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ROY RAY LECTURE*
THE DECISIONAL ENVIRONMENT IN TORTS
CONTROVERSIES

WEX S. MALONE**

When Professor Kennedy honored me with an invitation to deliver the Roy Ray Lecture today, he gave me only one clue as to what was expected. He told me that Roy Ray himself hoped that the talk would be so pitched as to be interesting to first-year law students. He didn't mention anything about subject matter, and I suspect that this is because he probably already had been alerted that I make no claim to have a wide or comprehensive range of interests in the world of law. For forty years I have been a torts teacher and everything I have done has been in this area.

For me, torts has been great fun. What a wide cross-section of life it covers! It ranges from bar room fights, automobile accidents, stubbing one's toes in a dark theatre, a manufacturer turning out 50,000 dangerously defective automobiles, a surgeon performing an operation on the wrong patient, to a securities analyst who has told lies during the conduct of some business transaction with a customer. I feel that torts is as big and as human as life itself, and if a person doesn't like torts, he probably doesn't like living very much.

So it's going to be torts again today. I gather that those of you who are first-year students have had about six months of torts, and if your experience has been similar to my own as a first-year law

* The Roy Ray Lecture is an annual address delivered at Southern Methodist University, School of Law, by a distinguished member of the legal community. The address is sponsored by Southern Methodist University Professor Emeritus of Law, Roy Ray.

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student, you probably have been so busy trying to keep your nose above water in an effort to find out what torts *is*, so busy trying to get your fill of its rules and doctrines, its procedures and *res ipsa loquiturs*, that you have had very little chance to sit down and wonder how torts got to be that way. This is what I would like to talk to you about this morning. What is torts law trying to *do*? What makes it tick?

Even as I start, you are probably asking, and justifiably, how did torts get to be *what* way? What way *is* it? When I entered the study of law back in the late twenties, I was taught that torts was a scheme for imposing liability for damages upon one who injured another through his fault. Without a showing of fault, there should be no liability, we were told. Well, we took this very seriously and when we finally ran into absolute or unqualified liability, in cases such as *Rylands v. Fletcher*,¹ and in the cases dealing with fire and trespassing animals, we tended to shove these situations aside as being something exceptional, to be accounted for only as freaks of history. Similarly, workman's compensation, which put a part of the costs of the employee's injuries on the shoulders of the blameless employer, was to be sharply distinguished by us from familiar tort liability, for the reason that under compensation law fault was ignored.

The fault system, however, already was deteriorating at that time, and since then it has continued to deteriorate at an accelerating pace. Liability imposed on non-negligent manufacturers for injuries from the use of products that turned out fortuitously to be defective has become a common-place feature of your torts study today. And you have doubtless devoted considerable attention to the legislative movements in recent years toward no-fault motor vehicle liability.

We are clearly losing faith in the traditional idea that ordinarily, losses should lie where they fall—that is to say, on the shoulders of the victim. We are now more hesitant to accept as an unqualified proposition that a shifting of liability to the shoulders of another person cannot be justified except when it came to be shown that the other person was a wrongdoer who will be taught a wholesome lesson when he finds himself socked

¹L.R. 3 H.L. 330 (1868).

with a bill for damages. The relevancy of this traditional view has become doubtful with the passage of time and the changes that are taking place in our economy and society. Today liability insurance readily can be made available to relieve any wrongdoer from paying the cost for his sins; or, frequently, the defendant is a large enterprise which can pass the accident costs on to the public as an increased charge for its goods or its services. This, of course, has tended to knock the props out from under the principle of liability dependent upon fault.

