exempt.[7]

Thus, the activism of the courts and the competency of the claimant's bar have played major roles in the expansion of the concept of liability rather than fault, the promulgation of new causes of action and the elimination of traditional immunities and defenses.

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Liability insurance

With the end of World War II and the passage of the McCarran Act,[8] attention focused on the liability insurance business. Changes in the ways of doing business and enlightened regulation by state insurance departments resulted in an increased insurance capacity and an expansion of risks covered by liability insurance.

One illustration was the packaging of insurance policies to sell various risks such as property, medical and liability together. As a result, every homeowner acquired liability coverage along with his fire insurance coverage. Automobile operators were able to obtain sufficient and inexpensive liability insurance, and businesses were insured against loss resulting from their operations and activities.

Thus, parties injured in the home, at work, on the highway or in public places were more able to find a viable and solvent source for compensation. The aim of tort law has always been indemnity and deterrence, and with the expansion of the capacity of liability insurers, the chances for indemnity became greater and, therefore, the types and nature of claims that were being brought to fruition expanded.[9]

Procedure and evidence

Tort procedural rules have come a long way from the traditional writs of trespass and trespass on the case to what has been termed by some as "post-card pleading."

The rules of evidence have been liberalized to the point where the parties can more easily meet their burden of proof. The adoption of the Federal Rules of Evidence in 1975 was but a culmination of the liberalizing developments in the field.[10] The expansion of the doctrine of *res ipsa loquitur*, the application of less rigid rules of civil procedure and the adoption by most states of the Federal Rules of Evidence led to broader discovery procedures and the expanded use of experts.

These evidentiary and procedural rules plus the extension of class actions gave impetus to a litigation explosion originally fueled by automobile and later by product liability and professional malpractice claims.

No-fault auto insurance

With the expansion of tort liability and increased litigation, it was inevitable that the advocacy system of litigating tort and insurance cases would be subject to attack. Dissatisfaction with delays, expense, uncertainty of result, "liberal" judges, contingent fees, claim practices, insurance costs and availability and the jury system culminated in the 1960s with proposals to adopt no-fault principles in the auto insurance field.[11]

In the mid-60s, the Keeton-O'Connell basic protection plan for automobile insurance was proposed.[12] This led to a wave of activity by various groups.

In 1969, the ABA House of Delegates adopted the "Report of the Special Committee on Automobile Accident Reparations," known as the "Powers Report."[13] The report addressed the problems of delay, cost and efficiency. It recommended change in substantive and procedural tort law and expressed opposition to a federal automobile no-fault law. Despite attempts at passage, a proposed federal no-fault law was defeated.

But from 1970 to 1973, 19 states and Puerto Rico adopted some form of automobile no-fault insurance.[14] The impact of this legislation has been varied from state to state. Changes in the guest laws, settlement practices, the adoption of comparative negligence and uninsured motorist coverage have reduced automobile accident litigation in the states that have not adopted no-fault statutes.

Since 1975 there has been very little impetus for the enactment of no-fault legislation at either the federal or state level. Although auto accidents continue unabated, the trial of these cases is no longer considered a major policy problem despite the losses being incurred by auto insurers.

Comparative negligence

The no-fault controversy probably had its greatest impact in the fact that, for the first time, the ABA advocated adoption of a comparative negligence system.[15] At the time the controversy arose, six states had some form of comparative negligence while elsewhere contributory negligence continued as a total defense. From these humble beginnings, 39 jurisdictions now have some form of comparative negligence; 11 have adopted a pure form, 25 a modified form and three a varied type of comparative law.[16]

Damages

Tort law in the early 19th century called for a strict construction of the evidence for the recovery of compensatory damages. The concept of general damages for pain, suffering or embarrassment was, although recognized, limited. Today, however, proof techniques, the availability of expert witnesses and a general recognition that pain and suffering, embarrassment, fright and emotional trauma are compensable items have led to large awards for emotional distress, loss of consortium and other more ephemeral forms of harm.

The last decade has seen a liberalization in the ability to recover for the negligent causing of emotional distress with the removal of the impact requirement. Although most jurisdictions still require proof of physical injury, more courts are beginning to em-

phasize the reliability of the proof of harm rather than rigidly requiring physical injury.[17]

Punitive damages, recognized in all but four jurisdictions, have continued to expand and develop[18] as a result of judicial recognition that compensatory damages may not always compensate a plaintiff or deter the wrongdoer. Claimant counsel have honed their ability to prove aggravated conduct to allow for punitive damages in more and more situations. Courts today are about evenly split on the issue of whether liability insurance covers punitive damages and on whether such coverage should be held to be against the public policy of the state.[19]

Early wrongful death statutes, which created a cause of action on behalf of the decedent's survivors, limited recovery to economic loss. Most statutes did not allow recovery for loss of society and companionship. The past two decades have seen the removal of any limitation on the amount recoverable for economic loss and more jurisdictions are allowing recovery for loss of society and companionship in an action for wrongful death.[20]

The fastest growing new concept in the tort damage area is the use of structured settlements. This concept's use of periodic payments has been fostered by favorable tax rulings, a lessening of opposition by plaintiff counsel, competitive activity among the annuity specialists, and a recognition that structured settlements benefit both claimants and defendants.[21]

Product liability

The most dramatic development in tort law in recent decades has been the so-called product liability "revolution."

Product liability is not new. Its expansion began with the removal of privity requirements in negligence actions. However, it mushroomed in the late 1960s when recovery was recognized on a "strict liability" theory based on a form of "warranty created by law" and, ultimately, Section 402A of the *Restatement (Second) of Torts.*[22]

Every attorney is aware of the increase in product liability suits based on the duty to construct, test, warn and design products safely for use by the consumer. Every product seller is now more readily exposed to liability if for some reason a product causes harm to an individual. Nuances of product liability law are well known, but the growth and impact of product claims continue to ripple across our land. This is dramatically illustrated by the DES cases, asbestosis and other "trauma," or "toxic," torts.[23]

Congressional concern about product liability is illustrated by the adoption of the Consumer Product Safety Act,[24] and the Model Uniform Product Liability Act,[25] as well as proposed Senate Bill 44.[26] Legislative reform in the states also continues.[27]

Individual liability has been expanded in certain types of product liability cases. The *Sindell* decision[28] adopted a so-called enterprise liability theory in the DES cases, which shifted the burden of proof for the defendant's causal conduct from the plaintiff to the defendant. By applying this concept, an entire industry can be charged with liability although individual members of the industry have not been proven to be either at fault or even the seller of the defective product.[29]

Professional liability

With courts increasingly emphasizing consumer protection, it was inevitable that the professions would be scrutinized to determine whether their failures to perform their responsibilities as professionals should give rise to tort liability.

Medical malpractice had long been a fertile field for tort liability since the harm resulting from the failure of a health care provider to perform its duty resulted in a direct loss to the individual. Liability had been hampered by statutes of limitation and the locality rule. Assault on the locality rule and changes in the limitation periods gave impetus to an increased number of medical malpractice claims. Coupled with the adoption of the informed consent concept, a "crisis" arose in the medical malpractice field in the early 1970s.[30] This fostered federal and state studies and a plethora of state reform legislation.[31] As a result, in many jurisdictions medical malpractice actions now must be submitted first to a panel type of proceeding before they can be brought to court. With the adoption of the panel proceeding and an expansion of the capacity of insurers to handle medical malpractice claims, some balance has been restored. However, trends indicate that the solution may be only a temporary one.[32]

Needless to say, attorneys, accountants, architects, engineers, insurance agents, real estate brokers, and other professionals have not been exempted from these developments.[33]

New causes of action

There have been numerous developments in traditional areas of tort litigation and emerging causes of action in recent years:

- Pollution, toxic waste and the desire to protect the environment, coupled with the more generous use of class actions, have led to more litigation. Federal legislation has provided a realistic basis for success by claimants adversely affected by abuses of the environment.[34]
- Civil rights actions have been fostered by the expanded interpretation of Sections 1982 and 1983 of Title 42 of the U.S. Code.[35] More claimants are seeking individual relief from civil rights violators in the form of tort actions for damages.
- Defamation actions are on the increase, aided by the Supreme Court's decisions in *New York Times v. Sullivan*,[36] *Gertz v. Robert Welch, Inc.*,[37] and their progeny. As a result, individuals now have an easier and clearer basis for libel and slander actions.

The future

The increased use of chemicals, additives, preservatives and nonnatural materials in our society will lead to more trauma torts similar to those resulting from the use of Agent Orange by the federal government and pesti-

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cides by farmers and production of chemical wastes by manufacturers. Liberalization of proof requirements in the damage area, the use of structured settlements, more liberal use of releases, expansion of principles of comparative contribution, indemnity and subrogation are just around the corner. New causes of action for wrongful life, wrongful death and expanded liability in the aviation field and in the use of homeowner warranties will fuel tort litigation growth.

Mounting criticism

However, what all lawyers must ponder is the criticism of the tort liability system that has been steadily mounting for years, reaching a fever pitch in the last five years. The entire method of resolving tort disputes is the issue of the 1980s:

> The end of the adversary system may be at hand unless the legal profession takes the initiative and sees to it that a judicial system is developed which can adequately handle this multitude of cases and provide for the needs of the ordinary citizen, all at a reasonable cost and in an expeditious manner.[38]

One knowledgeable writer has stated, "What may be the most important tort trend in a generation is the recognition of the crisis that now exists in the administration of justice."[39]

Reforms to enhance the legal profession and preserve the adversary system command the active support and participation of lawyers, judges, legal educators and the public. Trial counsel must recognize that they owe a duty not only to advise and represent clients, but also to bring about justice and fair play in an expedited and economical manner. TIPS as a section must face this challenge and play a greater role in its solution as it enters the second half-century of its existence.

FOOTNOTES

1. Malone, *Ruminations on the Role of Fault in the History of Torts*, DEPARTMENT OF TRANSPORTATION, AUTOMOBILE INSURANCE AND COMPENSATION STUDY, *The Origin and Development of the Negligence Action*, at 1 (March, 1970).
2. James, *Analysis of the Origin and the*

Development of Negligence Action, DEPARTMENT OF TRANSPORTATION, AUTOMOBILE AND INSURANCE COMPENSATION STUDY, *The Origin and Development of the Negligence Action*, at 35 (March, 1970).

3. Specter, *Challenges: Old and New*, 17 TRIAL 6 (Dec., 1982).

4. "To Increase the Professional Skill and Enlarge the Knowledge of Defense Lawyers," from Defense Research Institute, *Statement of Purpose*.

5. "In the 34(36) years since lawyers representing claimants in damage suits formed their own organization, a veritable tort revolution has fallen upon American courts. It probably was not the advent of the automobile and its accompanying liability insurance which produced that revolution as much as it was the growth and activity of that organization of lawyers."
Knepper, *Review of Recent Tort Trends*, 30 DEF. L.J. 1 (1981).

6. "We act in the finest common law tradition when we adopt and alter decisional law to produce common sense justice."
Keating, J. in Millington v. Southeastern Elevator Co., Inc., 22 N.Y.2d 498, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305 (1968).

7. Knepper, *Review of 1968 Tort Trends*, 18 DEF. L.J. 1 (1969).

8. Pub. L. No. 79-15, 59 Stat. 33 (1945), *codified at*, 15 U.S.C.A. §§ 1011-15 (West, 1976).

9. *See* INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS at 43 (1982-83 ed.).