I certainly do not intend, however, to leave you with an impression that blameworthiness has no role to play in torts law today. Quite to the contrary, ethical ideals of right and wrong and notions of socially acceptable versus unacceptable behavior do exert tremendous influence on the outcome of any torts controversy. I hope to make but one point—fault, as I see it, does not and cannot serve as the exclusive basis upon which our tort system must rest. The word “fault” will remain prominent in our torts vocabulary so long as we continue to feel that good guys should win out over bad guys. But let us remember that moral blameworthiness is only *one* factor, and the role it plays is in hot competition with a number of other factors operating in the arena of litigation. Let me mention just a few of these. There is the competing idea that accident loss should be shouldered initially by the person who is in the best position to spread the cost along in diluted form among those who enjoy the benefit of the activity that was being persuaded when the harm was inflicted. We are inclined to feel that when we charge each member of society just a little bit no one really gets hurt. This, of course, is familiar to you. Also, our Judeo-Christian ethics persuade us to favor the weak and the humble in their struggle against the rich and powerful. There is a sporting instinct frequently at work in the process of litigation. There is the notion that accident costs should be placed upon the shoulders of the person or the organization who is in the better position to avoid the same or similar accidents in the future. And there are many additional forces that are likely to play a part.

Are we not, therefore, tempted to conclude that the impulse that makes torts law tick is merely a reaction of a human being

to *all* these warring impulses and that there is no one controlling basis for liability? Are not these conflicting impulses all dumped into a bag, and the judge, jury or other trier selects as controlling that impulse which happens to appeal to him or to them most strongly for the case at hand? We may be tempted to conclude that in the final analysis what controls is the uninhibited personality of whichever judge or jury happens to be sitting on the case. Thus we wind up with a sort of "gut-reaction" theory which must explain what lies at the basis of torts law.

I know you are not going to let me slip you this kind of intellectual "Mickey Finn." Despite the fact that each of these factors just mentioned can exert a potential influence in the resolution of a torts controversy, there is much more to the show than this. For we know that there is a very substantial measure of order in torts law and that, more often than not, a knowledgeable person can make a dependable, intelligent prediction on the outcome of torts litigation.

If these various policy considerations we have discovered are at war with each other within the conscience of the trier, the struggle is by no means a free-for-all with no holds barred. The competing policy factors must fight it out on a stage that has been arranged elaborately for the struggle, and the fight must be conducted in accordance with certain Marquis of Queensbury Rules which have been worked out over the years. This stage on which the battle must be conducted and the rules of order that must be devised to control the combat make up together what I call the "decisional environment." It is the nature of this environment that I would like for us to consider. Without it litigation would be a farce. The effort to resolve a dispute through law is distinguishable from the resolution of a dispute in everyday life by virtue of the need in the courtroom to accommodate the decisional environment. The element of rules which we loosely call "the law" owes its justification to the needs of the decisional environment. Yet this environment, as I conceive it, is sweeping in its extension. It goes far beyond what we call substantive rules and principles. It embraces all congeries of procedural and evidentiary devices which loom with such importance in the conduct of litigation. Furthermore, the litigation environment includes what might be called

traditionally accepted patterns of thinking of judges and lawyers; the inhibitions, if you will, which are constantly at work in the mind of the trier.

Certainly the term "decisional environment" must embrace the arena within which the struggle between the warring policy factors takes place; that is, the trial forum itself. I suggest that we begin our discussion here. There first must be established the proper role to be played by the referees who, when the battle is over, must determine the outcome. In our Anglo-American system, there are both a judge and a jury to serve as referees. Let us look first at the judge.

He is the professional man who must view the fight within a time oriented perspective. He must determine whether a conclusion he is urged by one of the combatants to reach is consistent with conclusions that have been reached in the past by other referees in similar struggles. Then he must ask whether the conclusion urged upon him is one that threatens to cause troubles in future decisions for those referees who will follow him. Furthermore, he must do more than merely satisfy his own professional conscience on these matters. It will be borne in mind that a salient characteristic of the litigation environment is the requirement that the judge so explain the doctrine he has created as to convince a critical profession both that the decision enjoys an acceptable consistency with past decisions and that it will lead to a minimum of turmoil for future decisions in analogous cases. He affords this explanation by resort to an opinion in which he brings into play those theories, principles, doctrines and rules that you have been learning in your study of torts. He may end up with a conclusion which would be wholly commendable when applied to the particular facts before him. Yet in announcing this decision, however, the judge may adopt an explanation that leads to serious future complications. Let us assume that a passerby happens to see an infant drowning in a shallow pool and that he fails to do anything about it. Consequently the child dies and the parents bring suit. Under these facts a judge's conclusion that liability should be imposed and damages assessed is one that would strike most decent people as being eminently proper. If he adds by way of explanation, however, that there exists some general duty

to render needed assistance whenever this reasonably can be done he may lead later tribunals into serious trouble. He, unfortunately, has chosen a formula that cannot be administered successfully in future controversies with new facts. Roscoe Pound has pointed out that there is a marked difference between an engineering formula and a legal formula. An engineer who is designing a bridge can work out the stresses and loads which must be anticipated and then can calculate the weight-bearing capacities that will be required to accommodate that load. After he has done this, he is fortunately in a position to make provisions for an increase in the capacities so that they can bear more stress and strain than he anticipates they will be called upon to bear. Thus there is a blessed margin of tolerance which can serve as protection because it is not expected that the bridge-using public will require that added protection. Unfortunately, however, this does not hold true for a legal formula. Judges know full well that any principle or formula they choose to announce in a decision is certain to be invoked later, and that it will be pressed to its utmost limits by eager lawyers who hope to turn it to their advantage. Hence there arises the necessity for conservative understatement or even circuitous or fictionalized statement to satisfy the needs of the decisional environment. Courts are obligated to protect their own judicial machinery against the prospect of future imposition. The decisional environment, when viewed in this light, becomes something more than a passive stage upon which the act of judging is performed. It begins to operate as a factor just as active in influencing the course of judgment as is the moral factor, the economic factor, the sportsmanship factor, or any of the other factors. When the decisional environment is thus considered in terms of its capacity to exert its own influence upon the judgment that is being pronounced, it can be characterized appropriately as the "administrative factor," which must be reconciled along with the other factors that influence the decision.

When we discuss the refereeing function as a part of the decisional environment, we are talking about two referees: the judge and the jury. We have seen that the decisional role of the judge is that of the disciplined expert who is bound by professional standards and who must discharge his function within a time-

oriented framework looking to both the past and the future. This makes for caution and reserve. Quite in contrast is the role to be played by the twelve laymen who make up the jury. Their presence on the decisional scene contemplates a judgment dictated largely by instinct; a judgment tailored to meet the individual and the unique picture at hand. There is little or no concern by the jury for the ultimate societal effect its decision might have. It does not divide the problem into rational fragments; it responds to the totality of the situation before it. Its utility is impaired whenever laymen are expected to behave like "little judges." The jury reaches its conclusion without any explanation and it then is dissolved back into the society from which it came.

With two tribunals operating simultaneously on the decisional scene, it is obvious that between the judge and the jury a determination must be made as to *who* is to decide *what*. The responsibility of apportioning the judgment-passing function is a matter of the utmost importance to the law. The controversy must be fragmented so that those portions of it that demand professional expertise fall within the domain of the trained jurist, while those areas of the dispute that lend themselves readily to intuitive lay-judgment can be assigned to the jury. The task of apportionment is one that is entrusted exclusively to the judge and herein lies the genius of the common law that makes possible a working blend of expertise and laymen's horse sense. The judge is furnished with an elaborate arsenal of language which affords him a free hand either to pass the resolution of the entire conflict to the laymen or to retain the power of judgment exclusively within his own control. Alternatively he may fragment the controversy into issues and allocate to the jury only those which in his sound judgment he feels the jurymen can handle competently, without imperiling the future course of litigation. It is to this end that there have come into being a myriad of devices such as the prima facie case, the non-suit or directed verdict, the application of *res ipsa loquitur*, the conception of negligence *per se* or negligence *per quod*. There is a burden of persuasion and a burden of going forward. All these and more constitute the elaborate intellectual machinery that makes possible an intelligent apportionment of the task of deciding.