10. The rules were promulgated by the Supreme Court on November 20, 1972, but were not adopted by Congress until 1975. Pub. L. No. 93-585, 88 Stat. 1929 (1975), *codified at*, Federal Rules of Evidence 28 U.S.C.A. (West, 1975).

11. German, *Investigations of the Automobile Accident Reparations Systems, see* 1969 Proceedings of the Section of Insurance Negligence, and Compensation Law, at 346.

12. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM, A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1962). *See also* Blume, *State and Federal No-Fault Automobile Insurance Developments*, 12 FORUM 586 (1977).

13. *See* REPORT OF THE ABA SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS, AUTOMOBILE INSURANCE LEGISLATION, at 39 (August, 1972).

14. Knepper, *Review of 1973 Tort Trends*, 23 DEF. L.J. 1 (1974).

15. *See supra* note 13.

16. *See* Schwartz, *Comparative Negligence* (Supp. 1981). Since the publication of the Supplement, Iowa and Illinois have adopted comparative negligence.

17. Hawes v. Germantown Mutual Ins. Co., 103 Wis. 2d 524, 309 N.W.2d 356 (Ct. App. 1981).

18. Those four jurisdictions are Louisiana, Massachusetts, Nebraska and Washington. *See* J. GHIARDI J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE §§ 4.09-.12 (1981).

19. J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE, §§ 7.01-.14 (1981).

20. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3.49 (2d ed. 1975).

21. Knepper, *Review of Recent Tort Trends*, 31 DEF. L.J. 1 (1982).

22. *See* Banks, *How Strict is Strict Liability?*, 13 FORUM 293 (1977).

23. Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609 (1982); Comment, *Examination of Recurring Issues in Asbestosis Litigation*, 46 ALBANY L. REV. 1307 (1982).

24. 15 U.S.C.A. §§ 2051 *et seq.* (West, 1982).

25. 44 Fed. Reg. No. 212 at 62714 (Oct. 31, 1979).

26. S. 44, 98th Cong., 1st Sess. (1983). This bill is identical to S. 2631, 97th Cong., 2d Sess. (1982) reported in PROD. LIAB. REP. (CCH) No. 507 (Dec. 12, 1982).

27. *See* PROD. LIAB. REP. (CCH) ¶ 90,000 *et seq.* for product liability statutes.

28. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

29. *See* Gillick, *The Essence of Enterprise Liability, or the True Meaning of "We're All in This Together,"* 16 FORUM 979 (1981); and Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609 (1982).

30. Sepler, *Professional Malpractice Litigation Crises: Danger or Distortion?*, 15 FORUM 493 (1980).

31. *See* E. Pegalis & H. Wacksman, *American Law of Medical Malpractice* §§ 6.7, 19.1 (1981); and DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, DHEW Publication No. (OS) 73-88 (Jan. 16, 1973).

32. Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 FORUM 682 (1982).

33. Knepper, *Review of 1977 Tort Trends*, 27 DEF. L.J. 1 (1978).

34. The National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321 *et seq.* (1977). *See also* Editorial, *No Escape to Anywhere*, 5 TRIAL 8 (Aug., Sept. 1969); *Can Law Reclaim Man's Environment?*, 5 TRIAL 10 (Aug., Sept. 1969). Note also the Supreme Court decision of Askew v. American Waterways Operators Inc., 411 U.S. 325, 93 S. Ct. 1590, constitutional impediment in permitting states to employ their police power to protect their citizens from environmental losses.

35. With reference to 42 U.S.C. § 1983 *see* Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70 (1964); and Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964). With reference to 42 U.S.C. § 1982 *see* Note, *The Civil Rights Act of 1866, Its Hour Come Round at Last:* Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272 (1969).

36. 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

37. 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

38. Couch, *A Trial Lawyer's Perspective*, 9 THE BRIEF 9 (1980).

39. Knepper, *Review of Recent Tort Trends*, 50 FOR THE DEF. 1 (1981).