With these facts in mind, let us glance for a moment at the basic organization of the formal law of torts. We recognize that torts rules and doctrines fall within the domain of several distinct networks. These are broad administrative areas. Intentional harms to persons or property, for example, fall under one network which contemplates a trial in two stages: a *prima facie* showing, followed characteristically by a plea in confession and avoidance. This structure embraces assaults, batteries, trespasses and the like. Once the victim makes a satisfactory showing that he suffered physical harm and that the harm was inflicted by the defendant, he will be entitled to recovery if nothing else appears. If a conflict of interests is to be brought into focus in a controversy of this kind, it is the defendant who must initiate the struggle between competing values by affirmatively asserting the purpose he sought to achieve by delivering the blow crossing the forbidden boundary. He will attempt to establish a privilege. It is important for us to notice at this point that the controlling hand here is that of the judge; a jury is not free to place a value on whatever claim the defendant may choose to assert. If, for example, the defendant seeks to avoid liability for a battery by showing that he was attempting to make his way on an important mission and that the plaintiff's presence served as a serious obstruction to his passage, the judge, without hesitation, will deny him access to a jury. If the jury were allowed to consider his plea, it might feel free to decide that the mission on which the defendant had embarked was sufficiently important to justify his administering the trivial push with which he was charged. The judge, however, forestalls any such action by the jury and compels a decision favorable to the plaintiff. The legal policy here has been predetermined by rules which dictate the judge's action, and he in turn has exclusive power to control the outcome. The jury is restricted to factual determinations; for example, "did the defendant hit the plaintiff?" and "how much damage should be awarded?" If we move to another network, such as the negligence network, we find that the jury's range of operations is far broader than under the *prima facie* network we just considered. In most instances of alleged negligence the lay jurymen will enjoy the ultimate power of decision under a broad formula which was de-

signed for jury usage, that of the reasonable man. Although the judge will still retain supervisory control through the channel of the non-suit or directed verdict, the decisional environment here is such that the jury is hoisted fully into the saddle.

One might go so far as to venture that all torts law, without exception, is designed to assist in affording an answer to one single inquiry: Will society gain if the plaintiff's harm is repaired through legal intervention? Or will the social gain be greater if the law manifests its willingness to allow or even encourage the defendant to do *what* he was doing *when* and *where* he was doing it and in the *manner* in which it was being done? Perhaps we can use the more homely phrase "is the game worth the candle?" The differences between the various networks we have mentioned, including the power of the judge and jury, are traditionally recognized means for making profound shifts in the litigation environment within which this basic inquiry must be answered.

We may now ask "Why is so much elaborate legal doctrine dedicated to the mere task of implementing a selection of the referee?" The observation has been made many times that it is more important to determine *who* shall make the decision than to determine *what* the decision shall be. The decision announced by the judge, guided by precedent, reflects a deliberation that extends beyond the conflicting interests of the immediate parties. The judicial decision is designed to reflect an overview of those social, moral and economic values which through the course of experience have earned our acceptance and respect.

The jury, on the other hand, tends to see chiefly the immediate scene. During the past century, unrestrained human sympathy has strongly worked in favor of the claimant, the hapless, helpless neighbor struggling with an impersonal corporate entity with bottomless pockets. In participating as jurors, laymen often find an outlet for their human resentment against an industrialized and economically stratified society. In recent years, the pathos of this appeal has been sharpened by an increasingly astute and skillful plaintiff's bar. Whenever the accepted rules, doctrines and other intellectual devices that serve to apportion the function of deciding are wielded in such a manner as to place increased power within the hands of the jury, a significant step has been taken to-

ward the imposition of absolute liability, though under the guise of fault terminology. Thus negligence can be transformed into unqualified liability by a mere shift in the decisional environment. In France, where this two-tribunal system does not exist so that no such manipulation is possible, judges have been obliged to make radical adjustments in the theology of their civil code to weaken the impact of fault upon liability. In the common law world, we can produce the same effect with a minimum of outright doctrinal change. We merely loosen the reins and give the jury its full head.

The range of devices available for augmenting the jury's power in Anglo-American jurisprudence is indeed wide. Whenever a duty, at one time sharply limited, is now deliberately broadened in its scope the former power of the judge to control the course of the decision through non-suit, directed verdict or the constraint of instructions is lessened, and consequently the likelihood of recovery is correspondingly increased.

Your torts casebook is filled with illustrations of this transformation. Several years ago, the California Supreme Court scuttled all the familiar limitations that formerly prevailed with reference to the duty of care owed by an occupier to trespassers and licensees; and chose, instead, to recognize a broad duty of care toward all persons entering upon property, regardless of their status.² The court then announced that thereafter the standing of the person entering, whether trespasser, licensee, or whatever, was a matter to be taken into consideration only as it might reflect on the extent of care demanded of the occupier.³ By so doing, the California Supreme Court denied the judiciary its former power to control judgments. No longer could there be resort to such court-manipulable devices as the attractive nuisance. It obliterated a mass of earlier court-drawn distinctions between anticipated entrants and unsuspected intruders, and it deliberately chose to ignore the distinction between appreciated defects and those defects which merely *ought* to be appreciated. The remaining question as to how much effect the lowly status of the plain-

² Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

³ *Id.* at 115, 443 P.2d at 568, 70 Cal. Rptr. at 104.

tiff should have in fixing the extent of the occupier's duty was dumped into the lap of the jury.

Of tremendous interest in connection with this growing tendency to transfer power to the jury is the recent emergence, through both statute and decision, of comparative negligence. On the surface, it appears that this reform serves to enhance substantially the importance of the role played by fault in accident cases. Under comparative negligence, not only does the existence or nonexistence of blameworthiness determine whether the defendant is or is not to be held liable, but the concept of fault also is to be used as a yardstick for measuring the amount of damage that should be forthcoming. Is the running of a red light more blameworthy than the act of exceeding the speed limit by ten miles per hour? Is Milton a better poet than a pig is fat? The jury is entrusted with the power to answer the unanswerable. Gone is the former power of the court to non-suit the plaintiff as a matter of law on the ground that he was contributorily negligent. Gone also is the power of the judge to manipulate the intricate involutions of the last clear chance doctrine.

The possibilities for working radical policy changes by merely maneuvering the decisional environment are dramatically highlighted in a line of decisions of the United States Supreme Court in which that court interpreted the Federal Employer's Liability Act (FELA)⁴ in such a way as to pass a virtually unfettered power of judgment into the hands of the jury, a power which resulted in a liability that is almost absolute. The Federal Employer's Liability Act, at the time of its inception in 1908, was a modest congressional enactment designed only to extend to railroad employees the same common law remedies for negligence available to workers in other occupations at that time. Although the federal measure went somewhat further and abolished the defense of contributory negligence, the defense of assumption of risk remained in the FELA until 1939.⁵ During this early thirty-year period the trial courts had seized upon the defense of assumed risk as a means of protecting the railroads from liability,

⁴ 45 U.S.C. §§ 51-60 (1976) (originally enacted as Act of April 22, 1908, ch. 149, 35 Stat. 65).

⁵ Ch. 685, § 4, 53 Stat. 1404 (codified at 45 U.S.C. § 54 (1976)).

even in many instances where negligence could be established. In each such instance, the procedure adopted was that of manipulating the decisional environment. The court readily acknowledged that a jury should be allowed to render a verdict for the victim if it appeared that he had not assumed the risk. However, if the risk that brought about the accident in question was one that was commonly discoverable in railroad operations in the vicinity, an "ordinary" risk, the worker was deemed to have assumed it. By making their own determinations as to what would amount to ordinary risks, the courts were able to retain the power of judgment primarily in their own hands. Most railroad accidents happen in situations that fall readily into repetitious stereotyped patterns. These patterns, which the courts had encountered time after time in the general course of railroad accident litigation, came to be considered by the judges as instances of ordinary risk which the employee assumed as a matter of law when he entered the railroad employment. By this manipulation, the courts could put an end to many controversies in a way that favored employers before the jury could even have its turn at bat. In so doing, however, a court is not to be charged with trickery or chicanery. The judge is responding to a traditional feeling prevalent in past years that extravagant recoveries could only serve eventually to bankrupt the railroads upon which the continued growth and prosperity of America was dependent. For half a century, the courts had profoundly mistrusted juries who, they felt, were incapable of appreciating the full range of values at stake in railroad accident litigation. The courts were convinced that the jury's sympathies were likely to dominate their deliberations. This was simply the social and economic climate of the time.

We can now see what happens when the decisional environment undergoes a change. During this same period, employees in other enterprises who were injured in ordinary industrial employment covered by workmen's compensation were faring better progressively. Compensation benefits were improving substantially. Despite efforts made to induce Congress to adopt a compensation scheme for railroads, the only statutory change that became effective in the Federal Employers' Liability Act was the abolition of the defense of assumption of the risk. This, as we know, was done in

1939. By this time, the temper of the Supreme Court had changed substantially and the justices were indicating that they were prepared to move in the direction of no-fault liability that prevailed in other work accident areas. They seized upon the advantage brought about by Congress' abolition of assumption of the risk and, in 1943, began with increasing eagerness to insist that the claims of railroad workers reach the jury whenever there was the slightest indication of employer negligence.⁶ They announced confidently that when Congress abolished the defense of assumption of the risk it intended to depart from the traditional principles of negligence.⁷ This passage of the power of judgment to the jury was expanded to such an extent that by 1959 the opinions of trial and appellate judges were filled with cries of despair. In that year, a dissenting opinion by Mr. Justice Harlan voiced the following complaint. Speaking of the majority decision, he observed:

I fear that this decision confirms my growing suspicion that the real but unarticulated meaning of *Rogers*⁸ is that in FELA cases anything that a jury says goes, with the consequence that all meaningful judicial supervision over jury verdicts in such cases has been put to an end. . . . If so, I think the time has come when the court should frankly say so. If not, then the court should at least give expression to the standards by which the lower courts are to be guided in these cases.⁹

This is a truly challenging observation, and I would like to leave with you this morning the question whether manipulation of the decisional environment by courts to carry out basic changes in policy is a wise practice. Ironically, judges are exercising their own power for the purpose of defeating that same power. I believe I can see both advantages and disadvantages here. From its inception, the common law torts system has managed to provide a rare blend of judicial expertise and lay opinion. A delicate balance of power maintained between judge and jury serves to reconcile certain sharp inconsistencies that characterize the pub-

⁶ *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54 (1943).

⁷ *Id.* at 58.

⁸ *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957).

⁹ *Harris v. Pennsylvania R.R. Co.*, 361 U.S. 15, 27 (1959) (Harlan, J., dissenting).

lic's expectations concerning our torts law. We demand that our courts maintain a comforting appearance of stability—an assurance that we shall not be governed by whim or caprice. Yet at the same time, we insist that the courts show themselves to be fully responsive to changing needs. To satisfy these contradictory demands, a certain amount of judicial sleight of hand is inevitable. Perhaps this is to be encouraged so long as the policy changes at stake are modest. It is possible, however, that impending changes now being made in substantive policy are too basic for an under-cover operation. Perhaps we are approaching the point where the stratagem and the false front involved are too expensive. It is arguable that the public should be dealt with openly, that we should be brought face to face with those radical transformations that are now taking place in the administration of justice. How can we determine whether we can afford the expense that is built into our accident reparation system when the operations upon which the system depends are hidden behind the artifices of the decisional environment? If it is to our advantage to live under some sort of no-fault system, is it not better that we openly acknowledge that fact so we can lay the problems on the table and explore all the ramifications and affix a realistic price tag to the merchandise?

**Comments, Casenotes
and
Statute Notes**

